Purgatorio: The Enduring Impact of Juvenile Incarceration and a Proposed Eighth Amendment Solution to Hell on Earth

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INTRODUCTION

On June 6, 2015, twenty-two-year-old Kalief Browder hung himself nearly three years after his release from Rikers Island.[1] After being charged with grand larceny for allegedly stealing a backpack at age sixteen,[2] Kalief spent more than a thousand days in confinement while awaiting a trial that never happened.[3] Kalief refused to settle his case.[4] Instead, through nearly two years in solitary confinement, prolonged malnourishment, repeated physical and verbal abuse from guards and other inmates, and limited contact with his family, he maintained his innocence.[5] During the time Kalief spent in jail, his classmates attended prom and graduated from high school; his sister got married and his family celebrated holidays together.[6] In the meantime, Kalief appeared in court thirty-one times[7] before the prosecution finally dismissed his case for lack of evidence.[8]

Kalief tried to kill himself once while at Rikers, ripping his bed sheets and tying them together into a noose.[9] Six months later, following his release, he tried again at home.[10] When he was found hanging from a bannister, Kalief was

1. Jennifer Gonnerman, *Kalief Browder, 1993-2015*, THE NEW YORKER (June 7, 2015), http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

2. Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Oct. 6, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law.

3. Gonnerman, *supra* note 1.

4. Gonnerman, *supra* note 2.

5. *Id.*

6. Abby Phillip, *Kalief Browder's Suicide and the High Cost of Violence and Delay at Rikers*, WASH. POST (June 8, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/06/08/kalief-browders-suicide-and-the-high-cost-of-violence-and-delay-at-rikers.

7. Jennifer Gonnerman, *Kalief Browder and a Change at Rikers*, THE NEW YORKER (Apr. 14, 2015), http://www.newyorker.com/news/news-desk/kalief-browder-and-a-change-at-rikers.

8. Gonnerman, *supra* note 2.

9. Gonnerman, *supra* note 1.

10. *Id.*

taken to a psychiatric ward, where he spent two weeks.[11] A year later, he was hospitalized again.[12] Though he returned to school following his last confinement, Kalief continued to exhibit signs of paranoia, anxiety, and depression.[13] According to his family, Kalief "ultimately was unable to overcome his own pain and torment which emanated from his experiences in solitary confinement."[14]

Kalief Browder's story publicizes the "hell on Earth"[15] many incarcerated adolescents live each day.[16] And while Kalief's story ended in a particularly tragic way, he is but one of thousands of youths[17] permanently changed by their traumatic experiences in confinement. For example, at a detention center in Nampa, Idaho, a nurse forced a boy to seek release on fabricated home visits, during which time she took him to her house, where she drugged him before sexually assaulting him.[18] Sixteen-year-old, 5' 2" Rodney Hulin was anally raped within three days of his arrival at the Clemens Prison, an adult facility in Brazoria County, Texas; he was nonetheless returned to the same unit three days later.[19] After guards rejected repeated pleas for help, Rodney was finally removed to solitary confinement for protective purposes, where he attempted to hang himself.[20] He died in a prison hospital bed after spending four months on

11. *Id.*

12. *Id.*

13. *Id.*

14. Phillip, *supra* note 6.

15. *Id.*

16. New York, along with North Carolina, is the only state that treats sixteen- and seventeen-year-olds as adults in the criminal justice system. Yamiche Alcindor, *N.Y., N.C. Consider Changes to Juvenile Justice Laws*, USA TODAY (Mar. 1, 2014, 2:35 PM ET), http://www.usatoday.com/story/news/nation/2014/03/01/new-york-and-north-carolina-consider-juvenile-justice-changes/5280573. As discussed in Part I.b, however, the conditions Kalief endured are not unique to New York and North Carolina: many youths suffer similar conditions in juvenile detention facilities.

17. Youth advocates prefer "youth," "young person," "child," or "kid" to "juvenile" in describing those involved in the juvenile justice system because "juvenile" can cloak the humanity and young age of the individuals involved. For clarity, I will use "juvenile" when quoting others or describing the system or incarceration facilities; otherwise, whenever possible, I will use youth or young person. *See, e.g.*, THE ANNIE E. CASEY FOUND., http://www.aecf.org (last visited Oct. 11, 2017); ACLU, *Juvenile Justice*, https://www.aclu.org/issues/juvenile-justice (last visited Oct. 11, 2017) (using "youth" and "young person"); *see also* Vidhya Ananthakrishnan, *Status Offense Reform Center*, VERA INST. OF JUST., https://www.vera.org/projects/status-offense-reform-center (last visited Oct. 11, 2017) (using "kid").

18. John Sowell, *Suit Alleges Five More Teen Victims of Sexual Abuse at State Juvenile Detention Center*, IDAHO STATESMAN (Mar. 22, 2015) (on file with author).

19. NAT'L PRISON RAPE ELIMINATION COMM'N, NAT'L PRISON RAPE ELIMINATION COMM'N REPORT 69 (2009).

20. Michael Berryhill, *What Really Happened to Rodeny Hulin?*, HOUS. PRESS (Aug. 7, 1997, 4:00 AM), http://www.houstonpress.com/news/what-really-happened-to-rodeny-hulin-6570750.

life support.[21]

The practices that characterize juvenile confinement compromise children's rehabilitative prospects, making them more likely to recidivate,[22] undermining their prospects for finishing school,[23] and exacerbating mental illness[24] that may even result in suicide. The Supreme Court has distinguished incarcerated children from adults, as evidenced by its recent holdings in *Roper v. Simmons*,[25] *Graham v. Florida*,[26] and *Miller v. Alabama*.[27] Given the Court's distinction, now is the time to craft a litigation strategy to attack certain juvenile incarceration practices in order to establish categorical rules against their use. Categorical rules prohibit a class of punishment for either all prisoners or a class of prisoners. Solitary confinement and placement of pre-adjudicated youths in adult facilities, as Kalief experienced, are examples of treatment that could be categorically banned for all youths.

This article details the rationale for such an approach, summarizing the history of juvenile detention and impact of juvenile detention conditions in Part I; assessing the evolution of Eighth Amendment categorical rule jurisprudence as applied to youths in Part II; and concluding in Part III with an outline of how advocates might best use categorical rule jurisprudence to attack juvenile incarceration practices.

I. JUVENILE INCARCERATION: HISTORY AND IMPACT

Despite a variety of reports in recent years regarding the inhumane treatment of incarcerated youths, there is still much to learn about the abuses youths experience while incarcerated.[28] Reports of abuse are fractured across

21. *Id.*

22. *See, e.g.*, BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 4 (2006).

23. Juvenile incarceration is estimated to decrease high school graduation rates by thirteen percentage points. Anna Aizer & Joseph J. Doyle, *Juvenile Incarceration, Human Capital and Future Crime Evidence from Randomly-Assigned Judges* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 19102, 2013).

24. *See, e.g.*, Linda A. Teplin et al., *Prevalence and Persistence of Psychiatric Disorders in Youth After Detention: A Prospective Longitudinal Study*, 69 ARCHIVES GEN. PSYCH. J. 1031, 1037 (2012).

25. 543 U.S. 551, 577-79 (2005).

26. 560 U.S. 48, 80-82 (2010).

27. 567 U.S. 460, 488-89 (2012).

28. A number of factors make research of incarcerated juveniles difficult. Among other reasons, privacy laws protect juveniles in certain instances. Telephone Interview with Michael Bien, Founding Partner, Rosen Bien Galvan & Grunfeld LLP (June 19, 2015). Furthermore, researchers of and advocates for juvenile justice face funding challenges. Telephone Interview with Sue Burrell, Staff Attorney, Youth Law Cent. (June 16, 2015) [hereinafter Burrell Interview]. Few agencies invest in monitoring systems, so it is difficult to understand which factors, programmatic and otherwise, affect youths' experiences and how they do so. FUTURE OF CHILDREN, PRINCETON UNIV. & BROOKINGS INST., BEST

types of abuse and treatment facilities, making it difficult to assess the full scope of injustices young persons endure. Systematic underreporting of abuse further limits current understanding: Youths fear reprisal and do not realize they have rights to certain treatment and advocates to whom they can reach out when such rights are violated.[29] Furthermore, scientists and advocates are only beginning to understand the lasting impact of incarceration on any individual, let alone youths who have unique developmental needs. Part I attempts to summarize the wealth of abuses that have been documented as well as suggest the reasons such abuses affect juveniles not only during incarceration but, as Kalief's tragic story illustrates, long afterwards.

A. Juvenile "Treatment": Advent and Decline

Despite the deplorable conditions of juvenile detention facilities today, reformers in the nineteenth century created juvenile detention facilities with laudable motives. In 1825, a group of Quakers founded New York's House of Refuge[30] to prevent the perceived corruptive influence of adult criminals on immature, innocent youth.[31] Prior to that, adult criminals and young persons were imprisoned in the same facilities.[32] In 1855, Chicago opened its Chicago Reform School,[33] forty years before Illinois passed the Juvenile Court Act of 1899, which established the first juvenile court in the United States.[34] Within twenty years, thirty jurisdictions followed Illinois' lead, re-establishing the state not as an adversary to juvenile delinquents but, pursuant to its *parens patriae* power, as a benevolent intervener.[35]

Today, all fifty states and the District of Columbia have juvenile court systems[36] and corresponding specialized detention centers,[37] training schools, and youth centers to "treat" delinquent youth.[38] According to the Office of

PRACTICES IN JUVENILE JUSTICE REFORM 1 (2008), http://www.princeton.edu/futureofchildren/publications/highlights/18_02_ Highlights.pdf.

29. Telephone Interview with Corene Kendrick, Staff Attorney, Prison Law Office (June 25, 2015).

30. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1188 (1970).

31. *Id.* at 1189-90.

32. *Id.* at 1889.

33. *Id.* at 1207.

34. *Id.* at 1229.

35. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107, 109 (1909).

36. Juvenile Law Center, *Youth in the Justice System: An Overview*, http://www.jlc.org/news-room/media-resources/youth-justice-system-overview (last visited June 17, 2015).

37. Detention centers house youth pre-trial and are frequently considered the juvenile justice system's "version of jail." HOLMAN & ZIEDENBERG, *supra* note 22, at 2. Similar to Kalief Browder, seventy percent of youth held in detention centers are being held for nonviolent crimes. *Id.* at 3.

38. JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT

Juvenile Justice and Delinquency Prevention's census in 2013, there were nearly 20,000 youth in detention centers and 35,000 confined in correctional facilities or other residential programs.[39] The number of juvenile *admissions* each year relative to the number incarcerated on any given day is likely five to six times as high.[40]

Despite the best efforts of 1800s reformers to create distinct facilities to protect youths from the dangers of adult incarceration, the separation has not endured. A rise in violent crime in the 1980s and 1990s spurred a rash of laws by which states could attempt to sentence juveniles as adults, resulting in increases in arrests, length of incarceration, and the transfer of youths to the adult criminal justice system.[41] Adolescent confinements spiked at roughly 14,000 in 1997.[42] In 2015, 4,493 minors were confined in adult prisons and jails,[43] and the number of admissions each year relative to the number incarcerated on any given day may be ten or twenty times as high.[44] Nearly half

PRISONS AND JAILS: A NATIONAL ASSESSMENT ix (2000), https://www.ncjrs.gov/pdffiles1/bja/ 182503.pdf.

39. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *Easy Access to the Census of Juveniles in Residential Placement: 1997-2015*, http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/selection.asp (last visited June 19, 2015) (select 2013 for "Year of Census."). Residential programs may include group homes, residential treatment centers, boot camps, wilderness programs, or county-run youth facilities. ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 2 (2011). At the time of the Annie E. Casey Foundation's seminal report, "No Place for Kids," published in 2011, there were more adolescents living in incarceration than there were residing in Nashville, Tennessee; Baltimore, Maryland; or Portland, Oregon. *Id.* The rate of incarceration of adjudicated youths was nearly five times that of the next highest nation studied. NEAL HAZEL, YOUTH JUSTICE BOARD, CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE 59 (2008). The study was based on 2002 figures and included England & Wales, Australia, Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Portugal, Scotland, South Africa, Spain, Sweden, Turkey, and the United States. *Id.* The number of incarcerated youths reached a high of 108,802 in 2000. *See* NAT'L JUVENILE JUSTICE NETWORK AND TEXAS PUB. POL'Y FOUND., THE COMEBACK STATES: REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 (2013). That number has since declined by nearly half, but overwhelming racial disparity persists. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 39 (select 2013 for "Year of Census," and then select "Race"). In 2013, sixty-three percent of juveniles incarcerated were black or Hispanic. *Id.* As exemplified by Kalief Browder and Rodney Hulin's story, poor conditions also persist.

40. *See* HOLMAN & ZIEDENBERG, *supra* note 22, at 18 n.8 ("[T]he recent data available from surveys administered by the National Council on Juvenile Justice (NCJJ) estimate that 350,000 youth were detained in 1999. This figure, however, does not include youth detained while they are awaiting a court-ordered out-of-home placement.")

41. AUSTIN, *supra* note 38, at ix.

42. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 6 (2015), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

43. *Id.*

44. There is little evidence—especially recent evidence—regarding the number of juvenile admissions to adult facilities each year. This statistic is based on an estimation calculated from a 1999 census report. JOLANTA JUSZKIEWICZ, CAMPAIGN FOR YOUTH JUSTICE, TO PUNISH A FEW: TOO MANY YOUTH CAUGHT IN THE NET OF ADULT PROSECUTION 31 (2007). Because the number of juveniles held as adults decreased by about half between

of these youths are eventually returned to the juvenile justice system, where many are not convicted at all.[45] Nonetheless, twenty percent of those young persons who eventually return to the juvenile system will spend over six months in adult jail, and many more will spend at least thirty days in adult custody.[46]

B. Ongoing Harm: The Lasting Impact of Juvenile Incarceration in the Present Day

Though the number of youths incarcerated in both juvenile and adult facilities has declined in the past decade—resulting in part from decreased crime rates[47] and in part from advocates' tireless reform efforts[48]—reprehensible conditions persist. In 2012, twenty-one percent of juvenile facilities were at or over standard capacity,[49] limiting youths' access to mental health and medical resources, undermining adequate provision of programming and education services, and increasing the risk of violence and suicidal behavior rates.[50] Nearly ten percent of youths in juvenile facilities were victims of sexual assault.[51] Twenty-two percent of facilities employed solitary confinement as punishment.[52] Fourteen juveniles died while in custody, including two who were murdered and five who committed suicide.[53] The fact

1999 and 2013 (*see* THE SENTENCING PROJECT, *supra* note 42), this estimate may be high. Nonetheless, the fact remains that many more juveniles are *admitted* to incarceration, adult or juvenile, each year than are in fact incarcerated at any given time.

45. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4 (2007).

46. *Id.*

47. The arrest rate per 100,000 juveniles ages 10-17 fell from roughly 6,493 in 2000 to 2,716 in 2015. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE ARREST RATE TRENDS, http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200&text= yes (last visited January 8, 2018).

48. See, for example, the Juvenile Detention Alternatives Initiative (JDAI), which has established standards for juvenile facilities in over 300 local jurisdictions across thirty-nine states and the District of Columbia. ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE: 2013 ANNUAL RESULTS REPORT 1 (2014). In 2013, JDAI sites had experienced a forty-four percent reduction in average daily population, thirty-six percent reduction in annual admissions, and forty-six percent reduction in commitments to state custody (indicating that these jurisdictions are using alternatives to longer term custody). *Id.* at 2.

49. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE RESIDENTIAL FACILITY CENSUS, 2012: SELECTED FINDINGS 6 (2015); *see also infra* Part IV.d.

50. SUE BURRELL, ANNIE E. CASEY FOUND., IMPROVING CONDITIONS OF CONFINEMENT IN SECURE JUVENILE DETENTION CENTERS 6 (1999) (citation omitted).

51. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH: 2012, at 4 (2012), www.bjs.gov/content/pub/pdf/svjfry12.pdf (last visited June 19, 2015).

52. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 49, at 12.

53. *Id.* at 13.

that as many as two thirds of detained youth may possess mental disorders—with rates of depression among incarcerated juveniles at four and a half times the national average,[54] and rates of attempted suicide at two to four times the national average[55]—makes them all the more vulnerable to traumatic situations and inadequate mental health care.[56]

Youths housed in adult facilities fare worse. Relative to their peers in juvenile facilities, young persons in adult jails are five times more likely to be sexually assaulted and fifty percent more likely to be attacked with a weapon.[57] They are twice as likely to be beaten by staff,[58] who are not trained to engage with youths and thus frequently view age as an aggravating rather than mitigating factor.[59] Young people thus face a difficult choice: fend for themselves in the general population or seek "protection," usually in the form of solitary confinement.[60] Furthermore, adult facilities are not equipped to provide necessary education and rehabilitative programs for youths. In fact, forty percent of adult jails provide no educational services at all.[61] Nor can adult facilities easily accommodate the unique nutritional, medical, and dental needs of young persons.[62] The result: Youths housed in adult facilities are thirty-six times more likely to commit suicide in adult jail than they are in juvenile detention facilities.[63] While government agencies, academics, news media, and advocates have begun documenting the conditions youths experience in incarceration,[64] little research has been done on the lasting impact incarceration may have on the mental and physical wellbeing of young people.[65] A 2014 study found that, even controlling for child maltreatment prior

54. Javad H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCHIATRY RES. 185, 185-90 (1980).

55. KAREN M. ABRAM ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, SUICIDAL THOUGHTS AND BEHAVIORS AMONG DETAINED YOUTH 1 (2014).

56. HOLMAN & ZIEDENBERG, *supra* note 22, at 8.

57. PATRICIA ALLARD & MALCOLM YOUNG, SENTENCING PROJECT, PROSECUTING JUVENILES IN ADULT COURT: PERSPECTIVES FOR POLICYMAKERS AND PRACTITIONERS 7 (2002).

58. *Id.*

59. Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 7 (2015) (noting that "the sole fact that the inmate is an adolescent charged with or convicted of a crime makes him less human and more threatening to prison staff than if he were an adult," as though an individual capable of such an act as a child is innately more evil than an adult).

60. JASON ZIEDENBERG, NAT'L INST. OF CORRECTIONS, YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 12 (2011).

61. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 45, at 4.

62. ZIEDENBERG, *supra* note 60, at 12.

63. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 45, at 4.

64. This is not to suggest that further research is not required. As discussed in Part III.b, specific research is critical to successful litigation and subsequent change.

65. Studies *have* assessed the impact of both juvenile and adult detention of youths on recidivism rates in an effort to demonstrate juvenile incarceration's inefficacy vis-à-vis public safety. *See, e.g.*, HOLMAN & ZIEDENBERG, *supra* note 22, at 4-6 (summarizing studies

to incarceration, abuse during incarceration was a significant predictor of posttraumatic stress disorder (PTSD) and depressive symptoms.[66] The more frequently a youth experienced abuse during incarceration, the more likely he or she was to suffer PTSD and depression.[67] A 2012 study indicated increased likelihood of substance abuse as well as other mood disorders;[68] the study also suggested that, while such conditions might decrease as time passed, formerly incarcerated youths were more likely to experience persistent mental health issues.[69]

Though further, more robust longitudinal research is required, these studies' findings mirror results of more general research on child maltreatment and development: maltreatment and neglect inspire "isolation, fear, and an inability to trust" that can translate to "lifelong psychological consequences, including low self-esteem, depression, and relationship difficulties."[70] The traumas children experience are also linked to physical illness later in life, including heart disease, diabetes, obesity, and sexually transmitted diseases, as well as worsened occupational health and job performance.[71] Incarcerated youths' isolation only augments the impact of maltreatment because they lack the human connections that encourage positive attachment and self-esteem, undermining their ability to cope with the traumas they experience.[72] The

that, among other things, show: i) incarceration is a greater predictor of recidivism than carrying a weapon, gang membership, or a poor parental relationship; ii) congregating delinquent youth increases their chance of re-offending; and iii) detention can slow or interrupt the natural development whereby teens will "age out" of delinquent behavior). On a purely practical level, recidivism not only wastes lives and negatively affects public safety but also has enormous cost implications, driving up prison populations and subsequent spending.

66. Carly B. Dierkhising et al., *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 PSYCHOL. PUB. POL'Y & L. 181, 183, 186 (2014).

67. *Id.* at 181.

68. Teplin, *supra* note 24, at 1038.

69. *Id.*

70. U.S. DEP'T OF HEALTH & HUMAN SVCS., CHILDREN'S BUREAU, CHILD WELFARE INFORMATION GATEWAY, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT 4 (2013), https://www.childwelfare.gov/pubPDFs/long_term_consequences.pdf. Researchers are beginning to extend their studies of the impact of later stage abuse and neglect on future health and wellness. *See, e.g.*, CENTER FOR YOUTH AND WELLNESS, http://www.centerforyouthwellness.org/about/overview/ (last visited June 28, 2015) (assessing and addressing the impact of "early adversity harms [on] the developing brains and bodies of children.").

71. *See* Vincent J. Felitti, *The Relationship Between Adverse Childhood Experiences and Adult Health: Turning Gold into Lead*, PERMANENTE J., Winter 2002, at 44, 46.

72. CHILD WELFARE INFORMATION GATEWAY, *supra* note 70, at 3 (citing positive attachment within a family and a community as a protective and promotive factor of resilience that will help a child cope with maltreatment); *see also* PAUL TOUGH, HOW CHILDREN SUCCEED 28 (2013) ("Parents and other caregivers who are able to form close, nurturing relationships with their children can foster resilience in them that protects them from many of the worst effects of a harsh early environment. . . . The effect . . . is not just

personal relationships so difficult to maintain while incarcerated also carry a variety of other tangible benefits, for instance helping youths develop self-control and self-confidence.[73]

Incarceration conditions for juveniles are not only deplorable, but they also have lasting and often permanent impact on the juveniles who endure them, undermining any potential prospect of rehabilitation.

II. CATEGORICAL RULES: THE BEST HOPE FOR REFORM OF JUVENILE INCARCERATION

Despite the horrible abuses youths experience while incarcerated, efforts to effect sweeping legislative reform and programmatic overhaul have faced many obstacles.[74] Not only is there limited research on juveniles' experiences in incarceration,[75] but the cost of new programming and facilities represents an additional hurdle.[76] Moreover, legislators fear that advocating for more humane incarceration conditions may cause them to be perceived as "soft on crime" by their constituents.[77] Even when policymakers successfully pass new laws regarding conditions in juvenile facilities, facilities often require additional

emotional or psychological, the neuroscientists say; it is biochemical.").

73. RICHARD J. BONNIE ET AL., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 118 (2013). For a comprehensive explanation of suggested practices for youth detention facilities, see ANNIE E. CASEY FOUND., JUVENILE DETENTION FACILITY ASSESSMENT STANDARDS (2014). Some examples of suggested practices to mitigate isolation from friends and family include unlimited access to sent and received post; permission to make at least two phone calls each week of no less than ten minutes in length; permission to have at least two family visits per week of at least sixty minutes in length each, including alternative of Skype to accommodate families who do not live close to the facility. Additional programmatic recommendations include required ongoing training for staff in background characteristics of youth, covering both general adolescent development and individual physical, sexual, and emotional abuse histories of admitted youth; furnishings and decorations that reflect a "home-like, non-penal environment," including opportunity for youth to decorate their own personal spaces; and prohibition on corporal punishment.

74. While sites have shown meaningful improvement in both conditions of secure detention and juvenile commitments to custody because sites *elect* to participate in JDAI, ANNIE E. CASEY FOUND., *see supra* note 48, at 1-2, many facilities do not benefit from JDAI training and assistance. *Id.* Furthermore, because sites self-report to JDAI, compliance with JDAI recommendations is not guaranteed. Finally, juveniles in adult facilities do not benefit from JDAI recommendations. http://www.aecf.org/m/resourcedoc/aecf-2014JDAIProgressReport-2014.pdf

75. *See supra* note 28 and accompanying text.

76. *See, e.g.*, FUTURE OF CHILDREN, *supra* note 28 (explaining that policymakers are often hesitant to implement new, evidenced-based programming focused on reducing juvenile incarceration because of the lack of public sympathy for "criminal" youth and the misapprehension that doing so will cost taxpayers more money). The authors argue that such programming—if enacted correctly—will in fact save taxpayers money over the long-term by reducing the number of incarcerated youths.

77. William Arroyo, *Advocacy in Juvenile Justice*, *in* RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM 119, 119 (Louis J. Kraus et al. ed., 2005).

time to retrain staff prior to implementation.[78] In some cases, such retraining delays reform because it requires staff to shift their attitudes towards youth or to internalize murky standards that are difficult to enact consistently. Eighth Amendment lawsuits challenging juvenile incarceration conditions as cruel and unusual thus remain one of the most effective means by which to promote change: by bypassing the political process and establishing clear prohibitions on behavior, they offer near-immediate reform that can be implemented in a consistent way.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."[79] This includes punishments considered cruel and unusual at the time of the Bill of Rights' adoption[80] as well as those perceived as cruel and unusual in the eyes of modern American society as a whole.[81] The Eighth Amendment may either be applied to the individual assessment of whether a sentence is unconstitutionally excessive,[82] or in the form of categorical rules that define Eighth Amendment standards regarding the nature of the offense[83] or the nature of the offender.[84] In the latter instance, applied to juveniles in *Roper v. Simmons*,[85] *Graham v. Florida*,[86] and *Miller v. Alabama*,[87] the Court

78. Ken Stier, *Why Reforming the Juvenile-Justice System Is So Hard*, TIME (Sept. 16, 2009), http://content.time.com/time/nation/article/0,8599,1924255,00.html.

79. U.S. CONST. amend. VIII.

80. Stanford v. Kentucky, 492 U.S. 361, 368 (1989) (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986)), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005).

81. *Stanford*, 492 U.S. at 369.

82. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 303 (1983) (holding a life without parole sentence for passing a worthless check a violation of the Eighth Amendment).

83. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (holding that the imposition of the death penalty in "instances where the victim's life was not taken" violated the Eighth Amendment).

84. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding the execution of juveniles who committed capital crimes prior to their eighteenth birthdays a violation of the Eighth and Fourteenth Amendments), *overruling* Stanford v. Kentucky, 492 U.S. 361 (1989). *Roper v. Simmons* was not the first time the Court barred a given sentencing practice for juveniles. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality struck down capital punishment of youths aged younger than sixteen at the time they committed the offense. While the *Thompson v. Oklahoma* plurality indeed anticipated the rationale of the majority opinions in *Roper*, *Graham*, and *Miller*, because it predated the *Stanford v. Kentucky* decision, this article does not focus on it in depth. Instead, this article focuses on the *Stanford*, *Roper*, *Graham*, and *Miller* decisions, suggesting that the *Stanford v. Kentucky* decision represented a so-called low watermark of categorical rules as applied to juveniles. Since then, the *Roper*, *Graham* and *Miller* decisions have paved the way for more sweeping reform.

85. *Roper*, 543 U.S. at 578.

86. Graham v. Florida, 560 U.S. 48, 82 (2010) (holding life without parole sentences imposed on juvenile offenders who did not commit homicide a violation of the Eighth Amendment).

87. Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding the mandatory imposition of a life without parole sentence on an offender who committed a crime prior to turning eighteen a violation of the Eighth Amendment).

has deemed particular types of sentences unconstitutional for entire classes of offenders "due to shared characteristics that make them categorically less culpable than other offenders who commit similar or identical crimes."[88]

Categorical rules banning given practices for juveniles present a compelling opportunity to effect meaningful change in juvenile incarceration facilities by building on the *Roper*, *Graham*, and *Miller* line of cases. This Part assesses the challenges of traditional litigation and the benefits of categorical rules before assessing Eighth Amendment jurisprudence as applied to juveniles.

A. Juvenile Incarceration Litigation: Challenges to the Traditional Approach

Today, advocates seek to improve conditions in juvenile facilities through civil suits seeking punitive damages and injunctive relief. However, in addition to the challenges endemic to suit against prison facilities in general, suits against juvenile incarceration facilities present unique challenges specific to representation of the juvenile population.

The general legal and evidentiary challenges of civil rights suits against adult prisons persist in youth cases. Congress' passage of the Prison Litigation Reform Act in 1996 limited federal courts' ability to issue injunctive relief, requiring that relief be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right" and be "the least intrusive means necessary to correct the violation of the Federal right."[89] Hard, reliable evidence is crucial to convincing judges and juries of a plaintiff's case, but such evidence can be difficult to obtain from the very institutions advocates seek to sue.[90] Furthermore, the Supreme Court has assessed a high standard for proving Eighth Amendment violations in individual condition of confinement cases. Advocates must demonstrate that the prison official's deliberate indifference caused the contested condition in question.[91] To prove deliberate indifference, an inmate must demonstrate an objective and subjective component of the official's conduct: both that harm caused by the official was objectively heinous[92] and that the official's mental state indicated a knowledge of and disregard for "an excessive risk to inmate health or safety."[93] Plaintiff inmates

88. Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J. L. & SOC. CHANGE 285, 303 (2012).

89. 18 U.S.C. § 3626 (1996).

90. Kendrick, *supra* note 29.

91. *See* Estelle v. Gamble, 429 U.S. 97, 105-07 (1976) (explaining that accidents or inadvertent failure to provide medical care in the instant case would not suffice to establish an Eighth Amendment violation because plaintiff failed to establish a link between any deliberate action on the part of the official and the victim's suffering).

92. These include conditions that "deprive inmates of the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

93. Farmer v. Brennan, 511 U.S. 825, 837-38 (1994) (holding that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of

must therefore "[expose] the prison official's state of mind," which often proves an insurmountable barrier.[94]

At all stages of the case, lawyers also face challenges unique to representing youths. Incarcerated juveniles are less likely to report maltreatment, due to ignorance of outside advocacy, fear of retribution from guards,[95] and, at the most basic level, literacy challenges that frustrate written communication with attorneys.[96] When advocates do receive juvenile requests for representation, often through public defenders who have been trained to report violations,[97] the challenge becomes finding the correct person to file suit. Juveniles are generally not considered competent to sue, meaning that lawyers must find "next friends"[98] to stand in for the children they represent.[99] This can be challenging, given that many incarcerated children have experienced difficult home lives and persistent lack of parental involvement.[100]

The complexities of representing youths persist in the courtroom. Young persons can be problematic witnesses: age, education levels, and psychological handicaps all affect witness credibility.[101] Because suits against incarceration facilities pit juvenile offenders against law enforcement officials,[102] children's

serious harm exists, and he must also draw the inference."); *see also* Wilson v. Seiter, 501 U.S. 294, 299-300 (1991) (holding that, because "punishment" as employed by the Eighth Amendment is a deliberate act, the official in question must have acted intentionally to cause harm or deprivation).

94. Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection*, 49 DEPAUL L. REV. 567, 602 (1999).

95. Juveniles report that guards frequently read their external communications, reflecting the paternalistic culture that distinguishes juvenile from adult facilities. Kendrick, *supra* note 29. Officials in the system can point to such paternalism as rationale for violations that would not be tolerated in an adult context.

96. *Id.*

97. Burrell Interview, *supra* note 28. The Pacific Juvenile Defender Center, for example, now conducts trainings for public defenders as to how to recognize and report unlawful or egregious incarceration conditions. Kendrick, *supra* note 29.

98. "'Next-friend' standing is the procedure by which a third party appears in court on behalf of detained prisoners who are themselves unable to seek relief. To establish next-friend standing to file a federal habeas corpus petition on a prisoner's behalf, the putative next friends must show (1) that the prisoner is unable to litigate his own case due to mental incapacity, lack of access to the court, or other similar disability; and (2) that the next friend has some significant relationship with and is truly dedicated to the best interests of the prisoner." Tracy B. Farrell, *Next-Friend Standing for Purposes of Bringing Federal Habeas Corpus Petition*, 5 A.L.R. Fed. 2d 427 (2005).

99. Kendrick, *supra* note 29.

100. NATIONAL CENTER FOR JUVENILE JUSTICE & OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 10 (2014) (Melissa Sickmund et al. eds., 2014) (stating that delinquent youths are more likely to have experienced single-parent or other "nontraditional" family structures that are highly correlated to poor supervision, low levels of parental involvement, and poverty).

101. Telephone Interview with Ron Kaye, Founding Partner, Kaye McLane Bednarski & Litt, LLP (June 18, 2015).

102. *Id.*

credibility becomes all the more important. Not to mention, without proper context or scientific background, judges and jurors may be unable to weigh an offender's young age as a mitigating factor in the face of an extremely brutal crime, thereby making the youth plaintiff less sympathetic.[103] In some cases, a judge or juror might even view an offender's youth as an aggravating factor.[104] Though judges who serve in juvenile courts over time become familiar with juvenile development, federal judges and judges in adult criminal courts by contrast require education each time they assess a juvenile case, decreasing the likelihood of a judge's leniency in response to a juvenile's age.[105] Scientific research further suggests that black children—a disproportionate percentage of those in the justice system[106]—are perceived as older and less childlike than their white counterparts,[107] making those minors most likely to be in the justice system most susceptible to harsh treatment. The cost of litigation and later enforcement of injunctive relief, where relevant, is also crippling. Even when attorneys have a strong case, suits seeking punitive damages are costly, both to litigate[108] and for facilities to settle.[109] Suits seeking injunctive relief require

103. Roper v. Simmons, 543 U.S. 551, 573-74 (querying why, if trained psychiatrists were loath to diagnose a juvenile under eighteen as possessing a particular mental disorder, an untrained juror could be trusted with assessing whether or not a juvenile's life was worth saving).

104. *See id.* at 558 ("Defense counsel argued that Simmons' age should make 'a huge difference to [the jurors] in deciding just exactly what sort of punishment to make.' In rebuttal, the prosecutor gave the following response: 'Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.'"). See also *Graham v. Florida*, 560 U.S. 48, 57 (2010), in which the trial judge imposed a sentence of life in prison without parole above and beyond the forty-five year sentence the State had recommended. ("After hearing Graham's testimony, the trial court explained the sentence it was about to pronounce: . . . 'Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.'")

105. Kendrick, *supra* note 29 (noting that each time she is arguing a juvenile case before a federal judge, an advocate must assume the judge knows nothing about the adolescent's unique development or the justice system). A judge's lack of familiarity with adolescent brain development and the juvenile justice system's unique commitment to rehabilitation thus make it more difficult for advocates to successfully argue for the consideration of the youth's age as a mitigating factor.

106. According to the 2013 Census of Juveniles in Residential Placement, forty percent of incarcerated juveniles are black. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 39 (select 2013 for "Year of Census" and "Race.") *See infra* Part IV.a.

107. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY SOC. PYSCHOL. 526, 526 (2014).

108. Susan P. Strum, *The Legacy and Future of Corrections Litigation*, 141 U. PA. L. REV. 639, 716 (1993).

109. For example, just four years after California signed a consent decree to resolve conditions of confinement in the California Youth Authority as a result of the *Farrell* litigation, *see* Consent Decree, Farrell v. Harper, No. RG 03079344 (Super. Ct. Alameda Cty. Nov. 19, 2004), the cost of confinement per juvenile increased from $115,000 per

ongoing monitoring that is time consuming and expensive.[110] Lawyers may labor for as long as forty years to see consent decrees enforced.[111] Furthermore, even successful suits often only affect populations in the individual institutions sued.

By contrast, judicial intervention in the creation of categorical rules carries a number of important benefits. First and foremost, clear rules take immediate and material effect once the Supreme Court has decided them. In so doing, they limit the resource intensive nature of future monitoring.[112] They also increase the likelihood of consistent application, limiting judicial and juror discretion. So-called categorical rules thereby present a compelling means of securing compliance with limited continued oversight while also ensuring that all juveniles receive equal recognition of the distinguishing characteristics of youth. Finally, judicial involvement in sentencing and incarceration conditions eliminates the political circumnavigation that may delay change in a legislative context.[113] For all these reasons, categorical rules present one of the best means by which to prevent the sort of conditions that led to Kalief Browder's death.

B. The Eighth Amendment and Categorical Rules: A History

The Supreme Court imposed its first categorical ban specific to juveniles in 2005 when it banned the imposition of the death penalty for youths under eighteen in *Roper v. Simmons*.[114] The Court decided *Roper* twenty-six years after it had upheld the imposition of the death penalty for juveniles in *Stanford*

juvenile per annum to $252,000, *see* ANNIE E. CASEY FOUND., *supra* note 39, at 21.

110. *See* ANNIE E. CASEY FOUND., SYSTEMIC OR RECURRING MALTREATMENT IN JUVENILE CORRECTIONS FACILITIES: STATE-BY-STATE SUMMARY (2011), http://www.aecf.org/ resources/no-place-for-kids-full-report/; *see also infra* Part IV.e (summarizing the states in which consent decrees have been filed recently or continue to receive monitoring).

111. Plaintiffs filed in the District Court of Rhode Island in 1971; a consent order was finally filed twenty-nine years later on June 22, 2000. As of June 2011, the case remained active. ANNIE E. CASEY FOUND., LITIGATION AND FEDERAL CRIPA INVESTIGATIONS OVER CONDITIONS OF CONFINEMENT IN STATE-FUNDED JUVENILE CORRECTIONAL FACILITIES 8 (2011), http://www.aecf.org/resources/no-place-for-kids-full-report/. Following the filing of a consent decree in the *Farrell* litigation, it took California's Center on Juvenile and Criminal Justice (formerly known as California Youth Authority) nine years to meet obligations under the Dental Care portion of the Health Care Remedial Plan of the Consent Decree; at that time, use-of-force remained "a matter of high concern" for the Special Master appointed to oversee the Decree's implementation. CENTER ON JUVENILE AND CRIMINAL JUSTICE, Farrell Lawsuit Timeline 14 (2013). Nine years is apparently remarkably speedy for the implementation of a consent decree. Kendrick, *supra* note 29.

112. Suits regarding a particular violation of a Categorical Rule may still be necessary, but facilities will not require ongoing monitoring by special masters and advocates to the same extent consent decrees today require.

113. Burrell Interview, *supra* note 28.

114. Roper v. Simmons, 543 U.S. 551 (2005).

v. Kentucky,[115] therefore requiring the majority to justify its conclusion that the American "standard of decency" regarding capital punishment of juveniles had evolved in that short timeframe.[116]

In *Roper*, the Court admittedly faced facts similarly brutal to those in *Stanford* even as it reversed its earlier opinion. In the first of the consolidated cases in *Stanford*, seventeen-year-old Kevin Stanford repeatedly raped and sodomized twenty-year-old Barbel Poore after robbing the gas station where she worked.[117] Kevin and his accomplice then drove her to a secluded area and shot her in the face.[118] In the second, sixteen-year-old Heath Wilkins robbed a convenience store, stabbing the store's owner repeatedly in the chest and neck and leaving her to bleed out on the floor.[119] In *Roper*, seventeen-year-old Christopher Simmons boasted about his intentions to his friends prior to committing his crime: He planned to burglarize a house, tie up its inhabitant, and then murder her, a plan he later consummated when he kidnapped Shirley Crook and threw her from a railroad bridge to drown in the waters below.[120] The facts of the three cases were not distinguishable, so the Court relied on intervening case holdings and evolving national consensus on the issue of capital punishment for youths.

Indeed, the Court followed the analysis upon which it had relied in *Atkins v. Virginia* in 2002, a case assessing the legality of capital punishment for the mentally handicapped.[121] First, the Court assessed "objective indicia of society's standards, as expressed in legislative enactments and state practice."[122] Second, the Court applied its "own independent judgment"[123] to evaluate the scientific and psychological research that demonstrated youths, as

115. Stanford v. Kentucky, 492 U.S. 361 (1989).

116. *Roper*, 543 U.S. at 561.

117. *Stanford*, 492 U.S. 361 at 365.

118. *Id.*

119. *Id.* at 366.

120. *Roper*, 543 U.S. at 555-56.

121. 536 U.S. 304 (2002). In *Atkins*, the Court also invalidated a prior death penalty precedent, one in fact decided on the same day as *Stanford v. Kentucky*. In reversing the precedent established in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the *Atkins* decision held capital punishment of mentally handicapped individuals cruel and unusual. *Id.* at 321.

122. *Roper*, 543 U.S. at 563. In *Stanford v. Kentucky*, the Court had insisted on its decision being "informed by objective factors to the maximum extent possible." 492 U.S. at 369. In the *Roper* decision, the Court noted that *Stanford* had failed "to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of . . . offenders" and was therefore inconsistent with both prior Supreme Court opinions as well as the recent precedent established in *Atkins*. 543 U.S. at 574-75. While it is not entirely within the scope of this article to assess the merits on each side of this debate, it is important to note that three Justices—Chief Justice Roberts, Justice Alito, and Justice Thomas—on the current Court believe the majority opinions in favor of different categorical standards for juveniles rely too heavily on their own subjective views. *See infra* Part III.a. It is possible that Justice Gorsuch feels similarly.

123. *Roper*, 543 U.S. at 564.

a class, to be developmentally unique from adults, in so doing explaining young persons' reduced culpability and the resultant illegitimacy of certain penological goals.[124] The court applied variations of the same analysis in its subsequent decisions in *Graham* and *Miller*. The next Subparts will assess the evolution of these analyses in turn, establishing a foundation upon which to assess a categorical rule strategy as applied to incarceration conditions in Part III.

1. "Objective" Indicia of Society's Standards

Between *Stanford* and *Graham*, the Court has become much less focused on state law as indication of national consensus. In *Stanford*, the Court focused on the *number* of states authorizing a particular practice. The *Graham* Court instead concentrated on a number of criteria to determine societal standards, including: states' actual practice, whether or not states have explicitly sanctioned the practice, and states' prohibition of a particular approach. Understanding the evolution of such interpretation is important to understanding the opportunity for Eighth Amendment advocacy today.

In assessing whether the imposition of the death penalty on sixteen- or seventeen-year-olds violated the Eighth Amendment, the *Stanford* majority had adopted a very strict definition of what indicated national consensus "sufficient to label a particular punishment cruel and unusual."[125] The Court defined objective indicia of society's standards as "operative acts" (law and application of the laws).[126] "Public opinion polls, the views of interest groups, and the positions adopted by various professional activities" *did not* constitute objective indicia.[127]

In the majority's analysis, state practice did not indicate a majority sufficient to condemn the practice. Of the thirty-seven states that imposed capital punishment at the time, fifteen declined to impose it on sixteen-year-olds and twelve declined to impose it on seventeen-year-olds.[128] When assessed relative to those states that imposed the death penalty, neither fifteen nor twelve of thirty-seven states was sufficient to constitute a majority. Rather, Justice Scalia likened the case to *Tison v. Arizona*,[129] in which the Supreme Court had deemed eleven out of thirty-seven states imposing capital punishment for "major participation in a felony with reckless indifference to human life"

124. *Id.* at 568-74.

125. *Stanford*, 492 U.S. at 370.

126. *Id.* at 377; *see also Atkins*, 536 U.S. 304, 312 ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989))).

127. *Stanford*, 492 U.S. at 370.

128. *Id.*

129. 481 U.S. 137 (1987).

insufficient indication of national consensus.[130]

By contrast, the dissent advocated a different denominator, concluding from these statistics that twenty-seven states and thirty states did not permit capital punishment of seventeen- or sixteen-year-olds, respectively.[131] In so doing, the dissent included in the number that disallowed the death penalty for specific ages those states that prohibited the death penalty altogether. Furthermore, Justice Brennan stated that states' *silence* as to minimum age at which the death penalty might be assessed did not constitute conscious authorization of the death penalty for juveniles.[132] By implication, the dissent indicated that state legislatures must have "specifically considered the issue" in order to make the "conscious moral choice to permit the execution of juveniles."[133] In so reasoning, the dissent added an additional nineteen states that had "not squarely faced the question" to those states that disallowed the death penalty for certain ages, leaving only a "few remaining jurisdictions" that had "explicitly set an age below eighteen at which a person may be sentenced to death."[134]

The dissent proceeded to question the logic of the position that legislative authorization of a given practice in fact indicated the nation's sanctioning of it.[135] Instead of evaluating legislative authorization as a measure of public acceptance, the dissent argued for assessing actual practice. The limited imposition of the death penalty on juveniles supported its "unusual" occurrence: Between 1982 and 1987, the death penalty was imposed on youths in only 0.5 percent of cases involving homicide as compared to 1.8 percent of adults. [136] The fact that adults were sentenced to death at 3.6 times the rate of

130. *Stanford*, 492 U.S. at 371-72 (citing *Tison*, 481 U.S. at 154).

131. *Id.* at 384-85 (Brennan, J., dissenting).

132. *Id.* at 385.

133. *Id.*

134. *Id.*

135. *Id.* at 385-87. In so doing, the dissent followed the practice employed by the plurality in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), which held the death penalty unconstitutional for homicide offenders under sixteen. In the *Thompson* plurality opinion, Justice Stevens wrote that "the infrequent and haphazard handing out of death sentences" to homicide offenders under sixteen indicated that the practice was "generally abhorrent to the conscience of the community." *Id.* at 831-32.

136. *Stanford*, 492 U.S. at 387 (Brennan, J., dissenting). The dissent also pointed to international disapproval of capital punishment of juveniles. *Id.* at 389-90. While subsequent opinions have also nodded to international opinion as additional reasons to hold as they have, *see* Roper v. Simmons, 543 U.S. 551, 575-76 (2005); Graham v. Florida, 560 U.S. 48, 80 (2010), the Court has never seemed to view this as a focal point of its analysis, *see, e.g.*, *Graham*, 560 U.S. at 80 ("[International disapproval] does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment."). In light of this position, together with the Court's wholesale failure to discuss international norms in *Miller v. Alabama*, 567 U.S. 460 (2012), this article does not delve further into the implications of international practice or the Court's assessment thereof. Furthermore, scholars have already analyzed the topic in detail. *See, e.g.*, Birckhead, *supra* note 59, at 9.

youths suggested that the nation did *not* support capital punishment of youths to the extent the majority claimed.[137]

Since the *Stanford* decision, the Court has not changed so much as shifted its focus from the law itself to its application and the considered intent behind it. The *Roper*, *Graham*, and *Miller* majorities built upon the foundation of Justice Brennan's dissent, each employing a more flexible interpretation of legislative practice to demonstrate objective indicia of national consensus. In overruling *Stanford*, the *Roper* majority cited not only the percentage of states that did not permit the death penalty for young persons, but also the infrequency of its actual practice and the trend away from its imposition.[138] At the time of the *Roper* decision, thirty states prohibited capital sentencing of juveniles, twelve rejecting the death penalty altogether and eighteen prohibiting it by legislative directive or judicial interpretation.[139] Moreover, in *actual practice*, only six of the twenty states that authorized the juvenile death penalty had actually executed offenders for crimes committed as juveniles, with only three states doing so in the ten years prior to the Court's holding.[140] Finally, five states had outlawed the death penalty for juveniles since the *Stanford* decision, a consistent trend that further evidenced a change in national consensus since the 1989 holding.[141] Together, these facts led the majority to conclude that "a majority of States" had rejected the death penalty as applied to youths.[142]

In 2010, the *Graham* majority departed further, abandoning focus on the number of states that permitted a given practice altogether.[143] In *Graham*, the Court considered the constitutionality of a life without parole sentence for Tarrance Jamar Graham.[144] Tarrance was seventeen years old when he committed home invasion, holding the resident at gunpoint, thereby violating the terms of his parole from an earlier armed burglary and assault charge.[145]

Instead of concentrating on state law, the majority concentrated on "measures of consensus other than legislation"[146] such as states' "[a]ctual

137. *Stanford*, 492 U.S. at 386-87 (Brennan, J., dissenting).

138. *Roper*, 543 U.S. at 564-65.

139. *Id.* at 564.

140. *Id.* at 564-65.

141. *Id.* at 564-65. The Court acknowledged that the rate of abolition was not as fast as that which had occurred between *Penry* and *Atkins*. *Id.* at 565. It was not the pace, however, but the "consistency of the direction of the change," together with its occurrence in the face of "the general popularity of . . . cracking down on juvenile crime in other respects," that mattered. *Id.* at 566.

142. *Id.* at 568.

143. Graham v. Florida, 560 U.S. 48, 62 (2010).

144. *Id.* at 52-53.

145. *Id.* at 54-55.

146. *Graham*, 560 U.S. at 62 (internal quotation marks omitted) (quoting Kennedy v. Louisiana, 554 U.S. 407, 433 (2008)).

sentencing practices."[147] The fact that thirty-seven states, as well as the District of Columbia and federal law, permitted life without parole sentences for juvenile nonhomicide offenders was not sufficient to convince the majority of a national consensus.[148] Only 123 juvenile nonhomicide offenders served life without parole sentences at the time of the Court's holding, seventy-seven in Florida and the other forty-six "in just 10 States."[149] By the Court's count, twenty-six of the states that statutorily authorized life without parole sentences on juvenile nonhomicide offenders—a full seventy percent of those states permitting the practice—did not in fact impose the sentence.[150] The rarity of the practice "in proportion to the number of opportunities for its imposition" further supported the Court's holding.[151] Finally, as observed in the *Stanford* dissent,[152] those states that *had* authorized juvenile life without parole sentences had not necessarily done so by "deliberate, express, and full legislative" design; rather, by passing laws that permitted juvenile transfer to adult court, states had unintentionally subjected many juveniles to possible life without parole sentencing provisions.[153] "[S]tatutory eligibility" of such juveniles did not indicate a state's legislative authorization of life without parole sentencing.[154]

In striking down mandatory life without parole sentences for juveniles, *Miller v. Alabama* extended the *Graham* approach.[155] *Miller* considered two fourteen-year-old boys, Kuntrell Jackson[156] and Evan Miller,[157] charged in separate cases that had been transferred to adult court, and sentenced to mandatory life without parole sentences. Kuntrell was charged with capital felony murder after his accomplice to a video store robbery shot and killed the clerk; life without parole was the only sentence available under Arkansas law.[158] Evan was charged with murder in the course of arson after a burglary

147. *Id.* ("Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven states as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. Federal law also allows for the possibility of life without parole for offenders as young as 13.").

148. *Id.*

149. *Id.* at 64. The ten states included California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia. *Id*.

150. *Id.* at 49.

151. *Id.* at 65-66 (stating that, with respect to the roughly 380,000 juveniles arrested for nonhomicide crimes in 2007, the number serving life without parole sentences was miniscule and therefore as rare as other sentencing practices held by the Court to be cruel and unusual).

152. Stanford v. Kentucky, 492 U.S. 361, 384-85 (Brennan, J., dissenting).

153. *Id.* at 66-67.

154. *Id.* at 67.

155. Miller v. Alabama, 567 U.S. 460 (2012).

156. *Id.* at 465.

157. *Id.* at 467-68.

158. *Id.* at 466.

went awry; life without parole was the mandatory punishment under Alabama law.[159]

In its opinion, the *Miller* majority considered whether mandatory life without parole sentences resulted from intentional legislative design. Twenty-nine jurisdictions (twenty-eight states plus the federal government) imposed mandatory life without parole sentences for some juveniles convicted of murder in adult court.[160] However, the majority noted that the number of states authorizing a given practice was less relevant when such practice resulted not from explicit legislative design but "only through the combination of two independent statutory provisions," one allowing transfer of youths to adult court and the other setting out the penalties for individuals once transferred there.[161] In such situations, it was impossible to assess "whether a legislature had endorsed a given penalty for children."[162] In the majority's view, more than half of the jurisdictions mandated life without parole for juveniles simply because they lacked separate penalty provisions for juveniles tried as adults; such an "inadvertent legislative outcome" could not be considered supportive of a given sentencing practice.[163]

The Court has loosened its interpretation of objective indicia since *Stanford*, moving from literal focus on state law to whether or not a given practice results from careful legislative design. Whether the Court has in fact changed its definition of objective criteria or rather tailored objective criteria[164] to support a given result is a matter for debate outside the scope of this article. Regardless of the Court's rationale, the decision provides an important opportunity to attempt change for incarcerated youths. Moreover, at the same time that the Court has become more "flexible" in its objective assessment, it has also given more weight to its own independent judgment of a given issue.[165]

2. The Court's Own "Independent" Judgment

Just as the *Graham* court expanded its definition of "objective indicia"

159. *Id.* at 469.
160. *Id.* at 482.
161. *Id.* at 485.
162. *Id.*
163. *Id.* at 487.
164. In other words, did the number of states eschewing capital punishment and life without parole increase in a meaningful way, or did the majority find the mathematical basis to justify the conclusion it wanted to reach?
165. *See* Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250, 1255-57 (2015). ("In . . . *Miller v. Alabama*, the Court turned to psychological and neuroscientific evidence when it held that mandatory LWOP is unconstitutional when applied to juveniles, no matter the crime. Departing from the approach of its earlier decisions, the Court considered the science first and then turned to objective indicia such as legislative approval.")

relative to the *Stanford* court, it also expanded the types of considerations relevant to it assessment of the constitutionality of a given penological practice. The Court's seeming willingness to consider factors previously ignored—including evidence from neurology and the social sciences—created opportunities for youth advocates to demonstrate why youths were developmentally different from adults and therefore required distinct punishment.

By contrast, the *Stanford* court rejected any reliance on "subjective views of individual Justices" both because the "unusual" nature of punishments prohibited by the Eighth Amendment required an objective inquiry and because of the deference the Court owed state legislatures.[166]

The Justices in the majority therefore did not look to their "own conceptions of decency" in any part of their opinion.[167] By contrast, the dissent cited the vital role of the Court in ensuring the fulfillment of the Bill of Rights.[168] It proceeded to discuss across many pages the two reasons that the death penalty was not a proportional sentence to a crime committed by a juvenile: First, juveniles were less culpable than adults; and second, capital sentencing of juveniles failed to make "a measurable contribution to acceptable goals of punishment."[169] In so doing, the dissent cited states' prohibitions on certain activities permitted adults, including voting, marriage, and jury service; the Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders; a Brief submitted by the American Society for Adolescent Psychology; and a handful of scientific papers.[170]

In the *Roper* majority opinion, Justice Kennedy applied the two-part "own judgment" approach of the *Stanford* dissent, framing the Court's analysis as a return to traditional practice.[171] The opinion relied heavily on scientific

166. Stanford v. Kentucky, 492 U.S. 361, 369-70 (1989) (first quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); then quoting Gregg v. Georgia, 428 U.S. 153, 176 (1976) (emphasis omitted)). Such rejection seemed a direct response to the plurality decision in *Thompson v. Oklahoma*, which asserted that "it is for [the Court] ultimately to judge" the constitutionality of the death penalty for a fifteen-year-old defendant. 487 U.S. 815, 833 (1988) (plurality opinion) (quoting Enmund v. Florida, 458 U.S. 782, 797 (1982)). In so presaging later decisions, the *Thompson* majority determined that juveniles were not only less culpable than adults but also that capital punishment of juveniles under sixteen served limited "social purpose." *Id.* at 833-37. To support its argument, the plurality cited the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, as well as Department of Justice statistics, but it did not cite any scientific evidence. *Id.* at 834, 837.

167. *Stanford*, 492 U.S. at 369.

168. *Id.* at 392 (Brennan, J., dissenting).

169. *Id.* at 394-405, 401.

170. *Id.* at 394-98, 404-05.

171. Roper v. Simmons, 543 U.S. 551, 563-64 (2005) ("The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford*, that 'the

research, perhaps in part because the scientific community had made significant progress in the years between *Stanford* and *Roper*.[172] By some accounts, such progress itself explains the shift in the court's outlook.[173] In the intervening years, the MacArthur and Annie E. Casey Foundations, among others, devoted considerable resources to researching[174] and explaining that juveniles were categorically less mature than adults, more susceptible to negative peer pressure, and still in the process of forming their identities.[175] The *Roper* majority cited all three of these factors in supporting its conclusion that juveniles were less culpable than adults: Their diminished maturity and increased irresponsibility made them less "morally reprehensible" than adults.[176] Their vulnerability to peer pressure made their failure to escape negative influences more forgivable.[177] Finally, the evolving nature of their identities undermined the conclusion that any juvenile was "irretrievably

Constitution contemplates that in the end our own judgment will be brought to bear . . . ." (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002))).

172. *See The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, *supra* note 159, at 1264-65 (asserting that, at the time of *Stanford*, psychological and neurological understanding of juvenile brain development was limited); *see also* Kevin W. Saunders, *The Role of Science in the Supreme Court's Limitations on Juvenile Punishment*, 46 TEX. TECH L. REV. 339, 340 (2013) ("At the time of the Supreme Court's first considerations of the juvenile death penalty, . . . [t]he science did not study the physical structure of the relevant regions of the brain, but presented conclusions based on examining the behavior of children and asking them questions involving moral decision-making."). This is not to say that Justice Brennan's dissent lacked scientific foundation; indeed, it relied on evidence more than prior opinions had. *See Stanford*, 492 U.S. at 394-98, 404-05 (Brennan, J., dissenting).

173. Burrell Interview, *supra* note 28. By other accounts, the increased reliance on scientific evidence merely reflected a change in Court personnel. *See* Saunders, *supra* note 169, at 367 ("[T]he position favoring leniency lost one vote when Justice Marshall was replaced by Justice Thomas. A shift of two votes in the opposite direction was then required to reach the Court's later position. . . . [T]he change that resulted from Justice White being replaced by Justice Ginsburg seems better explained by the replacement of a conservative by a liberal than by the influence of science."). At the very least, the science may explain Justice Kennedy's change in position: he wrote the majority opinion in *Roper v. Simmons* after joining the majority in *Stanford v. Kentucky*. *See Stanford*, 492 U.S. 361; *Roper*, 543 U.S. 551.

174. Burrell, *supra* note 50. As a result of the MacArthur Foundation's work, the Network on Adolescent Development and Juvenile Justice published eight books and monographs and 212 articles in peer reviewed journals and books on child and adolescent development. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT & JUVENILE JUSTICE, ABOUT THIS NETWORK, http://www.macfound.org/networks/research-network-on-adolescent-development-juvenil/details (last visited June 26, 2015).

175. For a summary of the research sponsored by the MacArthur Foundation, *see* MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE (2006), http://www.adjj.org/downloads/552network_overview.pdf.

176. *Roper*, 543 U.S. at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

177. *Id.*

depraved" in character.[178] Therefore, juveniles could not "with reliability be classified among the worst offenders," for whom the death penalty was reserved.[179] By extension, neither of the two social purposes served by the death penalty—retribution and deterrence[180]—could support capital punishment for juveniles. Juveniles were less culpable and therefore not deserving of such extreme retribution, and, given the unlikelihood of juveniles' performing any sort of "cost-benefit analysis" prior to a crime's commission, they were not likely to be deterred even by such an extreme sentence.[181]

In *Graham*, the Court took much the same approach, stating that "[n]o recent data provide[d] reason to reconsider the Court's observations in *Roper* about the nature of juveniles."[182] Again writing for the majority, Justice Kennedy called life without parole "the second most severe penalty permitted" (after, of course, the death penalty).[183] The developmental differences that made the death penalty inappropriate for juveniles therefore applied to life without parole sentences: juveniles were less culpable.[184] Furthermore, such an extreme sentence achieved neither retributive nor deterrent purpose.[185] The majority then extended the analysis regarding the social purposes served by imposing a life without parole sentence on juvenile offenders who did not commit homicide, evaluating the two penological objectives foreclosed in a death penalty situation. The Court eliminated incapacitation as a legitimate reason for imprisonment: juveniles were still developing, and therefore could not be judged "incorrigible," meaning that a "life without parole sentence" would "improperly den[y] the juvenile offender a chance to demonstrate growth and maturity."[186] The majority then concluded that life without parole by its nature foreclosed rehabilitation as a goal. Not only did the juvenile offender lose the opportunity to ever re-enter society, but he also lost access to many of the vocational training and other rehabilitative services available to inmates serving shorter terms.[187]

By the time of the *Miller* decision, the Court took for granted the analysis so laboriously elaborated in *Roper* and *Graham*. The Court cited the science and social science relied upon in *Roper* and *Graham* as well as "common

178. *Id*.

179. *Id.* at 553.

180. Given the eventual execution of an offender in a capital case, incapacitation and rehabilitation are not considered legitimate goals of the sentence.

181. *Roper*, 543 U.S. at 571-72 (quoting *Thompson*, 487 U.S. at 837)).

182. Graham v. Florida, 560 U.S. 48, 68 (2010).

183. *Id.* at 69 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

184. *Id.* at 68.

185. *Id.* at 71-72.

186. *Id.* at 72-73.

187. *Id.* at 74.

sense" and "what any parent knows,"[188] perhaps suggesting the wide acceptance of realizations that had been novel in *Roper*. The majority then reasoned that none of the principles asserted in *Graham*, regarding either juvenile culpability or the inability of life without parole sentences to achieve penological objectives, was "crime-specific."[189]As such, *Graham*'s reasoning extended to any mandatory life-without-parole sentence.[190] Though the analysis in *Miller* did not show significant development from that in *Graham*, majority writer Justice Kagan's placement of the Court's "own inquiry" prior to its objective assessment perhaps indicated that, a long way from *Stanford*, categorical rules would not simply be a matter of legislative statistics in the future.[191]

In short, the "own inquiry" once prohibited in *Stanford* has since become a focal point of the Court's categorical rule analysis, thereby confirming the fact that "children are different"[192] as given. The reestablishment of the "own inquiry" prominence together with the presumption that juveniles' developmental differences both demonstrate their culpability and undermine the legitimacy of penological objectives has therefore constructed a strong foundation for future decisions seeking bans on certain practices harmful to juveniles. The impact of a given policy on a juvenile's rehabilitative prospects seems particularly important. Taken together with other recent decisions, the *Roper* line of cases suggests an opportunity to challenge juvenile incarceration norms.

III. SEIZING THE MOMENT: EXTENDING *ROPER*, *GRAHAM*, AND *MILLER* TO JUVENILE INCARCERATION PRACTICE

Though the Supreme Court has not, as of yet, applied categorical bans to certain incarceration (as opposed to sentencing) practices, there are multiple reasons to believe the Court may be open to such possibility. This Part first discusses these reasons and then suggests a strategy by which to approach the Court with proposed categorical bans.

A. Why Now?

Multiple factors suggest the Court may be open to extending categorical

188. Miller v. Alabama, 567 U.S. 460, 471 (2012) (internal quotation marks omitted) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

189. *Id.* at 473.

190. *Id.* Thereafter, the majority opinion devoted much time to assessing the issue that mandatory sentencing precludes judges from factoring in youth as a central consideration. *Id.* at 474-78. Indeed, the majority handled the objective and own judgment prongs of Eighth Amendment categorical rule analysis in only three pages, spending most of the opinion discussing the importance of individualized assessment at sentencing.

191. *Id.* at 481-82.

192. *Id.* at 481.

bans to certain incarceration conditions. These include: the Court's consideration of youth in other, non-sentencing contexts; the evolution of the Court's categorical rule analysis and the relevance of such analysis to incarceration conditions; the Court's increasing discomfort with current incarceration conditions; and the Court's concern with arbitrary decision-making regarding any offender, and, in particular, juvenile offenders.

Eighth Amendment suits are not the only instance in which the Supreme Court has given special deference to a juvenile's developmental differences.[193] In recent years, the Supreme Court has recognized the same three principles elaborated in *Roper*—immaturity, susceptibility to peer pressure, and impulsive behavior—across a broad number of contexts, including Fourteenth Amendment,[194] First Amendment,[195] and, most recently, Fifth Amendment[196] cases. While such widespread acknowledgment does not perhaps itself affect the possibility of a broadened application of categorical rules,[197] it does suggest that the Court endorses the view that children have distinct needs resulting from their developmental state. Justice Kagan's short shrift of the "own judgment" prong in *Miller v. Alabama*[198] perhaps stands as the most compelling example in which the Court assumes the necessity of certain accommodations because of children's developmental attributes.

When read together, the *Roper*, *Graham*, and *Miller* decisions indicate the Court's distaste for denying youths the opportunity to rehabilitate. At the same

193. *See* Levick, *supra* note 88, at 300 n.107.

194. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."). In *Bellotti*, the Court ultimately held unconstitutional a Massachusetts statute requiring pregnant minors seeking abortions to obtain parental consent or judicial approval following parental notification because, despite their differences from adults, minors were nonetheless still entitled to constitutional protection. *Id.* at 633-34.

195. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311-12 (2000) (stressing "the obvious observation that 'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention'" (quoting Lee v. Weisman, 505 U.S. 577, 593 (1992))).

196. In *J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011), the Supreme Court held that "a child's age properly informs the *Miranda* custody analysis." The majority reasoned that "children are 'most susceptible to influence' and 'outside pressures,'" thus requiring special consideration in the context of *Miranda* waiver. *Id.* at 275 (first quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); and then quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

197. Though the majority in *Roper v. Simmons* included three appendices detailing the contexts apart from the death penalty in which states prohibited certain activities—voting, serving on juries, and marrying without parental consent—it did not focus on those factors as a strong motivation for its holding. 543 U.S. 551, 569 (2005). Subsequent decisions confirm that activities outside of the justice context likely do not prove determinative of the age at which juveniles are or are not eligible for certain sentencing schemes. Other holdings, however, indicate such limitations likely do not extend to incarceration conditions.

198. *See supra* Part II.B.2.

time, the decisions suggest the Court's preference that practices regarding youths result from either the considered decision-making of a judge's sentencing decisions or the passage of new law. Minors' developmental states reduce their culpability and make them uniquely inclined to rehabilitation. Together, these qualities suggest entitlement not only to sentencing practices different from adults but also to distinct incarceration conditions that are rationally considered and not haphazardly created.[199] The history of the Court's recognition of the unique responsibilities of the state in protecting minors,[200] at times limiting juveniles' own constitutional freedoms because of their unique vulnerabilities,[201] further supports the conclusion that the Court may hold the State to higher standards for incarceration conditions. The reality that certain incarceration practices have unique and long-term negative impact on youths might thus convince the Court of the necessity of banning these confinement conditions in the juvenile context. This is particularly true if—as is often the case—these conditions occur in a haphazard and inconsistent manner. Such practices include: placing youths in adult confinement facilities; solitary confinement; and the use of restraints.

Furthermore, the Court has also indicated increasing displeasure with adult detention conditions. In its 2011 *Brown v. Plata* decision, citing graphic evidence[202] as to the zoo-like conditions in which physically and mentally ill prisoners were housed, the Court upheld a three-judge panel's remedial order to decrease its prison population to 137.5 percent of design capacity within two years.[203] In his recent concurrence in *Davis v. Ayala*,[204] Justice Kennedy all but

199. *See, e.g.*, Levick, *supra* note 88, at 306-07 ("Harmful or deplorable conditions, which have been found constitutional in cases involving adults, may therefore be unconstitutional when imposed on juveniles—both because the impact of the harm is more significant for juveniles, and because the expectation of treatment and rehabilitation is higher.").

200. *See, e.g.*, *J.D.B.*, 564 U.S. at 273 ("[C]hildren characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. . . . [L]egal disqualifications placed on children as a class—*e.g.*, limitations on their ability to . . . marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.").

201. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.").

202. Brown v. Plata, 563 U.S. 493, 501-06 (2011).

203. *Id.* at 528-29.

204. Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("[C]onsideration of these issues [presented by solitary confinement] is needed. . . . In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."); *see also* Editorial Board, *Justice Kennedy on Solitary Confinement*, N.Y. TIMES (June 19, 2015), http://www.nytimes.com/2015/06/20/opinion/justice-kennedy-on-solitary-confinement.html.

asked that a case challenging solitary confinement be brought before the court, writing a separate concurrence to address the tangential issue of the twenty-five years the respondent had spent in solitary confinement while awaiting his execution.[205]

In that same opinion, Justice Kennedy also indicated his discomfort with the seemingly incidental result of Ayala's solitary confinement, echoing concerns similar to those expressed in the *Miller* and *Graham* decisions and the *Stanford* dissent.[206] Though judges devoted considerable time to their sentencing decisions, Justice Kennedy wrote, they had "no accepted mechanism" by which to consider whether a prisoner ought to spend time in solitary confinement, such that a prisoner's long-term placement in solitary confinement resulted not from a considered decision but because of "society's simple unawareness or indifference."[207] Likewise, youths' exposure to certain types of maltreatment in detention facilities—those that exceed the discomfort inherent to incarceration—seem but the incidental outcome of judges' careful decisions to sentence juveniles to given types of placement. For youths, practices such as incarceration in adult facilities, solitary confinement, denial of family visitation, or suspension of activities do not result from the "deliberate, express, and full legislative" design that seemed so important to the Court in decisions regarding juvenile sentencing.[208]

To summarize, in a period of seven years through the *Roper*, *Graham*, and *Miller* decisions, the Court overturned its stance on capital punishment for sixteen- and seventeen-year-olds, prohibited life without parole sentences for youths under sixteen, and then prohibited mandatory life without parole sentences for all youths. This trilogy of cases highlights the Court's particular focus on youth development in the juvenile justice context.[209] The sweeping change made in such a short time period suggests momentum for juvenile justice issues that could well extend beyond sentencing, in particular given the overlap between the Court's apparent concerns in those cases and its displeasure with incarceration conditions more generally. Preoccupation with the minor's unique needs and vulnerabilities, concern with current incarceration conditions, and the seemingly inadvertent and unchecked exposure of juveniles to maltreatment all suggest the Court's readiness to extend categorical bans for juveniles beyond sentencing to certain incarceration conditions. However, advocates must coordinate carefully before attempting a case to evoke such change. A preliminary strategy is discussed in Subpart B below.

205. *Davis*, 135 S. Ct. at 2209-10.

206. *See supra* Part II.B.ii.

207. *Davis*, 135 S. Ct. at 2209.

208. *See* Graham v. Florida, 560 U.S. 48, 67 (2010).

209. One could probably consider *J.D.B v. North Carolina* in this line of cases, and many scholars have done so. *See, e.g.*, Levick, *supra* note 88, at 292.

B. Winning a Categorical Ban

The opportunities to improve juvenile incarceration are myriad: prohibiting solitary confinement for youths, the placement of detained, pre-adjudicated youths in adult facilities, and the use of restraints; increasing opportunity to interact with family visitors, engage in programming, and spend time outside; mandating intensive training for staff as to how to interact with minors and providing clear procedures by which to handle reported abuse; and requiring reentry programming when juveniles finish their incarceration terms.[210] The first three of these are examples of practices that could be banned through categorical rules.

In applying the Eighth Amendment categorical rule approach, the Supreme Court would measure each of these policies against its two-pronged analysis, requiring assessment of both the objective indicia of national consensus and the application of the Court's own judgment. Because applying categorical rule analysis would mark a shift in Eighth Amendment jurisprudence, and because the Court has been careful to avoid any decisions that may be deemed a result of subjective bias, advocates must provide the Justices with evidence upon which to draw their conclusion. Emulating the success of the MacArthur Foundation's efforts in mounting an attack on capital punishment of youths,[211] organizations must leverage similar financial and intellectual capital to demonstrate: i) the arbitrary decisions from which much maltreatment results; ii) the unpopularity of given conditions in actual practice; and iii) the devastating impact of certain confinement conditions on future rehabilitation. The next Subparts suggest the coordinated steps that might enable the extension of categorical rules to incarceration conditions.

1. Objective Indicia

Between *Stanford* and *Miller*, the Court's treatment of objective analysis has become more flexible, and arguably less "objective." Given the Court's recent analysis in *Graham* and *Miller*, which focused on the "incidental" occurrence of a given practice, together with Justice Kennedy's concern that certain penological practices result not from a judge's careful consideration but from societal ignorance or indifference,[212] it is possible the current Court would disregard the assessment of actual state practice completely. After all, youths' exposure to given sentencing conditions is not the result of judges' or legislators' careful consideration, but rather the result of wardens' and guards'

210. For further discussion of these reforms and additional possibilities, see ANNIE E. CASEY FOUNDATION, JDAI DETENTION FACILITY ASSESSMENT STANDARDS (2014).

211. *See supra* note 174.

212. *Davis*, 135 S. Ct. at 209.

hasty decision-making.[213] Advocates should focus on the arbitrary nature of such decisions, highlighting the inconsistency in many institutions and evidencing the role decision-maker bias can have on a youth's experience in incarceration.

Even if the Court were not convinced by such argument, today's current[214] Court likely would not require the strict calculus of the *Stanford* majority, whereby the *letter* of legislation is analyzed to assess national consensus.[215] Instead, the Court would likely assess actual practice and national trends towards or away from a given incarceration regime. [216] Advocates should thus focus on developing an overview of *actual* current practice as well as detailing state trends. The Lowenstein Center for the Public Interest provides one example of such efforts in the context of solitary confinement of young persons. In 2016, the Center compiled an assessment of solitary confinement rules across all fifty-one jurisdictions.[217] Twenty-nine jurisdictions barred punitive confinement altogether, while another five percent barred punitive confinement for periods longer than three days.[218] Such information may even suffice to convince those Justices who support the *Stanford* math, suggesting that fifty-seven percent of states do not permit punitive solitary confinement of youths for periods longer than three days. Winning a ban on solitary confinement for youths would be a small victory as a starting point, but a victory nonetheless, and, just as the *Roper* decision paved the way for the *Graham* and *Miller* holdings, a foundation for future litigation.

2. Own Independent Judgment

Advocates and social scientists can work together to detail the impact of various penological regimes on youth, particularly as relating to youth development.

Once focused on justifying their assessment of youths' reduced culpability, the Court now seems to take it as given,[219] focusing its own independent

213. The same issues affecting judges' and jurors' assessments of juveniles, *see supra* Part II.A, also affect those with authority in incarceration settings.

214. In the author's opinion, while Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan remain on the bench, so too does the opportunity for reform.

215. *See supra* Part II.B.i.

216. *See* Graham v. Florida, 560 U.S. 48, 62 (2010) (indicating that analysis of life without parole for juvenile offenders "begins with objective indicia of national consensus"). The majority in part justified its ban of life without parole by explaining that "an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use." *Id.*

217. LOWENSTEIN CENTER FOR THE PUBLIC INTEREST, 51-JURISDICTION SURVEY OF SOLITARY CONFINEMENT RULES IN JUVENILE JUSTICE SYSTEMS (2016), https://www.lowenstein.com/media/2825/51-jurisdiction-survey-of-juvenile-solitary-confinement-rules-72616.pdf.

218. *See id.* at 2.

219. *See supra* Part II.B.ii.

judgment not on culpability but rather on whether or not a given practice achieves any of the four penological objectives. Moreover, given the Court's recognition of juveniles' developmental immaturity, it seems to have rejected retribution and deterrence as supportable penological aims. As Justice Kennedy explained in *Roper* (and quickly summarized and dismissed in *Graham*),[220] juveniles' reduced culpability eliminates the justification of any extreme retribution.[221] Furthermore, given the infrequency with which juveniles perform any cost-benefit analysis, extreme practice carries no deterrent impact.[222] As such, the Court seems most focused on assessing whether a given practice serves any valid incapacitative or rehabilitative purpose. Research efforts should therefore focus on why certain incarceration conditions fail to both incapacitate and rehabilitate juveniles and why, even if a given practice does incapacitate youths (as in the case of solitary confinement or physical restraint), it does so at the expense of their future rehabilitation.[223] In the case of solitary confinement, research might build upon the studies[224] that show the short-term impact of prolonged isolation to show that such practice in fact has enduring

220. Graham v. Florida, 560 U.S. 48, 71 (2010).

221. Roper v. Simmons, 543 U.S. 551, 571-72 (2005).

222. *See id.* at 572.

223. Under this analysis, given the seemingly extreme impact of solitary confinement and placement of youths in adult facilities, these seem the two practices most likely to merit a categorical ban. Because these are arguably the two most punitive practices in an incarceration context, they capitalize on the *Graham* majority's focus on life sentences without parole as the "second most severe penalty permitted." Graham v. Florida, 560 U.S. 48, 50 (2010) (internal quotation marks omitted) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)). At the same time, because minors are so much more likely to commit suicide when exposed to these conditions, see *supra* Part I.B, the possibility of *any* future, let alone a reformed one, is strictly and completely curtailed; given the Court's preoccupation with permitting youths a rehabilitative opportunity, these conditions may also prove most compelling as related to rehabilitation.

224. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, ALONE & AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT AND ISOLATION IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES 4-5 (June 2014), https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf (summarizing the extensive evidence of the negative physiological and psychological effects of solitary confinement on adults and concluding that youths must, at the very least, experience the same negative effects). Further, given young people's unique developmental state, there exists high likelihood of their experiencing such effects more intensely. *See also* LINDSAY M. HAYES, JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 16 (Feb. 2009), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/206354.pdf (discussing the relationship between suicide and isolation as evidenced by the fact that sixty-two percent of suicide victims studied had a history of room confinement). Such studies are nascent and dwarfed by the research of the effects of solitary confinement on adults. Furthermore, data regarding the long-term impact of solitary confinement appears anecdotal. *See, e.g.*, Laura Dimon, *How Solitary Confinement Hurts the Teenage Brain*, THE ATLANTIC (June 30, 2014), https://www.theatlantic.com/health/archive/2014/06/how-solitary-confinement-hurts-the-teenage-brain/373002/ (telling the story of "Josh," a man who was isolated for sixteen years during his juvenile confinement). Josh still experiences paranoia and low self-esteem.

effect that compromises future recovery and rehabilitation.

Support from the social science community will thus be critical to any argument before the Court. If the Court is indeed as concerned with youth rehabilitation as recent decisions regarding youth treatment suggest, compelling social science and psychological evidence supporting the detrimental impact of various incarceration practices on youth could provide the necessary foundation for a sweeping Supreme Court ban. Just as the work supported by the MacArthur Foundation facilitated the shift in understanding of juvenile development undergirding the *Roper* decision, careful research on the negative impact of incarceration conditions on young persons could facilitate a crackdown on current practices. Preliminary research efforts show the long-term impact of trauma on youths and the importance of human connection for minors.[225] However, it is important that researchers focus on these topics in the juvenile incarceration context, thereby narrowing any required conclusions as to the specific impact of confinement. By showing the destructive impact of given conditions on youth rehabilitation, such research would undermine any possible rationale for the most extreme—and life destroying—confinement conditions.

IV. CONCLUSION

Categorical bans on certain incarceration practices represent a vital opportunity to effect change in juvenile detention conditions. After winning the imposition of a categorical ban of one juvenile incarceration practice, advocates could then extend the strategy more broadly, much in the same way the *Roper* prohibition on capital punishment for juveniles opened the path for the limitations on life without parole sentences established in *Graham* and *Miller*. Gains made for youths in confinement context could pave the way for later reform in adult confinement.

As the MacArthur and Annie E. Casey Foundations recognized in the years leading up to the *Roper* decision, however, convincing the Supreme Court to extend its Eighth Amendment categorical rule approach requires a coordinated strategy. Advocates must analyze states' *actual* practices (and the rationale behind them) while at the same time organizing and funding research on the debilitating and long-term impact of given incarceration practices on juveniles. This article seeks to identify a preliminary strategy by which to mount such efforts, recognizing that too many children have lost their lives inside. Kalief Browder is not an anomaly.

The strategy detailed herein is not without its drawbacks. Coordinating a successful approach requires time and capital. Furthermore, the same issues that provide challenges to advocates seeking to sue over individual youths'

225. *See supra* notes 70 through 73 and accompanying text.

conditions[226] persist in a categorical rule context. Moreover, the evolution in the Court's analysis shown between *Stanford* and *Miller* is not guaranteed: Justices Alito and Thomas, together with Chief Justice Roberts, consistently reject the approach adopted by the *Roper*, *Graham*, and *Miller* majorities, favoring instead the strict mathematical assessment applied by the *Stanford* court. Presumably, Justice Gorsuch will follow suit, particularly given his alleged originalism.[227] Further change in Court personnel could undermine the above-analyzed approach and potentially even endanger prior victories.

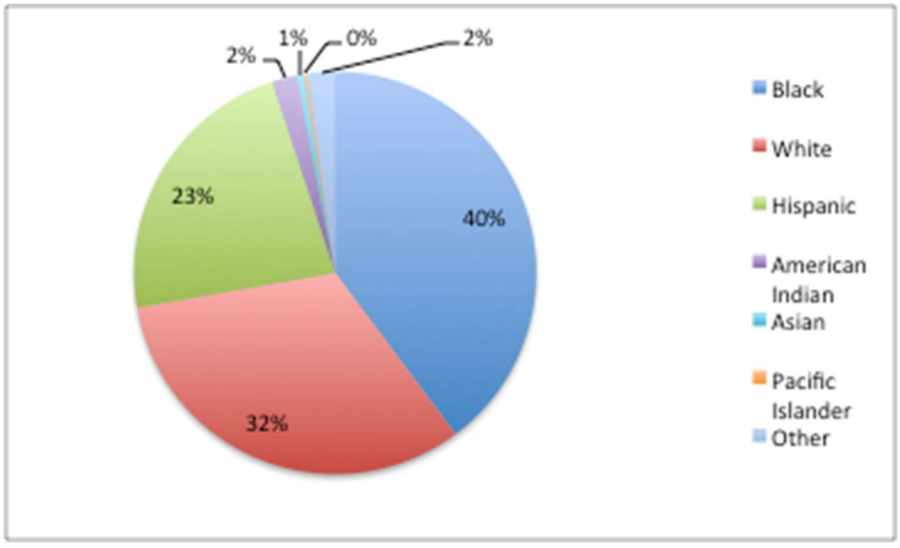
All the more reason to seize the moment *today*. The time to improve juvenile incarceration conditions is now, to end the hell on earth—and the enduring purgatory imposed—on far too many youths.

226. *See supra* Part II.A. To be sure, facing these challenges in one case—especially a test case presumably carefully assessed prior to its appearance before the Supreme Court—is preferable to confronting these challenges on a daily basis across multiple cases and jurisdictions.

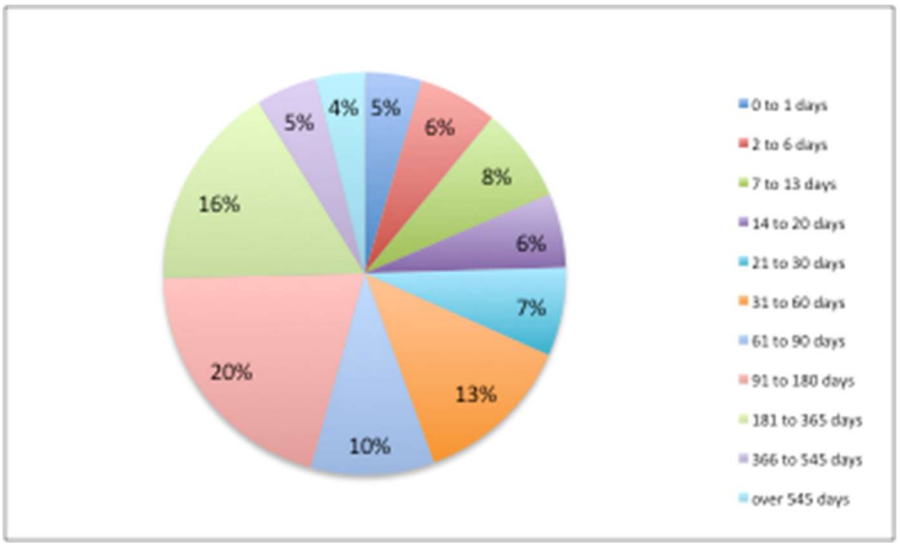
227. Hon. Neil M. Gorsuch, *2016 Summer Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016) ("[L]egislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges . . . should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward . . . not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.").

V. APPENDICES

A. 2013 Census of Juveniles in Juvenile Correctional Facilities (by Race)[228]



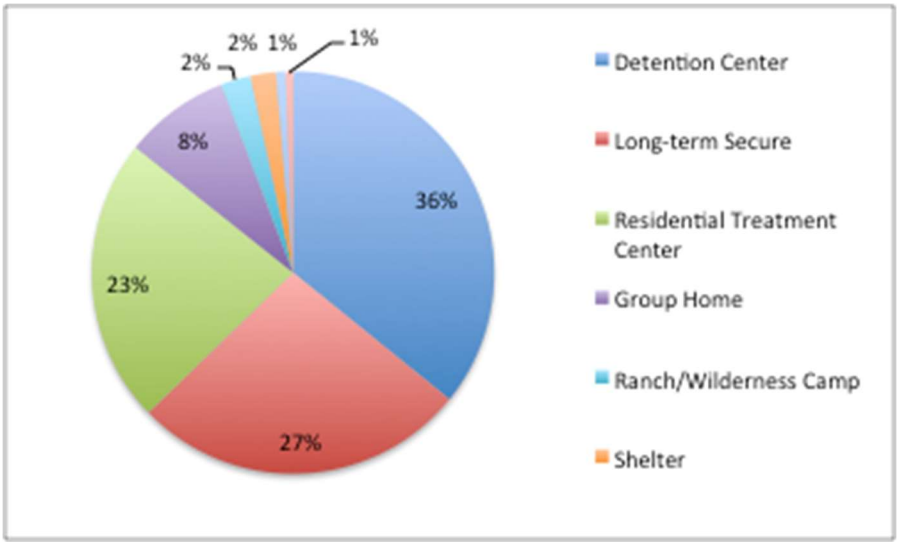
B. 2013 Census of Juveniles in Juvenile Correctional Facilities (by Days Since Admission)[229]



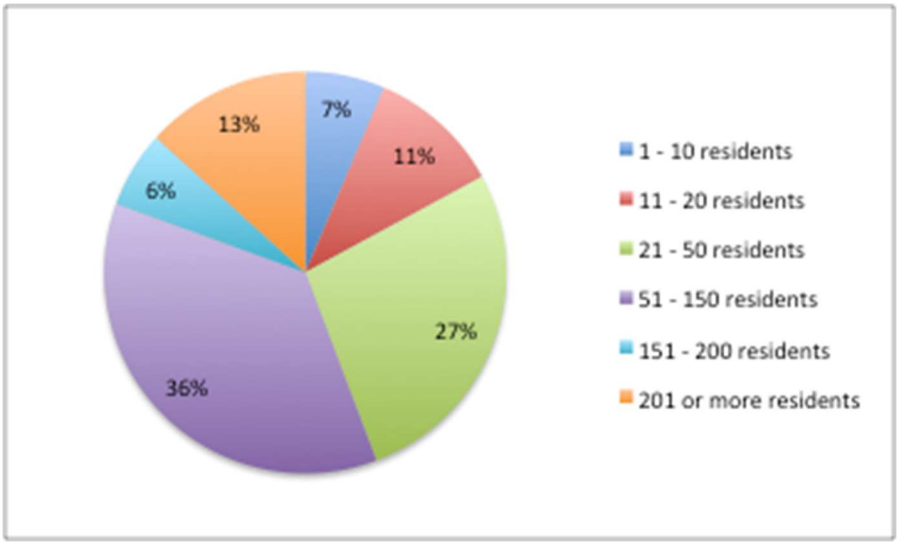
228. OJJDP STATISTICAL BRIEFING BOOK, *supra* note 37 (select 2013 for "Year of Census" and "Race.")

229. *Id.* (select 2013 for "Year of Census" and "Days Since Admission.")

C. 2013 Census of Juveniles in Juvenile Correctional Facilities (by Facility Self-Classification)[230]

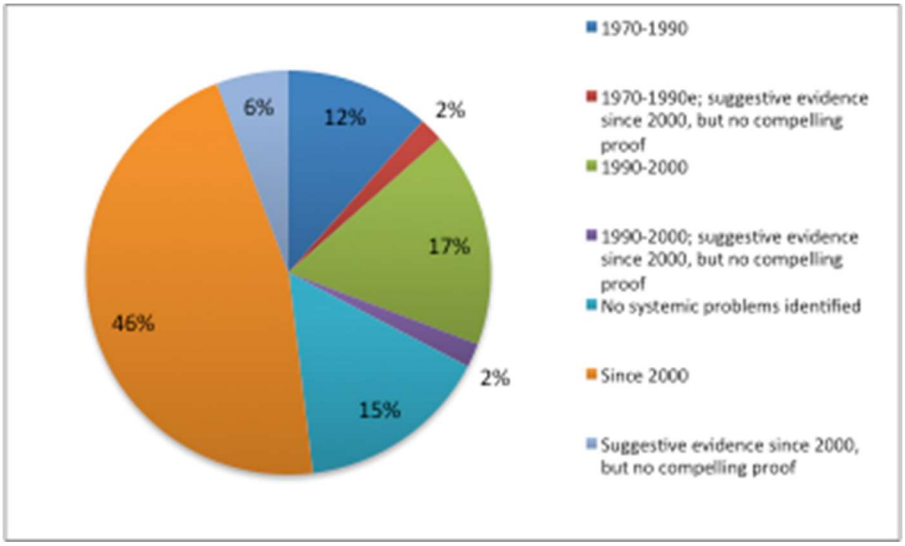


D. 2013 Census of Juveniles in Juvenile Correctional Facilities (by Number of Residents)[231]

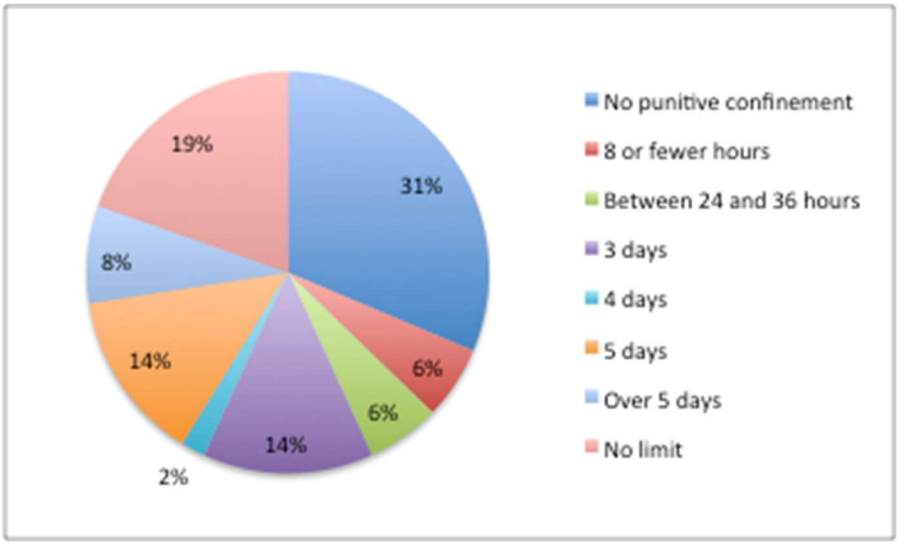


230. *Id.* (select 2013 for "Year of Census" and "Facility Self-Classification.")
231. *Id.* (select 2013 for "Year of Census" and "Number of Residents.")

E. States with Systemic or Recurring Maltreatment in Juvenile Corrections Facilities (by Dates of Incidence)[232]



F. Solitary Confinement Practices Across States[233]



232. ANNIE E. CASEY FOUNDATION, *supra* note 207.

233. LOWENSTEIN CENTER FOR THE PUBLIC INTEREST, 51-JURISDICTION SURVEY OF SOLITARY CONFINEMENT RULES IN JUVENILE JUSTICE SYSTEMS 44 (2016).