

Unwarranted Punishment: Why the Practice of Isolating Transgender Youth in Juvenile Detention Facilities Violates the Eighth Amendment

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Introduction

As transgender youth¹ are identifying as such at earlier ages, the population of self-identified transgender youth housed in juvenile detention facilities is on the rise nationwide.² In many jurisdictions,

¹ Transgender persons have gender identities that do not correspond with their anatomical sex. “Gender identity is distinct from sexual orientation, and refers to a person’s internal, deeply felt sense of being male, female, something other, or in between. . . . [Gender identity] also describes people whose gender expression does not conform to societal norms, although not all gender nonconforming individuals identify as transgender.” KATAYOON MAJD ET AL., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS 11 (2009) available at http://www.equityproject.org/pdfs/hidden_injustice.pdf. For an insightful resource that answers general questions about what it means to be transgender, see APA LESBIAN, GAY, BISEXUAL & TRANSGENDER CONCERNS OFFICE & APA PUB. & MEMBER COMM’NS, AMERICAN PSYCHOLOGICAL ASSOCIATION, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY AND GENDER EXPRESSION (2011), available at <http://www.apa.org/topics/sexuality/transgender.pdf>.

² Gender identity and sexual orientation are typically established at a young age. As of 2009, research indicated that thirteen percent of youths housed in U.S. juvenile detention facilities identified as lesbian, gay, bisexual or transgender (“LGBT”). MAJD ET AL., *supra* note 1, at 2. As late as 2001, even in New York State for example, “concrete data estimating the precise number of LGBT youth in the juvenile justice system [did] not exist.” RANDI FEINSTEIN ET AL., URBAN JUSTICE CTR, JUSTICE FOR ALL? A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 1 (2001) available at <http://www.urbanjustice.org/pdf/publications/lesbianandgay/justiceforallreport.pdf>. Still, there is no doubt that transgender youth are identifying as such at earlier ages, or at the very least, are having their existence acknowledged more than ever. This is evidenced by the many articles appearing in the national press on transgender youth fighting for their rights on their own or with the help of others, such as their parents. For example, in June, 2013, the State of Colorado’s civil rights division found that a local school district discriminated against a six-year-old transgender girl in the first grade when it refused to allow her access to the girl’s restroom. Dan Frosch, *Rights Unit Finds Bias Against Transgender Student*, N.Y. TIMES, June 23, 2013, http://www.nytimes.com/2013/06/24/us/agency-says-district-discriminated-against-transgender-student.html?_r=1&. In fact, when the child, Coy Mathis, was in kindergarten, her parents had informed the school system that “their child identified as a girl and should be treated as one.” *Id.* See also, Stephanie Francis Ward, *A Gender Change at a Tender Age*, A.B.A. J., Oct. 1, 2013, available at http://www.abajournal.com/magazine/article/a_gender_change_at_a_tender_age (discussing the Coy Mathis case and the experiences of other young transgender children). For a more thorough understanding of transgender issues in general, see Brian Moulton and Liz Seaton, *Transgender Americans: A Handbook for Understanding*, HUMAN RIGHTS CAMPAIGN (2008), <http://www.hrc.org/files/assets/resources/hrcTGguide.pdf>.

transgender youth are frequently isolated from general populations within these facilities.³

Isolation of transgender youth, depending on the reason given to justify the practice,⁴ may very well constitute unwarranted punishment that violates the Eighth Amendment's proscription against "cruel and unusual punishment."⁵ Isolation inflicts needless and significant physical and emotional distress on transgender youth,⁶ youth whose detention is often caused in large part by acceptance issues within their family, schools and communities.⁷

In a recent paper,⁸ Professor Marsha Levick and her colleagues advocate for the extension of Eighth Amendment rights to juveniles, primarily through the use of two Supreme Court decisions.⁹ This paper, *Unwarranted Punishment*, builds on Professor Levick's advocacy, and further shows why it is important to utilize the Eighth Amendment as a means of protecting transgender youth housed in juvenile detention facilities. Moreover, this paper shows how an Eighth Amendment

³ See discussion *infra* Part I.B.

⁴ Part I.B *infra* lists the reasons typically given by juvenile detention facility staff and administration to justify isolation of transgender youth. Of course, isolation of all youth may be justified in limited cases for very limited periods of time, such as when facility rules and procedures have been found to be routinely violated by a youth, or the youth is consistently found to be the instigator of physical assaults. See discussion of *Bell v. Wolfish*, 441 U.S. 520 (1979) *infra* in Part III.A. The *Bell* Court held that actions taken to "preserve the security" of an institution, if not excessive, would be considered a "legitimate nonpunitive governmental objective". *Id.* at 539 n.20. See e.g., *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 n.12 (D. Haw. 2006) ("The court notes that it is *not* concluding that [a juvenile detention facility] can never isolate a ward for his or her own protection. . . . [A] threatened ward might need to be temporarily segregated while the staff attempts to control the situation. . . . [H]owever, impos[ing] extended periods of isolation and segregation on LGBT wards who experience harassment and abuse rather than addressing the climate of harassment and abuse . . . of LGBT wards . . . is not a constitutionally acceptable response.").

⁵ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). See *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring) ("the Eighth Amendment prohibits all punishment, physical and mental, which is 'totally without penological justification'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

⁶ See *infra* Part I.C.

⁷ See *infra* Part I.A.

⁸ 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 (2012).

⁹ *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

approach, involving a proposed two-pronged test, could succeed in cases where a Fourteenth Amendment substantive due process approach may fail to protect transgender youth.

Part I.A of this article discusses the many factors that negatively impact the experience of transgender youth in the American juvenile justice system. Part I.A further examines how frequent rejection of transgender youth in the home and at school often leads to their involvement with the juvenile justice system. Part I.B surveys the ideal goal of the juvenile justice system, one that stresses rehabilitation over punishment or detention, and the four reasons why juvenile detention facility staff typically place transgender youth in isolation. Part I.C discusses the harmful effects of being placed in isolation, particularly when a transgender youth is the target of this practice.

Part II then examines *R.G. v. Koller*,¹⁰ a Hawaii District Court case that addressed a complaint filed by three LGBT youth, one transgender, seeking preliminary injunctive relief, in part to prevent future isolation in a juvenile detention facility. The examination of this case involves a description by the court of a transgender youth's account of what she experienced while held in isolation for her own "protection."

Using a Fourteenth Amendment substantive due process analysis, the *R.G.* court effectively found in the plaintiffs' favor.¹¹ However, in reaching its holding, the *R.G.* court explicitly declined to undertake an Eighth Amendment analysis of the conditions at issue to see if they constituted cruel and unusual punishment.¹²

In order to better understand why the *R.G.* court rejected an Eighth Amendment analysis of the plaintiffs' conditions of confinement in a juvenile detention facility, Part III.A explains how the courts are enforcing the Eighth Amendment rights of detained or sentenced incarcerated adults. Part III.B analyzes how these rights are addressed in conditions of confinement cases.

Next, Part III.C summarizes the Supreme Court's Eighth Amendment analysis in *Farmer v. Brennan*.¹³ *Farmer* requires that a two part test be satisfied in order for a court to hold that a condition of confinement violates an inmate's Eighth Amendment rights: the condition

¹⁰ *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006).

¹¹ *Id.* at 1152-62.

¹² *Id.* at 1152.

¹³ *Farmer v. Brennan*, 511 U.S. 825 (1994).

in question must be “objectively ‘sufficiently serious’”¹⁴ and there must be “‘deliberate indifference’” to the condition by prison or penitentiary staff.¹⁵ The key part of the *Farmer* opinion was the Court’s use of a subjective test to determine deliberate indifference, rather than an objective one.¹⁶ In effect, this subjective test requires both staff knowledge of the condition in question and a failure by staff to address it.¹⁷

In Part IV.A, this paper argues that the *R.G.* court incorrectly declined to address the Eighth Amendment in reaching its decision. While the Supreme Court has explicitly declined to extend Eighth Amendment protection to adult detainees, the Court has yet to reach the question of whether such protection should be extended to juveniles housed in juvenile detention facilities.¹⁸ This part examines a line of five Supreme Court opinions, culminating with the Court’s opinion in *Roper v. Simmons*.¹⁹ These cases, along with the concept of “evolving standards of decency,”²⁰ will be used to support the assertion that certain inherent characteristics of juveniles dictate that courts extend full Eighth Amendment protection to juveniles detained or adjudicated delinquent and held in juvenile detention facilities.

In Part IV.B, this paper proposes a two-pronged test to determine if isolation of transgender youth in juvenile detention facilities violates the Eighth Amendment’s proscription against cruel and unusual punishment. First, as in *Farmer*, the condition in question must be “objectively sufficiently serious.” Second, unlike the subjective test in *Farmer*, the deliberate indifference test must be an objective one, requiring that facility staff knew *or should have known* of the condition in question, yet failed to rectify it. In Parts IV.B and IV.C, the proposed two-pronged test is applied to two hypothetical situations involving isolation of transgender youth. The paper thereby shows why an Eighth Amendment analysis may be a more effective approach to preventing isolation of transgender youth than a substantive due process approach.

This paper concludes, in part, by stressing the importance of using several tools in conjunction—an Eighth Amendment analysis, a substantive due process analysis, and adoption of specific policies and

¹⁴ *Id.* at 834. (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)).

¹⁵ *Id.*

¹⁶ *Id.* at 837, 847.

¹⁷ *Id.* at 837.

¹⁸ See *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977).

¹⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

procedures—to prevent the isolation of transgender youth in detention facilities. These policies and procedures would effectively end the practice of isolation of transgender youth in juvenile detention facilities. Finally, this paper advocates for the extension of Eighth Amendment protections to transgender youth as these policies and procedures are implemented, and as a means to enforce these policies and procedures once they have been adopted.

I. Overview: Transgender Youth and the Juvenile Justice System

A. Risk Factors Leading to Detention

There are many factors that negatively affect the experience of transgender youth (and often LGBT youth in general,) in the American juvenile justice system.²¹ The juvenile justice system responds poorly to transgender youth largely due to common misconceptions about gender identity and frequent rejection of children who identify as transgender.²² Being transgender is often wrongly viewed as a choice or even as a mental illness, and hence, as a “condition” that can be changed.²³ As a result, parents, teachers, school administrators, and even some professionals working within the juvenile justice system, often punish transgender youth for expressing their gender identity “through choice of hairstyle, clothing, mannerisms, and name.”²⁴ Such punishment of transgender youth is quite harmful, as many medical experts now agree that it is “critically important for [the] well-being” of transgender youth to allow them to “express their core gender identity.”²⁵

Family rejection of a transgender youth is particularly hurtful, leading to feelings of isolation and damage to a youth’s self-esteem and physical well-being.²⁶ These issues are further compounded when a

²¹ These factors are explored in detail in *HIDDEN INJUSTICE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS*, a ground-breaking 2009 co-publication of Legal Services for Children, National Juvenile Defender Center, and National Center for Lesbian Rights. MAJD ET AL., *supra* note 1.

²² *See generally* MAJD ET AL., *supra* note 1, at 43-59.

²³ *See id.* at 2. Research confirms that gender identity is “established at a very early age, although it may take [transgender] youth some time to understand and become comfortable with their [gender] identity.” *Id.* at 45.

²⁴ *See id.* at 2. Such expression may actually result in a parent seeking to have unmanageability charges filed against a son or daughter. *Id.* at 71.

²⁵ *Id.* at 2.

²⁶ *See generally id.* at 70-74; FEINSTEIN ET AL., *supra* note 2, at 13-14.

transgender youth faces harassment at school from classmates.²⁷ Teachers and administrators then often fail to keep the transgender youth safe or may even single out and punish the youth for “minor misconduct that could more appropriately be handled at school.”²⁸

In response to these pressures, a transgender youth’s grades may suffer or school might be avoided altogether.²⁹ Fights may occur in the home or the youth may run away from the abusive home.³⁰ Absconding could eventually lead to homelessness,³¹ drug use, shoplifting, prostitution, or other crimes.³² If arrested, whatever the reason, a

²⁷ See generally, MAJDET AL., *supra* note 1, at 75-78.

²⁸ *Id.* at 3-4. See generally *id.* at 75-78.

²⁹ See *id.* at 76. Once involved in the juvenile justice system, problems at school may then be “counted against” the transgender youth charged. *Id.* at 78. Even if a youth receives probation for an offense, a common condition of such probation is attendance at school, and if the youth skips school out of fear for his or her own safety, “probation is often revoked without concern for the reason [he or she] did not attend school.” *Id.* Indeed, “[t]he school system and [the] juvenile justice system have become inextricably linked in ways that undermine the effectiveness of each system.” *Id.* at 75. For example, “[s]chools today often rely on the court system to handle minor student misconduct that historically would have been handled informally by the school. These school-referral cases have clogged the juvenile court dockets Like other youth, LGBT youth are impacted by the tendency to criminalize student [in effect, typical adolescent,] behavior. For them, however, the problem is exacerbated by the harassment and abuse they face in schools.” *Id.* at 75.

As a former Juvenile Public Defender, I can state with certainty that “zero tolerance” policies in school systems are regularly taking often needless personal and financial tolls on children, their families and the juvenile justice system. In addition, the prosecution of status offenses (versus delinquent ones,) is up sharply across the country, which is ironic, as the adoption of status offense laws throughout the 1960’s was originally “intended to provide preventative measures to keep at-risk youth out of the criminal justice system.” *Id.* at 25. It should be noted that status offenses involve conduct that is unlawful only as a result of a child’s age, such as ungovernability, absconding, truancy and possession of alcohol by a minor. These are actions that would not be crimes if an adult had committed them. Juvenile delinquent defenders, on the other hand, have committed acts that would be considered crimes if an adult had committed them. Not all states differentiate between these “classes” of offenses, but most do. See *id.*

³⁰ MAJDET AL., *supra* note 1, at 71-72.

³¹ Ann Cammett, *Queer Lockdown: Coming to Terms with the Ongoing Criminalization of LGBTQ Communities*, 7 S&F ONLINE, no. 3, 12 (Summer 2009), <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1626&context=facpub> (“It is estimated that in some cities [in the U.S.,] up to 40 percent of homeless youth are [LGBT]. This condition is a direct result of the hardships associated with coming out” or expressing gender-related identity issues at a young age). See also FEINSTEIN ET AL., *supra* note 2, at 17-18.

³² See MAJDET AL., *supra* note 1, at 72-74; *infra* note 61. See also FEINSTEIN ET AL., *supra*, note 2 at 18-19.

transgender youth is then typically detained disproportionately to other youth pending trial.³³ This disproportionate detention results because the family refuses to take the youth back into the home³⁴ and/or because there are insufficient alternative placement options that can accommodate a transgender youth.³⁵ Detained transgender youth, as well as transgender youth who are eventually adjudicated delinquent,³⁶ then “often experience further rejection, harassment, and discrimination at the hands” of other wards, as well as at the hands of the facility staff and administrators.³⁷

B. Stated Justifications for Isolation of Transgender Youth

The purpose of the juvenile justice system is to rehabilitate youth, not punish them.³⁸ Accordingly, all participants in this system – judges, families, prosecutors, defense attorneys, social agencies and detention facility workers – should strive together to improve the quality of life and future of the youth who have contact with the system.³⁹ Ideally, detention of transgender youth, indeed all youth, should be avoided and appropriate alternative placement options should be considered if the child must be

³³ See generally MAJD ET AL., *supra* note 1, at 93-99.

³⁴ *Id.* at 95.

³⁵ See generally *id.* at 83-91; FEINSTEIN ET AL., *supra* note 2, at 28-29.

³⁶ If a juvenile court judge determines that a youth has violated a criminal law or has engaged in a status offense, the youth is then adjudicated delinquent and is referred to as such, rather than as “guilty.” See discussion of status offenses *supra* note 29.

³⁷ Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Systems Safe for All Youth Through Litigation, Advocacy and Education*, 79 TEMP. L. REV. 415, 419 (2006).

³⁸ “The Juvenile Court is theoretically engaged in determining the needs of the child . . . rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child . . . , not to fix criminal responsibility, guilt and punishment.” *Kent v. United States*, 383 U.S. 541, 554-55 (1966).

³⁹ There are generally two types of cases handled in juvenile courts: delinquency cases and dependency cases. A delinquency case involves a child who has been accused of a crime or status offense. A dependency case involves situations where allegations have been made that a child has been or is being abused or neglected by the child’s parent(s) or guardian(s). See generally Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 UNIV. N.H. L. REV. 97, 97-100 (2013). Note that juvenile criminal proceedings in most states are actually civil proceedings, but involve procedures that are more analogous to those used in adult criminal proceedings. As such, juvenile criminal proceedings are often referred to as “quasi-criminal” in nature. See discussion of *In re J.M.*, 287 S.W.3d 481 (Tex. App. 2009), *infra* note 149.

removed from the home.⁴⁰ However, if a judge determines that detention of a transgender youth is warranted, and isolation then ensues, such isolation can often have detrimental effects,⁴¹ effects that may in turn lead to feelings of further rejection and perhaps even to an increased likelihood of future criminal activity.

Detention facility officers and administrators justify isolation of transgender youth on four grounds: (1) the prevention of further or anticipated emotional, physical, and/or sexual abuse of transgender youth at the hands of other wards, often referred to as “involuntary protective custody;”⁴² (2) the perceived need to “solve” the “problem” of how to

⁴⁰ When I worked as Juvenile Public Defender, I had a client (“Amber,” for purposes of this paper,) who presented as a boy. Amber was not transgender, but self-identified as lesbian. She wore baggy clothes, kept her hair quite short, and wore no makeup.

Amber was charged with an assault on her brother, and was detained when I met her. During my initial interview of Amber, she indicated that her brother had hit her, she responded in kind, and things progressed from there. As usual, she said, her mom had sided with her brother. She relayed that this was because her mom was very unhappy with Amber’s appearance and lifestyle “choice;” consequently if there was a problem in the home, Amber was blamed. Of course, her brother had become aware of this, and had begun taking advantage of the family dynamics.

Amber had been detained several times prior to the case at hand, and, I believe, had one or more prior adjudications. At her detention hearing, Amber agreed to allow me to be candid with the judge about her sexual orientation and assessment of the situation at her home. During the hearing, Amber’s mom indicated in no uncertain terms that she wanted Amber detained and out of the house as she was causing problems in the home. After approaching the bench and explaining Amber’s and my view of the situation to the judge, he ordered the case to remain open pending family counseling and sent Amber into alternative placement. At my suggestion, she was placed with CHRIS Kids, a local organization in Atlanta that has LGBT friendly alternative placement options for children in the Atlanta area. For information about CHRIS Kids see CHRIS KIDS, <http://www.chriskids.org/about-chris-kids/history-mission> (last updated 2013). The prosecutor was on board for all of these conditions of release.

Amber thrived at CHRIS Kids, the family counseling went well, and the last time I heard from Amber, she was back at home with a more accepting mom, and things had changed all around for the better. The assault charges were dropped.

Amber’s case is an example of how the juvenile justice system should ideally work. Unfortunately, not all judges are as enlightened as Amber’s is and not all systems have alternative placements available such as those provided by CHRIS Kids. This is especially so in more rural locales, where there are likely to be less placement options for LGBT youth.

⁴¹ See *infra* Part I.C.

⁴² Cf. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 544-45 (2009).

house transgender youth within the detained juvenile population;⁴³ (3) to punish transgender youth for expressing their gender identity;⁴⁴ and (4) the perception that transgender youth are sexual predators who need to be segregated from the general population.⁴⁵

C. *The Harmful Effects of Isolation*

Isolation of transgender youth from the general population in detention facilities is “profoundly psychologically damaging.”⁴⁶ An expert in one case involving a transgender youth declared that “isolation may be perceived [by a youth] as punishment for being LGBT, which evokes feelings of rejection and depression [that] . . . may manifest itself through a variety of physical symptoms ranging from headaches to self-mutilation.”⁴⁷ Expert testimony in many cases points to the “devastating” and lingering effects of isolation of juveniles in general, leaving youths feeling “angry, depressed, frightened, self-destructive, and violent.”⁴⁸

In April, 2012, the American Academy of Child & Adolescent Psychiatry (the “AACAP,”) issued a Policy Statement on the harmful effects of placing juvenile offenders in isolation (referred to by the AACAP as “solitary confinement”).⁴⁹ The AACAP statement references recommendations of other commissions on the topic, noting that isolation

⁴³ *Id.* at 545.

⁴⁴ *Id.* at 545-46; *cf. id.* at 546 (for example, in adult populations, transgender women might be placed in isolation “for possession of a bra or other items of women’s clothing or for using makeup . . . [while transgender men might be placed in isolation] for failing to eliminate their facial hair or for refusing to wear prison uniforms that are tight fitting or that involve skirts”).

⁴⁵ See FEINSTEIN ET AL., *supra* note 2, at 29. See also *id.* at 8 (One “transgender girl was placed in isolation at every facility she attended, since staff believed that she would inappropriately touch the other residents.”).

⁴⁶ See Arkles, *supra* note 42, at 538.

⁴⁷ Declaration of Robert J. Bidwell, M.D. at 11, R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006) (No. 05-566 JMS/LEK). These feelings of “rejection and depression” of course, further compound those experienced through family and school rejection discussed *supra* Part I.A.

⁴⁸ See, e.g., Gary H. v. Hegstrom, 831 F.2d 1430, 1434 (9th Cir. 1987) (Ferguson, J., concurring). See also Arkles, *supra* note 42, at 537-39 (setting forth the “documented psychological effects of isolation”).

⁴⁹ Juvenile Justice Reform Committee, *Solitary Confinement of Juvenile Offenders*, AM. ACAD. OF CHILDREN AND ADOLESCENT PSYCHIATRY (April 2012), http://www.aacap.org/AACAP/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx. For more information about the AACAP, a professional medical organization comprised of over eight thousand members, see,

should only be used for the least amount of time possible for the immediate physical protection of an individual, in situations where less restrictive interventions have proven ineffective . . . [and it should never be used] “as a means of coercion, discipline, convenience or staff retaliation.”⁵⁰

When placed in isolation, youths are cut off from other wards, and their rights and privileges (e.g., phone calls, showers, television, facility programming, recreation,) are also typically restricted.⁵¹ One judge, in assessing the bleak conditions of isolation of a youth in a juvenile detention facility, found that the isolation in question was “so oppressive as to destroy the integrity and the identity of the child” who was ironically supposed to be “the object of our concern.”⁵²

A problem unique to involuntary protective custody isolation is that it punishes the victim of violence, not the offender.⁵³ Moreover, if transgender youth are aware that they will automatically be placed in isolation if an attack is reported, the policy deters them from reporting such attacks.⁵⁴

One might think that transgender youth would prefer the perceived “safety” of isolation and protective custody. However, a study of adult transgender prison populations has shown that more transgender

About Us, AM. ACAD. OF CHILDREN AND ADOLESCENT PSYCHIATRY (2013), http://www.aacap.org/AACAP/About_Us/Home.aspx. The majority of AACAP’s members are psychiatrists specializing in the treatment of children and adolescents. *Id.*

⁵⁰ Juvenile Justice Reform Committee, *Solitary Confinement of Juvenile Offenders*, *supra* note 49 (citations omitted).

⁵¹ See Arkles, *supra* note 42, at 541-42. See also *infra* Part II for a discussion of the conditions of isolation of C.P., a transgender youth held in a juvenile detention facility and a plaintiff in *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006). *R.G.* is discussed in detail *infra* Part II as well.

⁵² *Lollis v. N.Y. State Dep’t of Soc. Servs.*, 322 F. Supp. 473, 475-76 (S.D.N.Y. 1970) (statement of Judge Burstein, a Family Court Judge who was not the judge before whom the matter was heard, but who submitted a detailed report on the conditions in question) (“[Lollis] was kept in a room about 6’ x 9’ for 24 hours a day. . . . She was completely unoccupied for 24 hours daily. Nevertheless[,] I inquired how she kept herself busy. She replied by saying ‘I sleep all day and I cry all night.’ She [was denied a request] . . . to see a psychiatrist . . . until she was released from solitary. . . . ‘She wore pajamas all day, sat staring at the wall and did absolutely nothing. ‘There was a wooden bench * * *. There was a blanket on the bench and this is where the child rested for twenty-four hours.’ Although the room contained a window, it was blinded so that it ‘absolutely prevented the youngster from looking outside.’”).

⁵³ Arkles, *supra* note 42, at 545.

⁵⁴ *Id.* at 544-45.

“prisoners who were in some form of segregation against their will [were] seeking assistance to get out of it than . . . [those] in general population seeking to be placed in protective custody with all of the attendant negative consequences.”⁵⁵ It is likely that this would be the case with juveniles as well - that they would prefer to find their way in the general population with all its inherent difficulties, rather than be placed in isolation.⁵⁶

⁵⁵ *Id.* at 537. “However, many have wanted some other change to improve their safety, such as . . . access to a private shower, access to a single cell within general population, or the ability to choose the person with whom they would share a cell.” *Id.* at 537 n.129. There are, indeed, other effective alternatives to isolation. The adopted policies and proposed model policies discussed *infra* Part IV.A and Conclusion detail some options. For now, it appears that the best solution is to house transgender girls with other girls, with transgender boys being housed with the girls as well if safety concerns are an issue. See MAJDET AL., *supra* note 1, at 108-109 (“it may be necessary to place . . . transgender boys[,] who face high risk of assault in boys’ facilities if the other boys discover they are transgender” with the female population).

On a related note, see Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011) (examining the KG6 block at the Los Angeles County Jail, a special unit distinct from the general population, dedicated solely to the housing of gay men and transgender women). While strategic segregation may someday be an option in larger juvenile detention facilities in major urban areas with higher LGBT populations, it is unlikely that such distinct housing will ever be a possibility in more rural, or even suburban areas. However, if there is enough population to create a unit such as the KG6 block in a juvenile detention facility, “vulnerable” youth will have “access to both security and community, ensuring that no one has to choose between safety from sexual assault and satisfying his or her basic human need for the company of others.” *Id.* at 87-88.

⁵⁶ See Arkles, *supra* note 42, at 539. Arkles notes “one major flaw in the legal analysis of challenges to segregating placement, [is] that to the extent courts consider issues of safety at all in their analysis[,] they almost always assume that safety would be better served by isolation than by contact with others.” *Id.* at 547.

However, this should not be taken to assert that the threat of serious physical and sexual assaults of transgender youth in juvenile detention facilities is not one that needs to be taken seriously. See *generally*, Letter from Masen Davis et al., to Att’y Gen. Eric Holder, Preventing the Sexual Abuse of Lesbian, Gay, Bisexual, Transgender, and Intersex People in Correctional Settings, Comments Submitted in Response to Docket No. OAG-131: AG Order No. 3143-2010, 3-5 (2010), <http://www.wcl.american.edu/endsilence/documents/ACLULambdaNCLRNETLCCo mmentsonPREAStandards.pdf>. The letter points out that transgender youth are not just subject to sexual abuse at the hands of other wards, but also at the hands of staff as well. *Id.* at 22. See also Arkles, *supra* note 42, at 540 (stating that “[s]ome [adult] trans people have reported that they are more likely to be attacked in protective custody or other forms of segregation because it is easier for abusive correctional staff to access them alone and out of the sight of other prisoners or video surveillance”).

II. *R.G. v. Koller*⁵⁷: Ignoring the Eighth Amendment

R.G. v. Koller is the seminal case involving the isolation of a transgender youth in a juvenile detention facility.⁵⁸ This case provides a good example of how some courts have been handling isolation cases in general.⁵⁹ In *R.G.*, three youths who were or had been confined at the Hawaii Youth Correction Facility (the “HYCF,”) filed a motion seeking preliminary injunctive relief.⁶⁰ The plaintiffs were: (1) J.D., a young man “who was perceived to be gay;” (2) R.G., a self-identified lesbian; and (3) C.P., a transgender girl.⁶¹ The defendants included the Directors of the Hawaii Department of Human Services and the Hawaii Office of Youth Services, the HYCF Youth Facility Administrator (the “YFA”), and several Youth Corrections Supervisors and Officers.⁶²

As a caveat, it is important to note that not all transgender youth housed in a general population are necessarily being victimized emotionally and/or physically, or are having extremely negative experiences in general. Clearly though, being housed in a juvenile detention facility is going to be fraught with issues, whether one is transgender or not. After all, it can hardly be expected to be an easy experience to be housed with a large group of youth with “raging” hormones and adolescent angst. Regardless, other open-minded wards are certainly capable of forming friendships and bonds with transgender youth, even to the extent that they may protect the transgender youth from harassment by other wards. *See id.* at 527-31 (Section III, Detention as a Site of Solidarity, Resistance, Love and Mutual Support). “Any concept that the only interactions possible between transgender and non-transgender prisoners are necessarily violent does disservice to the diversity and humanity of the people behind bars and plays into racist stereotypes.” *Id.* at 531.

⁵⁷ *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006).

⁵⁸ *Id.*

⁵⁹ *See* discussion *infra* Part IV.A.

⁶⁰ *R.G.*, 415 F. Supp. 2d at 1133.

⁶¹ *Id.* at 1134. In her declaration for the *R.G.* court, C.P. detailed the facts surrounding several of her arrests. According to C.P., she was arrested in May 2003 for hitting her sister in the shoulder during a fight over some car keys. Declaration of C.P. at 1, *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006) (No. 05-566 JMS/LEK). The situation escalated to the point that two neighbors beat C.P. up so badly that she suffered a head trauma and had to be taken to the hospital. *Id.* at 1-2. When the police arrived, C.P.’s mother declined to press charges against the neighbors for physically assaulting C.P., yet charges were filed against C.P. for assault on a family member. *Id.* at 2. C.P.’s experience is a prime example of the consequences of family rejection of transgender youth discussed *supra* Part I.A. C.P. stated that she was also arrested for solicitation in November 2003 and for running away in February 2004. *Id.* at 2-3. This crime (solicitation,) and status offence (running away,) are typical of those committed by transgender youth who are feeling rejected by family. *See supra* Part I.A.

⁶² *R.G.*, 415 F. Supp. 2d at 1134.

Among other reasons, the plaintiffs sought injunctive relief “to require defendants to refrain from . . . isolating plaintiffs based on their actual or perceived sexual orientation, gender identity or sex.”⁶³ After examining several factors, the court determined that only J.D. and R.G. had standing to pursue the injunction.⁶⁴ The court found that J.D.’s and R.G.’s claims were not moot,⁶⁵ but that C.P.’s claims were, as C.P. had aged out of the juvenile justice system when she had turned eighteen in December, 2005.⁶⁶ The court nevertheless found that despite C.P.’s lack of standing, testimony and evidence regarding her experience at the HYCF was “relevant to the remaining plaintiffs’ claims insofar as it show[ed] the extent and nature of the alleged abuse” at that facility.⁶⁷

During the hearing, the YFA testified under oath that the HYCF’s retained experts “told her that it was appropriate to house male-to-female . . . transgender youth with the boys, and that the norm in juvenile corrections is to house wards based on their genitalia.”⁶⁸ Both experts emphatically denied ever making such a statement, insisting they had actually indicated that housing male-to-female transgender youth with males in a juvenile detention facility would be “unsafe and inappropriate.”⁶⁹

In fact, over the objections of her own medical staff, the YFA actually transferred C.P. from the girls’ unit to the boys’ unit.⁷⁰ The court found that

[a]fter C.P.’s transfer [to the boys’ unit], C.P. was subjected to escalating harassment and abuse from other wards, including physical and sexual assaults . . . and threatening commands such as “suck my dick,” “put this in your mouth and suck on it,” or “give me head,” and threats of rape and assault. . . . Some of the male wards touched C.P., pulled her hair, threw things at her . . . or asked permission to rub her legs. Other male wards made comments like, “I want to

⁶³ *Id.* at 1133.

⁶⁴ *Id.* at 1135-40.

⁶⁵ *Id.* at 1138-39.

⁶⁶ *Id.* at 1139. To say that a child has “aged out” of the juvenile justice system means, in most jurisdictions, that the child is seventeen years of age or older. Accordingly, any future charges would be handled in the adult criminal court system.

⁶⁷ *Id.*

⁶⁸ *R.G.*, 415 F. Supp. 2d at 1141.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1144.

feel your ass,” and “I want to fuck you,” or asked her to show her breasts. Other male wards exposed their buttocks to her, pulled out their erect penises and showed them to her, or started masturbating in front of her.⁷¹

As a result of this verbal, physical and sexual abuse, C.P. sent a letter to the YFA reporting that the boys were giving her a “hard time” by teasing her, calling her names and generally by “making trouble.”⁷² She stated that this conduct hurt her and that it made her feel “insane and angry.”⁷³

The abuse of C.P. was not solely at the hands of her fellow wards though. The court found that while housed with the girls at the HYCF, C.P. was also verbally abused by staff, who “taunted and harassed” her, threatening to cut off her hair and even to transfer her to the boys’ section.⁷⁴

Despite C.P.’s reports of abuse by fellow wards, the YFA and HYCF staff “failed to discipline or stop the wards from calling her names.”⁷⁵ What the staff did do, however, pursuant to the YFA’s policy of isolating certain LGBT wards for their own protection, was to first subject C.P. “to social isolation by physically segregating her from the other wards in the module.”⁷⁶ Eventually, and for her “protection,” C.P. was “held in solitary confinement for six days.”⁷⁷

She was isolated in a holding cell under video surveillance for twenty-three hours a day, with nothing in her cell other than her pillow and a blanket. She was allowed one hour a day to leave the cell for recreation and showering. She was not permitted letters, writing instruments, radio, or

⁷¹ *Id.* at 1144-45 (citation omitted). C.P. alleged that even when she was briefly housed with the girls, she was threatened with being sent “to the boys’ side” if she swore or hit the other girls. *Id.* at 1146. C.P. stated that this was the case even when she was simply responding to verbal or physical harassment from other female wards, harassment that the staff was ignoring. Declaration of C.P., *supra* note 61, at 5. To expect a child not to stick up for herself in such a situation, whether or not the taunts related to her gender identity, was clearly going to create an untenable situation for C.P.

⁷² *R.G.*, 415 F. Supp. 2d at 1145.

⁷³ *Id.*

⁷⁴ *Id.* at 1143. C.P. alleged that when she wanted to “put up” her hair, the threats to move her were based on staff assertions that C.P. “did not have [the] same privileges as the girls.” Declaration of C.P., *supra* note 61, at 6.

⁷⁵ *R.G.*, 415 F. Supp. 2d at 1145.

⁷⁶ *Id.* at 1148.

⁷⁷ *Id.*

television, nor was she allowed to interact with any other wards. C.P. reported to medical staff that she was “going crazy” in the holding cell.⁷⁸

The court found that J.D. suffered similar physical and sexual abuse at the HYCF at the hands of the wards, and both J.D. and R.G. reported emotional abuse by fellow wards and the HYCF staff.⁷⁹ Only J.D., however, was subject to isolation similar to that inflicted upon C.P.⁸⁰

In examining the effects of such isolation on C.P. and J.D., the court reviewed the evidence provided by the experts originally retained by some of the defendants in the case.⁸¹ The experts gave credence to C.P.’s and J.D.’s testimony, stating, “that social isolation is experienced as punishment and that prolonged isolation can cause serious psychological consequences.”⁸² It was further stated that isolation and segregation should “be used ‘sparingly’ and only in response to serious behavioral infractions and for short periods of time ‘while the ward poses an imminent danger to others,’”⁸³ and presumably, to his or her self.

Experts testified that it was “the responsibility of the [HYCF] administration to create an environment that is physically and psychologically safe for the wards without violating the wards’ rights.”⁸⁴ The experts agreed that the practice of isolating youth at the HYCF for

⁷⁸ *Id.* (citations omitted). See Declaration of C.P., *supra* note 61, at 15-16 (where C.P. relays her experiences in isolation). In addition to what was described by the court, C.P. reported: “I had no privacy . . . because there is a camera right over me 24-7. The camera could see me using the bathroom . . . , just everything. It’s very intrusive. When I had to go to the bathroom I would try to hold it and wait for the nurse [so that I could use] their bathroom.” *Id.* C.P. stated that when she was housed with the boys and not in physical isolation, she was frequently instructed not to have any interaction whatsoever with the male wards. *Id.* at 11. She “was not supposed to sit with them, not even . . . speak with them [or] look at them.” *Id.* She quickly became lonely, but was regardless denied a request to interact with “some of the nicer boys.” *Id.* This social isolation was surely almost as harmful as the physical isolation she endured from time to time. Note the reference to “nicer boys,” one example of how transgender youth housed in general population are not necessarily being treated poorly by all wards. See *supra* note 56.

⁷⁹ *R.G.*, 415 F. Supp. 2d at 1142-44.

⁸⁰ *Id.* at 1148.

⁸¹ *Id.* at 1154-55.

⁸² *Id.* at 1149 (citations omitted). See also, *supra* Part I.C. The text associated with note 47 of Part I.C actually quotes from the court declaration of one of the experts who testified in *R.G.*, Dr. Robert J. Bidwell.

⁸³ *Id.*

⁸⁴ *Id.* at 1150.

their own protection was “inexcusable,” “not an acceptable correctional practice for juveniles,” and, most importantly, “inherently punitive.”⁸⁵

Despite the fact that isolation practices at the HYCF were determined to be “inherently punitive,” the court found that the Eighth Amendment’s “guarantee against cruel and unusual punishment” was not the correct constitutional standard to apply in deciding the case before it.⁸⁶ In making this determination, the court indicated that the Eighth Amendment was not applicable as the youths had simply been detained for alleged crimes and/or adjudicated delinquent for committing crimes.⁸⁷ With respect to the latter group, the court held that juveniles “adjudicated delinquent” had not been convicted of crimes under Hawaii statute, so they were not to be treated as sentenced adult inmates.⁸⁸

In reaching its decision, the court applied what it referred to as a “more protective” Fourteenth Amendment substantive due process standard.⁸⁹ Based solely on due process grounds, the court determined that the preliminary injunction was warranted to prevent further verbal,

⁸⁵ *R.G.*, 415 F. Supp. 2d at 1148-49 (citations omitted).

⁸⁶ *Id.* at 1152.

⁸⁷ *See id.* at 1152. *See infra*, Part III.A, where the rights of adult pretrial detainees versus adult convicted prisoners are discussed. The *R.G.* court effectively chose to accord the *R.G.* plaintiff’s the same rights accorded to adult pretrial detainees.

⁸⁸ *R.G.*, 415 F. Supp. 2d at 1152.

⁸⁹ *Id.* (quoting *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987)). For the balance of this paper, “substantive due process” will be referred to as “due process.” If a reference to procedural due process is made, it will be referred to as such. “Substantive due process embraces the right of citizens to be free from arbitrary deprivations of life, liberty and property.” 16C C.J.S. *Constitutional Law* §1505 (2013). “Procedural due process, on the other hand, concerns the constitutionality of the procedures employed to deny a person’s life, liberty or property. . . .” *Id.*

No discussion of juvenile rights in the criminal context would be complete without referencing a line of important cases that extended specific procedural due process rights to juveniles. In *In re Gault*, 387 U.S. 1, 33-34, 41, 47, 57 (1967), the Court found that juveniles were entitled to certain rights in delinquency hearings: timely notice of a hearing, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. These procedural due process rights were further expanded in subsequent cases. In *In re Winship*, 397 U.S. 358, 368 (1970), the Court held that the correct burden of proof in delinquency hearings was for the State to prove its case beyond a reasonable doubt. In *Breed v. Jones*, 421 U.S. 519, 541 (1971), the Court found that juveniles were not to be subject to double jeopardy. Subsequent cases, however, limited procedural due process protections for juveniles. *See Schall v. Martin*, 467 U.S. 253, 265-68 (1984) (holding that “preventive detention” of juveniles was not unconstitutional); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (holding that a jury trial is not constitutionally required in delinquency proceedings).

physical and sexual abuse, and isolation of, LGBT youth.⁹⁰ Specifically with respect to isolation, the court found that the customary response to verbal, physical and sexual abuse of LGBT youth housed at the HYCF was to isolate and segregate these wards “rather than [to address] the climate of harassment and abuse.”⁹¹ Applying the *Bell v. Wolfish*⁹² test, the court held that there was no “legitimate nonpunitive government objective”⁹³ in “[c]onsistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to separate LGBT wards from their abusers.”⁹⁴ It also noted that “[t]he likely perception by teenagers that isolation is imposed as punishment for being LGBT only compound[ed] the harm.”⁹⁵

⁹⁰ *R.G.*, 415 F. Supp. 2d at 1152-58. However, the court delayed the granting of the injunction to see if certain on-going negotiations between the HYCF and the Hawaii Department of Justice could be completed. *Id.* at 1162.

⁹¹ *Id.* at 1156 n.12.

⁹² *Bell v. Wolfish*, 441 U.S. 520 (1979) is discussed *infra* Part III.A.

⁹³ *R.G.*, 415 F. Supp. 2d at 1152 (quoting *Bell*, 441 U.S. 520).

⁹⁴ *Id.* at 1156. This paper will not discuss in detail issues and holdings relating to violations of Equal Protection rights. It is duly noted, however, that the *R.G.* court did not reach the plaintiffs’ Equal Protection claims as it saw no need to address this issue in light of its holding on the Due Process claims. *Id.* at 1159. Some, however, have advocated for an Equal Protection analysis to end isolation of transgender adults. *See e.g.*, Arkles, *supra* note 42, at 557 (stating that the Equal Protection Clause is violated “[w]hen the state imposes the extreme conditions of solitary confinement on people in detention against their will solely because they are transgender . . . or gender nonconforming”); Estrada & Marksamer, *supra* note 37, at 431-32 (section on “The Constitutional right to Equal Protection.”). Estrada and Marksamer also advocate for use of the First Amendment to secure the right of transgender youth in juvenile detention facilities to express their gender identity “through clothing and grooming.” *Id.* at 432.

⁹⁵ *R.G.*, 415 F. Supp. 2d at 1155. The *R.G.* court was not entirely unassisted in considering the *Bell* due process test’s applicability in determining the constitutionality of isolating the plaintiffs for their own protection and in rejecting the potential applicability of the Eighth Amendment. The ACLU filed a Memorandum in Support of Motion (the “ACLU Memorandum,”) in the case and the language in that motion in support of this determination was “lifted” by the court almost verbatim from the ACLU Memorandum. *Compare R.G.*, 415 F. Supp. 2d at 1152 with ACLU Memorandum in Support of Motion at 13, *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006) (No. 05-566 JMS/LEK). The ACLU Memorandum persuasively argued that “Defendants may not constitutionally punish the victims of harassment with isolation simply because doing so is cheaper or more convenient than providing adequate staffing, supervision or training.” ACLU Memorandum, *supra*, at 24.

The State of Hawaii eventually agreed to a settlement involving a large payment to the to the *R.G.* plaintiffs. *See Hawai’i Youth Correctional Facility to Pay Over Half a Million Dollars for “Relentless Campaign of Harassment” of Gay and Transgender Youth*, AMERICAN CIVIL LIBERTIES UNION (June 15, 2006), <https://www.aclu.org/lgbt->

So then, the *R.G.* court rejected an Eighth Amendment analysis. In order to understand why this was done in error, this paper will continue by examining the Eighth Amendment in the adult context.

III. The Eighth Amendment and Conditions of Confinement

A. Eighth Amendment Rights of Adults

The Eighth Amendment⁹⁶ states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁹⁷ Adults convicted of crimes are currently afforded direct protection under the Eighth Amendment.⁹⁸ Federal inmates making a claim that their Eighth Amendment rights have been violated may do so directly.⁹⁹ State inmates making a similar claim currently do so under

rights_hiv-aids/hawaii-youth-correctional-facility-pay-over-half-million-dollars-relentless-cam.

⁹⁶ The purpose of this paper is not to delve into the history of the Eighth Amendment, so there will be no lengthy discussion of why this amendment was adopted or how its current language came to be. As the Supreme Court has stated, “[t]he history of the constitutional prohibition of ‘cruel and unusual punishments’ has been recounted at length in prior opinions of the Court and need not be repeated here.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1975). *See e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976); *Furman v. Georgia*, 408 U.S. 238, 316-33 (1972) (Marshall, J., concurring). *See also Furman* 408 U.S. at 242-44 (Douglas, J., concurring); *Id.* at 258-69 (Brennan, J., concurring).

For an interesting discussion on the text of the amendment, see Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 883-84 (2009) (“[the] normative force [of the amendment] derives chiefly from its use of the word cruel. . . . In its most basic sense, to be cruel is to inflict unjustified suffering”) (footnotes omitted). For a discussion on the importance of “evolving standards of decency” as it relates to application of the Eighth Amendment, see *infra* Part IV.A.

⁹⁷ U.S. CONST. amend. VIII.

⁹⁸ *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

⁹⁹ A person can bring suit for the violation of a Constitutional right, unless a federal statute specifically excludes such a lawsuit. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395-96 (1971). *Bivens*, in effect, creates a cause of action against the federal government similar to that created against the states by 42 U.S.C. § 1983 (2012). *See infra*, notes 100 and 101.

section 1983 of the Civil Rights Act of 1871.¹⁰⁰ In a section 1983 claim, the Eighth Amendment is applied under the incorporation doctrine.¹⁰¹

In *Bell v. Wolfish*, however, the Supreme Court found that the Due Process Clause of the Fourteenth Amendment controls the rights of adult pretrial detainees, not the Eighth Amendment.¹⁰² A detainee asserting cruel and unusual punishment would therefore assert this claim through due process.¹⁰³

The *Bell* Court found that the government can detain a person to ensure his presence at trial in a detention facility so long as the conditions and restrictions at the facility “do not amount to punishment, or otherwise violate the Constitution.”¹⁰⁴ However, the Court also held:

[i]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to

¹⁰⁰ 42 U.S. § 1983 (2012) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.”).

¹⁰¹ See *Wilson v. Seiter*, 501 U.S. 294, 296 (1991) (affirming that the Eighth Amendment applies to the States through the due process clause of the Fourteenth Amendment); *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that the Fourteenth Amendment incorporated the Eighth Amendment, making the Eighth Amendment enforceable against the States). See also *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (one of the first cases to explicitly suggest that the Bill of Rights could be applied to the States via the Fourteenth Amendment through what has now become to be known as the Incorporation Doctrine); Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 257–73 (1982) (an overview of the origins of the Incorporation Doctrine and its development).

¹⁰² *Bell*, 441 U.S. at 535 n.16 (“Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be ‘cruel and unusual’ under the Eighth Amendment. . . . ‘Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.”) (citations omitted) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 (1977)).

¹⁰³ See *id.* at 535 (holding that “under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law”).

¹⁰⁴ *Id.* at 536–37.

“punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.¹⁰⁵

This *Bell* test is what the *R.G.* court used when examining the plaintiffs’ assertions that their due process rights were violated when they were placed in involuntary protective custody. As indicated in Part II, the *R.G.* court found that there was no “legitimate nonpunitive government objective” in subjecting the juvenile plaintiffs to isolation for the asserted purpose of protecting them.¹⁰⁶ The *R.G.* court clarified that even when such an objective was asserted, if the conditions in question were “excessive” or “exaggerated,” there was accordingly a violation of Due Process.¹⁰⁷

With respect to adult detainees though, where does this *Bell* test leave them, with more constitutional rights than someone sentenced to serve time, or less? It appears that the rights are considered to be, at minimum, of the same degree, with the *Bell* Court finding that “pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”¹⁰⁸

¹⁰⁵ *Id.* at 539 (footnotes omitted) (citations omitted).

¹⁰⁶ *R.G.*, 415 F. Supp. at 1155-56 (D. Haw. 2006).

¹⁰⁷ *Id.* at 1152 (quoting *Bell*, 441 U.S. at 538, 540 n.23).

¹⁰⁸ *Bell*, 441 U.S. at 545. For an interesting and excellent discussion of the Eighth Amendment and the rights of pretrial detainees, see Dolovich, *supra* 96, at 886 n.15 (“[C]ourts routinely regard the Fourteenth Amendment due process rights of plaintiffs challenging the conditions of their confinement in jail as identical to those accorded sentenced offenders under the Eighth Amendment. It is widely acknowledged that pretrial detainees cannot be accorded fewer rights than convicted offenders. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (‘[T]he due process rights of a person [in state custody] are at least as great as the Eighth Amendment protections available to a convicted prisoner.’). But as regards conditions claims, this principle has not translated into anything more than an assurance of parity of treatment.”). The author then cites and quotes key language from four federal Courts of Appeals that adopt this approach. *Id.*

B. Confinement of Adults

The Supreme Court has held that the Eighth Amendment “does not mandate comfortable prisons.”¹⁰⁹ However, the Court has also stated that the Constitution does not allow for inhumane prisons, it being “now settled that ‘the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.’”¹¹⁰ The Eighth Amendment then, “imposes a duty” on prison officials to provide basic inmate needs such as “food, clothing, shelter, and medical care.”¹¹¹

The Supreme Court first acknowledged that the Eighth Amendment “could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment” in *Estelle v. Gamble*.¹¹² In *Gamble*, an inmate whose back was injured when a bale of cotton fell on him filed a complaint against various prison officials, including certain doctors.¹¹³ *Gamble*’s main allegation was that he had received poor medical treatment for his injury, leaving him in pain, and that this poor treatment was a violation of his Eighth Amendment rights.¹¹⁴

The Court dismissed the claims against the doctors, rejecting *Gamble*’s claim that he had suffered cruel and unusual punishment when the doctors failed to adequately attend to his back pain.¹¹⁵ The Court found that only the “unnecessary and wanton infliction of pain”¹¹⁶ violates the Eighth Amendment, and that an inmate stating a claim under that amendment needed to at least allege “deliberate indifference” to “serious” medical needs.¹¹⁷ Finally, the Court held that allegations of “inadvertent

¹⁰⁹ *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

¹¹⁰ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 31 (1993)).

¹¹¹ *Id.* at 832.

¹¹² *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). *See generally* *Estelle v. Gamble*, 429 U.S. 97, (1976).

¹¹³ *Gamble*, 429 U.S. at 98-99.

¹¹⁴ *Id.* at 99-101. *Gamble* also alleged, in effect, that the discipline for refusing to work due to this pain was part of this violation of his rights. *Id.* at 101.

¹¹⁵ *Id.* at 104-08.

¹¹⁶ *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

¹¹⁷ *Id.* at 106. *See also id.* at 104-05 (“[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to prisoner’s needs or by prison guards intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

failure to provide adequate medical care” and a “negligent” diagnosis failed to establish “deliberate indifference” on the part of the doctors.¹¹⁸ The Court then noted that these allegations might, however, support a malpractice claim.¹¹⁹

However, the *Gamble* opinion did not make clear exactly what constituted “deliberate indifference.” The Court hinted that the standard was more of a subjective recklessness standard, as opposed to one of mere negligence,¹²⁰ but that was not clarified until the Court’s opinion in *Farmer v. Brennan*.¹²¹

C. *Farmer v. Brennan*¹²² and the Subjective Deliberate Indifference Test

Farmer v. Brennan, a key case in Eighth Amendment jurisprudence, involved a lawsuit by Dee Farmer, a transgender woman.¹²³ In 1986, Farmer was convicted for a non-violent crime and sentenced to prison.¹²⁴ At the time, “[t]he practice of federal prison authorities [was] to incarcerate preoperative transsexuals with prisoners of like biological sex”¹²⁵ While Farmer was accordingly housed with the general male prison population, she was also segregated several times for disciplinary reasons, and on at least one occasion, for her own safety.¹²⁶

In 1990, Farmer alleged that after being in a brief “administrative segregation” following a transfer to a higher security penitentiary for disciplinary infractions, she was placed in the general male population, where, within two weeks, she was “beaten and raped” by her cellmate.¹²⁷

Regardless of how evidenced, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under [§] 1983.”) (footnotes omitted) (citation omitted).

¹¹⁸ *Gamble*, 429 U.S. at 104-07.

¹¹⁹ *Id.*

¹²⁰ *See id.* at 104-05 (the “indifference” may be evidenced by “prison guards . . . intentionally denying or delaying access to medical care”).

¹²¹ *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹²² *Id.*

¹²³ *Id.* at 829.

¹²⁴ *Id.* Prior to her conviction, Farmer “wore women’s clothing . . . , underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful ‘black market’ testicle-removal surgery.” *Id.* at 829. Farmer claimed to have continued hormone treatment in prison through the use of smuggled drugs. *Id.* All parties in the lawsuit were in agreement that Farmer projected a feminine appearance while in prison. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 829-30.

¹²⁷ *Farmer*, 511 U.S. at 830.

She then filed a *pro se Bivens* complaint,¹²⁸ in which she alleged that her Eighth Amendment rights had been violated.¹²⁹

The Court found that there was only a violation of Farmer's Eighth Amendment rights if two conditions were satisfied.¹³⁰ First, the alleged violation had to be "objectively, 'sufficiently serious.'"¹³¹ For cases involving an allegation that prison officials failed to prevent physical harm to one inmate at the hands of the other, the inmate therefore needed to demonstrate that the conditions under which he was incarcerated posed "a substantial risk of serious harm."¹³² As for the second condition, the *Farmer* court confirmed that a deliberate indifference test was needed, finding that this requirement flowed

from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." To violate the Cruel and Unusual Punishments Clause, a prison official must have a "sufficiently culpable state of mind." In prison-conditions cases, that state of mind is one of "deliberate indifference" to inmate health or safety¹³³

Impliedly, the fact that Farmer was raped satisfied the requirement that the violation in question be "objectively sufficiently serious."¹³⁴ Both parties in *Farmer* agreed that the deliberate indifference standard governed the inquiry into the second prong of the test, but they disagreed as to whether or not the proper inquiry for determining the presence of deliberate indifference on the part of prison officials should be an

¹²⁸ See *supra* note 99.

¹²⁹ *Farmer*, 511 U.S. at 830-31. Farmer also "sought compensatory and punitive damages, and an injunction barring future confinement in any penitentiary . . ." *Id.* at 831.

¹³⁰ *Id.* at 834.

¹³¹ *Id.* (emphasis added) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

¹³² *Id.* at 834.

¹³³ *Id.* (citations omitted) (quoting *Wilson*, 501 U.S. at 297, 302-03).

¹³⁴ See *id.* at 834 ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))). In discussing whether or not the alleged deprivation was "objectively sufficiently serious," the Court indicated that "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" *Id.* (quoting *Rhodes*, 452 U.S. at 347 (1981)). Clearly, being free from rape would satisfy that inquiry. Still, the Court went on to note as follows: "At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it." *Id.* at 834 n.3.

objective or subjective one.¹³⁵ This was, in effect, the central issue in *Farmer*.¹³⁶

Ultimately, the Court found that the subjective deliberate indifference test advocated for by respondents, one that implied a degree of recklessness analogous to a criminal standard of recklessness, was the proper test to adopt in determining the presence of deliberate indifference.¹³⁷ The Court held that

a prison official may be held liable under the Eighth Amendment for denying [inmates] humane conditions of confinement only if he knows that [the] inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.¹³⁸

¹³⁵ *Farmer*, 511 U.S. at 834. The objective test considered by the *Farmer* Court is discussed *infra* Part IV.B.

¹³⁶ *Id.* at 832. Indeed, the Court noted that it had granted certiorari in the case “because Courts of Appeals had adopted inconsistent tests for ‘deliberate indifference.’” *Id.* “Compare, for example, *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991) (holding that ‘deliberate indifference’ requires a ‘subjective standard of recklessness’), cert. denied, 503 U.S. 907, 1112 S. Ct. 1265, 117 L.Ed.2d 493 (1992), with *Young v. Quinlan*, 960 F.2d 351, 360-361 (3d Cir. 1992), ([A] prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate’).” *Id.*

¹³⁷ *Farmer*, 511 U.S. at 836-37.

¹³⁸ *Id.* at 847. This holding relied, in large part, on the Court’s pronouncement in *Wilson*, 501 U.S. at 296 and later cases, “that Eighth Amendment suits against prison officials must satisfy a “subjective” requirement.”” *Farmer*, 511 U.S. at 838. See Dolovich, *supra* note 96, at 881 (in which the author nicely sums up the second prong of the *Farmer* test as being “that unless some prison official actually knew of and disregarded a substantial risk of serious harm to prisoners, prison conditions are not ‘punishment’ within the meaning of the Eight Amendment.”).

In *Wilson*, an inmate alleged conditions of confinement that violated the Eighth Amendment, such as “overcrowding, excessive noise” and “improper ventilation.” *Wilson*, 501 U.S. at 296. In its holding vacating summary judgment and remanding to ensure the proper test was applied, the Court stated: “[A]ssuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim, see *Rhodes v. Chapman*, 452 U.S. 337 . . . (1981), whether it can be characterized as ‘wanton’ depends upon the constraints facing the *official*. From that standpoint, we see no significant distinction between claims alleging inadequate medical care and those alleging inadequate ‘conditions of confinement.’ Indeed, the medical care a prisoner receives is just as much a ‘condition’ of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. . . . ‘Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the ‘deliberate indifference’ standard

The Supreme Court reversed the District Court's summary judgment for the respondents, affirmed by the Court of Appeals, on each of Farmer's claims.¹³⁹ In the reversed opinion, the District Court had, in fact, applied a subjective deliberate indifference test, granting summary judgment largely on the basis that Farmer had not filed any type of grievance with prison officials expressing "concern for [her] safety."¹⁴⁰ Accordingly, the District Court found that the prison officials could not have been aware of the potential problem.¹⁴¹ The Supreme Court found that the reliance on this sole factor, the lack of a filed grievance, was improper and that other evidence would need to be considered in determining if the prison officials acted with deliberate indifference in housing Farmer with the general male population.¹⁴²

articulated in [*Gamble.*]" *Id.* at 303, 305-06 (quoting *LaFaut v. Smith*, 834 F.2d. 389, 391-92 (4th Cir. 1987)).

¹³⁹ *Farmer*, 511 U.S. at 848.

¹⁴⁰ *Id.* (citation omitted).

¹⁴¹ *Id.*

¹⁴² *Id.* at 848-49 (holding that the record below "does not so clearly establish respondents' entitlement to judgment as a matter of law on the issue of subjective knowledge."). Many of the Eighth Amendment cases involving transgender inmates that have been heard since the turn of the century involve the application of the *Farmer* subjective deliberate indifference test to the alleged lack or insufficiency of medical treatment relating to gender identity. *See, e.g., Fields v. Smith*, 653 F.3d 550, 556, 559 (7th Cir. 2011) (holding that a Wisconsin Act prohibiting the Department of Corrections from using state funds for any hormone therapy violated the Eighth Amendment, stating in part that "[r]efusing to provide effective treatment for a serious medical condition [gender identity disorder ('GID,') when the inmate was receiving hormone treatment for GID prior to incarceration,] serves no valid penological purpose and amounts to torture."); *Brooks v. Berg*, 270 F. Supp. 2d 302, 10 (N.D.N.Y. 2003), *vacated in part* by 289 F. Supp. 2d 286 (N.D.N.Y. 2003) (reversing summary judgment for defendants in finding that there was evidence that prison officials acted with deliberate indifference in denying plaintiff's "numerous requests for treatment" for GID). *See also*, Travis Wright Colopy, *Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates*, 22 HEALTH MATRIX 27 (2012).

Farmer was not Dee Farmer's first lawsuit involving prison officials. In 1988, she filed a suit alleging in part that her Eighth Amendment rights had been violated when she was placed in administrative segregation for her own safety. *Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (D. Pa. 1988). Unfortunately, the *Farmer v. Carlson* court held that the curtailment of rights in question "were a necessary part of prison security and . . . [did] not amount to an infliction of cruel and unusual punishment." *Id.* at 1343 (quoting *Loe v. Wilkinson*, 604 F. Supp. 130, 135-36 (M.D. Penn. 1984)).

In his *Farmer v. Brennan* concurrence, Justice Thomas makes light of the relief sought by Farmer in *Farmer v. Carlson* by pointing out that in *Farmer v. Brennan*, she was asserting "that leaving him [*sic*] in general prison population was unconstitutional because it subjected him [*sic*] to a risk of sexual assault," while in *Farmer v. Carlson*, she

IV. Extending Eighth Amendment Rights to Juveniles

A. *Evolving Standards of Decency: Protecting Juvenile Detainees and Juveniles Adjudicated Delinquent*

It is clear from the discussion in Part III.A that adults convicted of crimes can bring Eighth Amendment claims. Under *Bell* and its progeny, adults detained¹⁴³ for the alleged commission of a crime who allege cruel and unusual punishment must do so through a due process claim. Courts in several jurisdictions, including the *R.G.* court, have found that claims relating to isolation and other conditions of confinement at juvenile detention facilities should be dealt with by applying due process to both

alleged that her conditions of confinement after having been removed from general population were unconstitutional. *Farmer v. Brennan*, 511 U.S. 825, 861 n.1 (1994) (Thomas, J., concurring). What Thomas clearly failed to understand, however, was that the curtailment of rights and privileges evidently experienced by Farmer while in administrative detention (e.g., “lack of educational programs, . . . limited use of the telephone[.]” etc., *Farmer v. Carlson*, 685 F. Supp. at 1343 (quoting *Loe v. Wilkinson*, 604 F. Supp. at 135-36)), was not the only means available to prison administrators to ensure that she remained free from the threat of rape. *See Arkles, supra* note 42, at 553. (“It is extremely problematic that our courts could consider a desire to be free from sexual assault to be incompatible with a desire to be free from solitary confinement¹⁴³.”).

As the years went by in my close to twenty year career as a public defender with DeKalb County, Georgia, it seemed as if more and more persons awaited case resolution at the DeKalb County Jail as opposed to out on bond. (The DeKalb County Jail is one of the largest jails in the Southeastern United States, generally housing those charged with crimes until they are released on bond, set free, or sentenced. Those sentenced on felony charges to a year or more in jail are typically transferred to a State prison after sentencing.) “Most of the people incarcerated in jails have not been convicted, but are pre-trial detainees too poor to pay bail.” *Arkles, supra* note 42, at 519. Several factors seemed to contribute to this surge in detainee population: (1) an increase in the number of people charged with crimes; (2) the increase in fees associated with posting a bond; (3) a decline in staffing and curtailed budget at a pre-trial release program that assisted those having trouble making bail secure lower or On Their Own Recognizance (“OR,”) bonds; (4) often slow indictment of cases; and (5) an increase in the trial calendar back log in some court divisions. While I am basing these observations on my own personal experiences, as well as discussions with other attorneys involved in criminal defense in other jurisdictions, it appears that these issues are not unique to DeKalb County. Perhaps in this age of seemingly limitless detention for many inmates awaiting case resolution, the Supreme Court should revisit the issue of extending strong Eighth Amendment rights to adult detainees in addition to juvenile detainees and those adjudicated delinquent as argued for in this paper. The *Farmer* subjective deliberate indifference test (discussed *supra* Part III.C) is too difficult a standard for convicted prisoners to satisfy, and a “relaxing” of this standard must be reexamined for all seeking the protection of the Eighth Amendment.

juvenile detainees and juveniles who have been adjudicated delinquent.¹⁴⁴ The logic in applying a due process test in such cases is typically that expressed by the *R.G.* court, that juvenile detainees should be treated similar to adult detainees, and that, as juveniles adjudicated delinquent have not been actually convicted of a crime, they should be treated similar to adult detainees as well.¹⁴⁵

However, this due process approach to conditions of confinement claims brought by juveniles housed in juvenile detention facilities is not mandated by the United States Supreme Court. In fact, in the 1977 case of *Ingraham v. Wright*, the Supreme Court stated:

[s]ome punishments, though not labeled ‘criminal’ by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. *We have no occasion in this case, for example, to consider whether or under what circumstances*

¹⁴⁴ See *Alexander S. v. Boyd*, 113 F.3d 1373, 1377 n.3 (4th Cir. 1997) (involving an award of attorney’s fees to plaintiffs in which the court noted that “[t]he district court joined the First, Ninth, Tenth, and Eleventh Circuits in reviewing the conditions at state juvenile facilities under the standards of the Due Process Clause of the Fourteenth Amendment”) *abrogation on other grounds recognized by* *Montcalm Pub. Corp. v. Virginia*, 199 F.3d 168 (4th Cir. 1999). *Gary H. v. Hegstrom*, 831 F.2d 1430, 1431-32 (9th Cir. 1987) (involving “disciplinary segregation” (isolation) issues in an Oregon juvenile facility); *Milonas v. Williams*, 691 F.2d 931, 939-43 (10th Cir. 1982) (involving isolation and other conditions of confinement issues at a Utah private school for youth with behavior problems found to be “acting under color of state law” as some youths were “placed at the school involuntarily by juvenile courts.”); *Hewett ex rel. H.C. v. Jarrard*, 786 F.2d 1080, 1085-87 (11th Cir. 1986) (a pre-*Farmer* case following *Gamble*’s “deliberate indifference” standard, involving a Florida juvenile detainee who sustained serious injuries after being slammed into a wall and a metal cot by a guard as the juvenile was being placed in isolation, but who was nevertheless left in isolation and denied medical treatment for three days). *But see* *Stevens v. Harper*, 213 F.R.D. 358, 374 (E.D. Ca. 2002) (“Because two of the named plaintiffs . . . have been convicted of a crime as adults and sentenced to the CYA [California Youth Authority], their claims must be analyzed under the Eighth Amendment.”).

For an exhaustive 1998 survey of cases involving conditions in juvenile detention facilities, see Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675 (1999). This article includes unreported opinions and consent decrees. I respectfully disagree with the author’s assertion, however, that, post-*Bell*, the Due Process Clause would have to be the means to holding a condition was unconstitutional, rather than the Eighth Amendment. *Id.* at 683-84. See *infra* following paragraph in this Part IV.A.

¹⁴⁵ See *R.G.*, 415 F. Supp. 2d at 1152.

*persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment.*¹⁴⁶

To date, this issue has not been considered by the Supreme Court, neither with respect to juveniles arrested and detained pending an adjudication hearing, nor with respect to juveniles adjudicated delinquent.

In fact, several jurisdictions responding to claims of cruel and unusual punishment by juveniles held in juvenile detention facilities have analyzed these claims under the Eighth Amendment. They have done so with analyses that addressed both Eighth Amendment and Due Process concerns,¹⁴⁷ or by looking solely to the Eighth Amendment.¹⁴⁸ Several

¹⁴⁶ *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977) (emphasis added) (citation omitted).

¹⁴⁷ See *Nelson v. Heyne*, 355 F. Supp. 451, 454-57 (N.D. Ind. 1972), *aff'd* 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974) (finding that use of corporal punishment, tranquilizing drugs and solitary confinement at a medium security correctional institution for boys violated, the plaintiffs' Eighth Amendment rights, "8th and 14th Amendment rights," and Eighth Amendment and "procedural due process rights," respectively). The *Nelson* court noted that "[t]he use of solitary confinement does not of itself constitute cruel and unusual punishment. . . . [but that t]he quality of confinement [the length of time held in confinement and conditions therein], however, is subject to limitations imposed by the 8th Amendment." *Id.* at 456. See also *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983) (assessing both Eighth Amendment and due process concerns in determining the constitutionality of the use of isolation at a detention facility); *Inmates of the Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1366-67 (D.R.I. 1972) ("I hold that isolation of children under the circumstances as described in my findings of fact for the solitary confinement rooms of Annex B to be cruel and unusual punishment . . ."). In *Inmates of the Boys' Training Sch.*, several juveniles were disciplined by sending them to an adult facility, where they were housed "in the resuscitated relic of a former women's prison, in dim and cold steel cellblocks . . ." *Id.* at 1357. Some of the rooms contained just a toilet and a mattress on the floor and had no artificial lighting, and in one of the rooms with no artificial lighting, the windows were boarded over. *Id.* at 1359. The court also found that the use of these cells was "a violation of equal protection and due process of law." *Id.* at 1367.

¹⁴⁸ See *Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F. Supp. 473, 482 (S.D.N.Y. 1970) ("[A] two week confinement of a fourteen-year old girl in a stripped room in night clothes with no recreational facilities or even reading matter must be held to violate the Constitution's ban on cruel and unusual punishment."). See also *Morales v. Turman*, 364 F. Supp. 166, 173 (E.D. Tex. 1973) (following *Lollis* and stating that Eighth Amendment protection applied "not only to convicted persons[,] but also to non-convicted persons held in custody [so that] juveniles held in state institutions are protected by the eighth amendment"). In *Morales*, the court found that placing juveniles in isolation (referred to by the court as "solitary confinement"), "in the absence of any . . . administrative limitation on the duration and intensity of the confinement and subject only to the

courts using the Eighth Amendment have done so by utilizing *Farmer's* subjective deliberate indifference test.¹⁴⁹

unfettered discretion of correctional officers, constitutes cruel and unusual punishment in violation of the eighth amendment.” *Id.* at 174.

See also Santiago v. City of Phila., 435 F. Supp. 136, 149 (E.D. Pa. 1977) *abrogated on other grounds* by Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317 (3d Cir. 1982) (“We find that the eighth amendment applies to the confinement of juveniles . . .”). The Santiago court found that a factual hearing was required in order “to determine whether or to what extent the conditions [of confinement] . . .” at a juvenile detention facility “violate[d] the eighth amendment.” *Id.* at 149. The use of solitary confinement was one of the conditions alleged to do so. *Id.* at 142.

¹⁴⁹ In *Beers-Capitol v. Whetzel*, 256 F.3d 120, 144 (3d Cir. 2001), the Third Circuit Court of Appeals affirmed in part and reversed in part the lower court’s denial of summary judgment in favor of juvenile detention facility staff. The two plaintiffs in *Beers-Capitol* alleged “violations of their Eighth Amendment rights” as they had been sexually assaulted by a staff member while housed at the facility. *Id.* at 125. Originally, the case had also included allegations that due process rights had been violated, but the *Beers-Capitol* court agreed with the District Court’s holding that “an Eighth Amendment analysis was the proper one to use for claims arising from incarceration in a facility for juvenile offenders.” *Id.* at 130 n.5. As the Fourteenth Amendment claim was not pressed in the appeal, it was not addressed. *Id.* The court then went on to apply *Farmer's* two-pronged test to determine that summary judgment was proper with respect to all defendants but one, a staff member who admitted that she “‘kind of knew’” that the alleged perpetrator was “‘messing’” around with wards. *Id.* at 141, 144. *Cf.* Paige v. Hines, 2006 WL 2252703, 5 n.16 (N.D. Ill. 2006) (another case where female juveniles housed in a detention facility alleged that they were subjected to sexual assaults by staff where the court used the *Farmer* test, holding that “[i]t need not be decided whether plaintiffs’ claims are Eighth amendment cruel and unusual punishment claims or Fourteenth Amendment due process claims because, for failure to protect claims, ‘there is ‘little practical difference between the two standards.’”) (quoting *Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005)); *but see* A.M. v. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 584-85 (3d Cir. 2004) (applying the *Farmer* test in a conditions of confinement case after stating, “[w]e do not dispute that A.M.’s claims are appropriately analyzed under the Fourteenth Amendment since he was a detainee [arrested for indecent exposure and awaiting an adjudication hearing,] and not a convicted prisoner. However, the contours of a state’s due process obligations to detainees with respect to medical care have not been defined by the Supreme Court. Yet, it is clear that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment.”) (citations omitted). Still, the Third Circuit has now held that allegations concerning conditions of confinement made by juveniles adjudicated delinquent “fit squarely within the Eighth Amendment’s prohibition on cruel and unusual punishment.” *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 261 (3d Cir. 2010). *Betts* was followed by *Troy D. v. Mickens*, 806 F. Supp. 2d 758, 771-72 (D.N.J. 2011). In *Troy*, the *Farmer* test was applied to a case where the plaintiffs, both adjudicated delinquent, made allegations concerning conditions of confinement, including “excessive room isolation.” *Id.* at 762.

See also *In re J.M.*, 287 S.W.3d 481, 492 (Tex. Ct. App. 2009). J.M. complained of, among other things, being threatened by other wards, pressured by other wards to join a

The Supreme Court has several options when it reaches the question of whether or not those confined in “juvenile institutions can claim the protection of the Eighth Amendment.”¹⁵⁰ The Court could follow the logic of the *R.G.* court discussed in Part II, as well as the line of cases discussed in this Part IV.A (specifically corresponding to note 144,) that look exclusively to Due Process when determining claims relating to conditions of confinement in juvenile detention facilities. Alternatively, the Court could look to the line of cases discussed in this Part IV.A (specifically corresponding to notes 147 - 149,) in which similar claims were examined under the Eighth Amendment, either alone or in conjunction with a Due Process analysis. However, as will be shown in the balance of Parts IV.A, IV.B and IV.C, an Eighth Amendment analysis may offer more comprehensive protection to such youths than that afforded by a Due Process analysis alone. The Eighth Amendment analysis must be specifically tailored to take into account the levels of maturity and culpability of juveniles being housed in juvenile detention facilities, in addition to their high susceptibility to psychological distress in comparison to incarcerated adults.¹⁵¹ To begin to understand why the

gang and poor staff supervision. *Id.* at 492 (quoting *In re H.V.*, 252 S.W.3d 319, 323 (Tex. 2008)), the *In re J.M.* court first found that “[j]uvenile cases, though classified as civil proceedings, are quasi-criminal in nature and frequently concern constitutional rights and procedures normally found only in criminal law.” *Id.* “Due to this similarity, we examine cases involving claims of cruel and unusual punishment in the context of confinement for criminal offenses for guidance here. Confinement in a state prison facility is a form of punishment subject to scrutiny under the Eighth Amendment.” *Id.* (citations omitted). No Eighth Amendment violation was found, however. *Id.* at 495. The court found that the staff had largely responded to the grievances that they were made aware of. *Id.* at 494. Accordingly, there was no evidence that the staff “acted in reckless disregard of the threats posed to J.M.” *Id.* at 495.

¹⁵⁰ *Ingraham*, 430 U.S. at 669 n.37.

¹⁵¹ See discussion *infra* Part IV.A. These considerations have also been addressed to a degree in the procedural and substantive due process context. In *Fare v. Michael C.*, 442 U.S. 707, 725 (1979), the Supreme Court found that a totality of the circumstances approach was ideal to determine the validity of a juvenile’s waiver of his Fifth Amendment rights. The Court held that “[t]he totality approach . . . mandates inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile’s age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.” *Id.* (citations omitted). However, while “[t]heoretically, this test allows judges the discretion to weigh the age of the child more heavily and thereby extend greater protections to juveniles. . . . judges generally do not grant these protections.” Benjamin E. Freidman, *Protecting Truth: An Argument for Juvenile Rights and a Return to In re Gault*, 58 UCLA L. REV. DISCOURSE 165, 174 (2011). With regards to substantive due process, in a case not directly related to

Eighth Amendment could be the guiding principle in these cases, a discussion of the concept of “evolving standards of human decency” must first be undertaken.

The Eighth Amendment, according to the Supreme Court, “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .’ against which we must evaluate penal measures.”¹⁵² These standards, however, are not fixed in time. The Supreme Court has recognized that these standards evolve and that these “evolving standards of decency . . . mark the progress of a maturing society.”¹⁵³

The concept of “evolving standards of decency” is demonstrated in an important line of death penalty cases involving the mentally ill and juveniles. In these five cases, the distinct characteristics of these two classes were taken into account in ultimately banning the execution of the mentally ill¹⁵⁴ and youth under the age of eighteen.¹⁵⁵ The rationales expressed in these decisions ultimately supports the extension of Eighth Amendment protections to both detained juveniles and those adjudicated delinquent.

The first of the three cases involving juveniles was *Thompson v. Oklahoma*.¹⁵⁶ In *Thompson*, a plurality of the Court found that evolving standards of decency precluded the execution of juveniles who were under the age of sixteen when the crime in question was committed.¹⁵⁷ It based this determination in part on

[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense[, which] is consistent with

juveniles, the Seventh Circuit has acknowledged that “an investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements” *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998).

¹⁵² *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

¹⁵³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁵⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁵⁵ *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹⁵⁶ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹⁵⁷ *Id.* at 821-23.

the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.¹⁵⁸

However, in *Stanford v. Kentucky*, the Supreme Court, referring to “evolving standards of decency,” declined to extend its ruling in *Thompson* to prevent the execution of juveniles sixteen years of age or older, but under the age of eighteen.¹⁵⁹ The *Stanford* plurality looked solely to what it referred to as objective indicia in reaching its decision, finding that only a minority of the States who permitted capital punishment limited that sentence to those eighteen years of age or older.¹⁶⁰

In the sixteen intervening years between *Stanford* and the next major case involving juveniles and the death penalty, the Supreme Court heard two major cases involving this punishment as applied to the mentally ill. The first of these two cases was *Penry v. Lynaugh*.¹⁶¹

In *Penry*, the Supreme Court held that although, “mental retardation” was a mitigating factor in determining whether or not the death penalty should be imposed in a capital case, it could not “conclude . . . that the Eighth Amendment preclude[d] the execution of any mentally retarded person . . . by virtue of his or her mental retardation alone.”¹⁶² The plaintiff argued in part that there was “objective evidence . . . of an emerging national consensus against execution of the mentally retarded, reflecting the ‘evolving standards of decency that mark the progress of a maturing society.’”¹⁶³ The Court rejected the plaintiff’s argument, finding that only two states to date had actually banned the execution of the mentally ill.¹⁶⁴

¹⁵⁸ *Id.* at 830.

¹⁵⁹ *Stanford*, 492 U.S. at 369, 378-80.

¹⁶⁰ *Id.* at 369-71. The court noted that “our job is to . . . determine, not what they [the evolving standards of decency,] *should* be, but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society’s apparent skepticism. . . . [and we] reject petitioner’s suggestion that the issues in this case permit us to apply our ‘own informed judgment’ regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.” *Id.* at 378 (citations omitted).

¹⁶¹ *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002). The *Penry* and *Stanford* opinions were both delivered on June 26, 1989.

¹⁶² *Id.* at 340.

¹⁶³ *Id.* at 333-34 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁶⁴ *Id.* at 334.

Thirteen years later, in *Atkins v. Virginia*, the Supreme Court overruled *Penry*, finding that in the years since *Penry* had been decided, a national consensus had emerged that executing the mentally ill was cruel and unusual punishment in violation of the Eighth Amendment.¹⁶⁵ By 2002, out of the thirty-one states that allowed the death penalty to be imposed, twenty-one, in addition to the federal government, did not allow the mentally ill to be executed.¹⁶⁶ In *Atkins*, unlike in *Penry*, the Court found that there was an emerging national consensus on the issue that reflected “evolving standards of decency.”¹⁶⁷

The *Atkins* Court did not just look at objective indicia in reaching its decision. It also used its own independent judgment to find that the “relationship between mental retardation and the penological purposes served by the death penalty” led to the conclusion that the Eighth Amendment forbade the execution of the mentally ill.¹⁶⁸ By using this more subjective approach, the Court impliedly rejected the holding in *Stanford* that “the Court’s independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment.”¹⁶⁹

These four cases, *Thompson*, *Stanford*, *Penry* and *Atkins*, set the stage for the Supreme Court’s decision in *Roper v. Simmons*.¹⁷⁰ In *Simmons*, the Court overruled *Stanford*, finding that the execution of juveniles who were under the age of eighteen at the time of their crimes was prohibited by the Eighth Amendment’s proscription against cruel and unusual punishment.¹⁷¹ Referencing “‘evolving standards of decency that mark the progress of a maturing society’ to determine which punishments

¹⁶⁵ *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002).

¹⁶⁶ *Id.* at 313-16.

¹⁶⁷ *Id.* at 316, 321. It was effectively left to the States, however, to determine what constituted mental illness. *See id.* at 317.

¹⁶⁸ *Id.* at 317.

¹⁶⁹ *Roper v. Simmons*, 543 U.S. 551, 563 (2005). The *Atkins* Court also held that the “imposition of the death penalty” on the mentally ill did not contribute to any sense of retribution [due to diminished capacity,] or deterrence [the same capacity making it less likely that the penalty meted out to others would be considered by one who is mentally ill], so amounted to “nothing more than the purposeless and needless imposition of pain and suffering, and hence [was] an unconstitutional punishment.” *Atkins*, 536 U.S. at 319 (internal quotation marks omitted) (citations omitted).

¹⁷⁰ *Simmons*, 543 U.S. at 569.

¹⁷¹ *Id.* at 578-79. The Court noted in reversing *Stanford* that it was reconsidering the issue in that case, just as the Court had reconsidered the issue in *Penry* in deciding *Atkins*. *Id.* at 564.

are so disproportionate as to be cruel and unusual,”¹⁷² the Court examined both objective and subjective indicia.¹⁷³

With respect to objective indicia, after examining the laws of the various States at that time, the Court concluded that a majority no longer allowed juveniles under the age of eighteen to be sentenced to death.¹⁷⁴ Turning to subjective indicia, the Court made several notable observations in ultimately recognizing that “[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty [retribution and deterrence,] apply to them with less force than to adults.”¹⁷⁵ Most importantly, the court stated that “[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.”¹⁷⁶ Noting that “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood[,]” the Court held that this was “the age at which the line for death eligibility ought to rest.”¹⁷⁷

Therefore, the Supreme Court has provided a rationale that could extend Eighth Amendment protections to juveniles housed in juvenile detention facilities, whether detained or adjudicated delinquent: evolving standards of decency. The Court has explicitly acknowledged the “diminished culpability”¹⁷⁸ of juveniles and the “comparative immaturity”¹⁷⁹ to adults of youth under the age of eighteen.¹⁸⁰ This

¹⁷² *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

¹⁷³ *Id.* at 564-74.

¹⁷⁴ *Id.* at 568.

¹⁷⁵ *Id.* at 571.

¹⁷⁶ *Simmons*, 543 U.S. at 569.

¹⁷⁷ *Id.* at 574. *See also id.* at 587 (Stevens, J., concurring) (holding that “[i]f the meaning of . . . [the Eighth] Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment.”) (citation omitted).

¹⁷⁸ *Id.* at 571.

¹⁷⁹ *Id.* at 569.

¹⁸⁰ In *Levick et al.*, *supra* note 8, at 299-306, the authors point to *Graham v. Florida*, 560 U.S. 48 (2010), a post-*Roper* case, to show how the Supreme Court continues to examine adolescent development and the ways in which one’s status as a juvenile “is central to” an Eighth Amendment “constitutional analysis.” *Levick et al.*, *supra* note 8, at 300. The *Graham* Court held that “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” *Graham*, 130 S. Ct. at 2034.

acknowledgement justifies the extension of these heightened protections to juveniles.

The Court has also recognized that being young “is more than a chronological fact.”¹⁸¹ Being young, the Court has observed, “is a time and condition of life when a person may be most susceptible to . . . psychological damage.”¹⁸² As has been shown in Part I.C, the practice of isolating transgender youths is fraught with the potential to cause such damage. Other courts have recognized the inherent frailty of adolescents, stating that “there is a legal distinction in the nature of treatment appropriate to a convicted felon, and that accorded one adjudged a juvenile delinquent.”¹⁸³

More specific to the problem of isolation of transgender youth in juvenile detentions facilities, cities are promulgating new policies and procedures meant to protect transgender youth, as discussed further in this Part IV.A. These policies recognize the inherent differences between adults and juveniles. The New Orleans policies, for example, state that “[t]he [New Orleans] detention center recognizes that LGBT youth are in the midst of adolescent development and have complex needs that require the sensitivity and awareness of well-trained staff. . . .”¹⁸⁴

In light of these differences, the holding in *Simmons*, and the concept of the “evolving standards of decency that mark the progress of a maturing society,”¹⁸⁵ subjective indicia dictate that youths housed in juvenile detention facilities, especially transgender youth who are particularly at risk as discussed in Part I.A, should be treated differently

¹⁸¹ *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

¹⁸² *Id.*

¹⁸³ *Nelson v. Heyne*, 355 F. Supp. 451, 457 (N.D. Ind. 1972) (citation omitted), *aff'd* 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974). *See also* *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983) (“It would not be unreasonable to assume that society’s conscience might be shocked by the conditions of confinement imposed on a juvenile in an isolation cell, when it would be unwilling to label the same treatment, given to an adult, cruel and unusual.”).

¹⁸⁴ LOUISIANA DEP’T OF HUMAN SERVS. & THE NEW ORLEANS JUVENILE DET. CTR., POLICY 12.3: NON-DISCRIMINATORY DEVELOPMENTALLY-SOUND TREATMENT OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER (LGBT) YOUTH 1 (2011), *available at* <http://www.youthbreakout.org/sites/breakout.drupalgardens.com/files/YSC%20LGBT%20Policy%202011.pdf>.

¹⁸⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

than their adult counterparts in jails, prisons and penitentiaries. In fact, juveniles should be subject to far less harsh conditions than adults.¹⁸⁶

As for objective indicia, there is admittedly not an overwhelming trend toward adoption of policies and procedures that advocate for and protect transgender youth (and LGBT youth in general,) in custody, but there is an emerging trend nonetheless. For example, the New York State Office of Children and Family Services (“NYOCFS,”) has adopted specific and comprehensive guidelines relating to treatment of LGBT youth “in [the] residential and after-care programs it operates.”¹⁸⁷ The policy specifically states that it “protects from discrimination . . . youth who self-identify as . . . transgender.”¹⁸⁸

In 2011, the Department of Human Services and the New Orleans Juvenile Detention Center adopted policies and procedures which emphasize that “[i]t is the policy [of this jurisdiction] to establish operational guidelines and training to respond to the gender identity and sexual orientation of the youth in our care.”¹⁸⁹ With respect to isolation, the policy is clear: “LGBT youth will not be placed in isolation as a means of keeping them safe from discrimination, harassment or abuse. Staff will actively intervene in behaviors by other youth that make the youth feel unsafe or disrespected.”¹⁹⁰

Accordingly, following the logic of *Simmons*, objective and subjective indicia of evolving standards of decency dictate the extension

¹⁸⁶ Levick et al., *supra* note 8, at 286. (“As the [Supreme] Court increasingly relies upon the principle that youth are different to inform its decisions involving children’s constitutional rights . . . the conditions under which juvenile offenders are incarcerated . . . will face greater scrutiny.”).

¹⁸⁷ N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS. POLICY AND PROCEDURES MANUAL 3442.00 LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH, (March 17, 2008), *available at* http://www.equityproject.org/pdfs/LGBTQ_Youth_Policy_PPM_3442_00.pdf

¹⁸⁸ *Id.* at 1.

¹⁸⁹ LOUISIANA DEP’T OF HUMAN SERVS., *supra* note 184, at 1.

¹⁹⁰ *Id.* at 3. Washington, D.C. has adopted the “General Prohibitions of Gender Identity or Expression Discrimination” Act. Compliance Rules and Regulations Regarding Gender Identity or Expression, 4 DCMR § 801 (2006). While this act does not specify that it applies to juvenile detention facilities, that it does so is certainly implied in its text, which covers all “housing” and “educational institutions.” (Of course, educational instruction takes place in juvenile detention facilities, “housing.”) California has adopted a “Youth Bill of Rights” for “youth confined in a juvenile facility” that includes sections effectively banning isolation of all youth and “discrimination or harassment on the basis of actual or perceived . . . gender identity. . . .” CAL. WELF. & INST. CODE §§ 224.74(i), (m) (2008).

of Eighth Amendment protection to conditions of confinement of transgender youth. Just as the Eighth Amendment protects those under the age of eighteen from being put to death, it should also protect transgender youth held in juvenile detention facilities—whether detained or adjudicated delinquent—from being subjected to conditions that amount to cruel and unusual punishment.

For adults, the conditions under which a sentence is served, not just the sentence itself, are clearly part of that punishment.¹⁹¹ In Part III.B, it was shown that the Supreme Court has found that conditions of confinement for sentenced adult prisoners are subject to Eighth Amendment scrutiny. In fact, the Supreme Court has specifically held that isolation “is a form of punishment subject to scrutiny under Eighth Amendment standards.”¹⁹² A youth who is detained or adjudicated delinquent should be provided *more* Eighth Amendment protections than an adult who has been sentenced to prison, not less.¹⁹³

¹⁹¹ See Dolovich, *supra* note 96, at 907. See also *id.* at 910 (asking “when [do] prison conditions cross the line from mere unpleasantness into cruelty[?]”).

¹⁹² *Hutto v. Finney*, 437 U.S. 678, 685 (1978). In *Finney*, the Court found that conditions in the isolation cells in question constituted cruel and unusual punishment and upheld a lower court’s ruling limiting the time spent in such isolation cells. *Id.* at 687.

¹⁹³ See *Lollis v. N.Y. State Dep’t of Soc. Serv.*, 322 F. Supp 473, 481 (S.D.N.Y. 1970) (With respect to the negative effects of isolation, “[w]hat is true in this case for adults is of even greater concern with children and adolescents. Youngsters are in general more vulnerable to emotional pressures than mature adults . . . [and] isolation is a condition of extraordinary severe psychic stress . . .”) (quoting the sworn affidavit of expert Joseph D. Noshpitz, M.D. filed with the court on November 6, 1970). See also *Swansey v. Elrod*, 386 F. Supp. 1138, 1140, 1143, 1145 (N.D. Ill. 1975) (a case where juveniles between the ages of thirteen and seventeen facing charges as adults filed a successful lawsuit seeking a preliminary injunction to prevent their further incarceration in an adult facility, and where the court held as follows: “[u]nder the Eighth Amendment[,] children who remain unconvicted of any crime may not be subjected to devastating psychological and reprehensible physical conditions, and while other juvenile law cases are not strictly on point, they recognize that juveniles are different and should be treated differently. Thus, the evolving standards of decency that mark the progress of a maturing society require that a more adequate standard of care be provided for pre-trial juvenile detainees. Plaintiffs therefore have demonstrated that there is a likelihood of success on their Eighth Amendment claim.”). Cf. *United States ex. rel. Wolfish v. United States*, 428 F. Supp. 333, 339 (S.D.N.Y. 1977), *aff’d*, *Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978), *rev’d*, *Bell v. Wolfish*, 441 U.S. 520 (1979) (“To have an inferior minority of persons housed in ways found unconstitutional for the rest would . . . fairly . . . be condemned as cruel and unusual for those affected.”). *Id.* at 528. In making this statement, the court was pointing out the inherent unfairness of adult detainees being double banded in rooms originally intended to house one person, while those sentenced to crimes and incarcerated in the

It is axiomatic that transgender youth (indeed, all youths,) housed in juvenile detention facilities should be free from cruel and unusual punishment. This right should accrue directly in federal court cases, and through the incorporation doctrine, rather than through Due Process, in state court cases. Indeed, an Eighth Amendment analysis, undertaken as described in Parts IV.B and IV.C, will result in a court holding that it is a violation of the Eighth Amendment to place a transgender youth in isolation as punishment for, effectively, identifying as transgender.

B. The Need for an Objective Deliberate Indifference Test

Accordingly, conditions of confinement in juvenile detention facilities should be subject to Eighth Amendment scrutiny. It will now be shown why the practice of isolating transgender youth in such facilities, if based on one of the four grounds set forth in Part I.B, constitutes cruel and unusual punishment. To begin, a brief review of the *Farmer*¹⁹⁴ decision discussed in Part III.C is required.

In order to determine if a condition of confinement in a juvenile detention facility constitutes cruel and unusual punishment, the Supreme Court's opinion in *Farmer* would theoretically require the application of a two-pronged test.¹⁹⁵ First, an inquiry examining the totality of the circumstances surrounding the condition and youth in question must be made in order to determine whether or not the alleged violation is "objectively, 'sufficiently serious.'"¹⁹⁶ This inquiry assesses whether or not the actions or omissions of the facility staff resulted "in the denial of 'the minimal civilized measure of life's necessities.'"¹⁹⁷ The second prong involves the subjective deliberate indifference test, requiring "that unless some prison official actually knew of and disregarded a substantial risk of serious harm to prisoners, prison conditions are not 'punishment' for Eighth Amendment purposes."¹⁹⁸

The typical conditions of isolation and the effect of isolation on transgender youth in juvenile detention facilities has been documented in Part I.C ("The Harmful Effects of Isolation,") and in Part II (discussing the

same facility were being housed in comparative luxury in rooms similar to those found in "college dormitories." *Id.* at 336-39.

¹⁹⁴ *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹⁹⁵ *Id.* at 834.

¹⁹⁶ *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)) (emphasis added).

¹⁹⁷ *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

¹⁹⁸ *Dolovich*, *supra* note 96, at 881.

isolation of LGBT youth during an analysis of the decision of *R.G. v. Koller*.¹⁹⁹ Experts and judges consistently state that isolation of transgender youth (indeed, all youth,) in juvenile detention facilities is a particularly harmful and psychologically devastating practice.²⁰⁰ To place a transgender youth in isolation, effectively as punishment for identifying as transgender, and to leave the youth in isolation for an extended period of time, is “objectively, ‘sufficiently serious.’”²⁰¹ The objective seriousness of this practice satisfies the first prong of the *Farmer* test.²⁰²

Next, troubling language in *Farmer* must be examined in an analysis of the second prong of the test used to determine if deliberate indifference is present. The Court held that “[t]he Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’”²⁰³ This language was used in part by the *Farmer* Court to justify its decision to adopt a subjective deliberate indifference test, as opposed to an objective one. However, the position of the Court is fatally flawed. The correct approach would be to view the conditions of imprisonment as being part of the punishment.

When someone is sentenced to a term in jail, persuasive critiques have been made that one cannot argue that the conditions of confinement have no relation to the sentence itself.²⁰⁴ “In a society where incarceration

¹⁹⁹ *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006).

²⁰⁰ Arkles, *supra* note 42, at 538. Marsha Levick et al. argue that “[as] juveniles are both more vulnerable to pressures and more malleable than adults[,] . . . the effects of a harmful condition may take a unique toll on a juvenile, even when the same punishment is constitutional for an adult.” Levick et al., *supra* note 8, at 312. “For example, . . . isolation . . . may inflict heightened trauma on youth.” *Id.*

²⁰¹ *Farmer*, 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

²⁰² It is possible that the length of period in isolation and/or the conditions therein may have some bearing on the outcome reached in applying the objective test, as well as the reasons given for the isolation. See discussion of *Nelson v. Heyne*, 355 F. Supp. 451, 454-57 (N.D. Ind. 1972), *supra* note 147.

²⁰³ *Farmer*, 511 U.S. at 837. See Dolovich, *supra* note 96, at 890 (stating that this holding reflects that the *Farmer* Court “was motivated by consideration[s]” of when prison conditions are punishment, and not by when they are cruel).

²⁰⁴ In his concurring opinion in *Farmer*, Justice Blackmun makes several observations. *Farmer*, 511 U.S. at 851-58 (Blackmun, J., concurring). First, he compares the prison sentence of inmates classified differently, with one being sent to a minimum security prison to serve out his sentence (“well-managed . . . , complete with tennis courts and cable television”), while another is sent to a maximum security prison (“characterized by rampant violence and terror”). *Id.* at 855. He then observes, “it matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing

is the most common penalty for criminal acts,” if the Eighth Amendment’s prohibition on cruel and unusual punishment is to mean anything, limits must be placed on “what the state can do to prisoners over the course of their incarceration.”²⁰⁵

Indeed, Professor Sharon Dolovich²⁰⁶ argues that

the state . . . has an affirmative obligation to protect [adult] prisoners from serious physical and psychological harm. This obligation, which amounts to an ongoing duty to provide for prisoners’ basic human needs, may be understood as *the state’s carceral burden*. When the state, indifferent to its obligation, violates this burden and thereby causes serious harm to prisoners, prison conditions may be said to be cruel. . . . [As] the state’s carceral burden is ongoing, those prison officials charged with fulfilling its terms are obliged to be proactive. . . . [Prison officials should at the very least be held] liable for failures to recognize substantial risks of serious harm that a reasonable prison official, appropriately attentive to prisoners’ basic needs, would have recognized.²⁰⁷

punishment for the two convicts.” *Id.* Second, Blackmun states: “[a] punishment is simply no less cruel or unusual because its harm is unintended. In view of this obvious fact, there is no reason to believe that, in adopting the Eighth Amendment, the Framers intended to prohibit cruel and unusual punishments only when they were inflicted intentionally. As Judge Noonan has observed: ‘The Framers were familiar from their wartime experience of British prisons with the kind of cruel punishment administered by a warden with the mentality of a Captain Bligh, [b]ut they were also familiar with the cruelty that came from bureaucratic indifference to the conditions of confinement. The Framers understood that cruel and unusual punishment can be administered by the failure of those in charge to give heed to the impact of their actions on those within their care.’ *Jordan v. Gardner*, 986 F.2d 1521, 1544 (9th Cir.1993) (citations omitted) (emphasis added).” *Id.* at 856.

Certainly, one should consider as well that it is not just the impact of prison official “action” that should be of concern, but inaction as well. *Contra id.* at 859 (Thomas, J., concurring) (holding that “[b]ecause the attack . . . [on Farmer] was not part of his sentence, it did not constitute ‘punishment’ under the Eighth Amendment”).

²⁰⁵ Dolovich, *supra* note 96, at 885.

²⁰⁶ Sharon Dolovich is a Professor of Law at UCLA School of Law and a scholar of Eighth Amendment jurisprudence.

²⁰⁷ Dolovich, *supra* note 96, at 891-92 (footnotes omitted). Professor Dolovich’s discussion here relates primarily to the responsibilities of a state toward its inmates, but of course, this would apply as well to the responsibilities of the federal government toward its inmates. *See supra* notes 99-101. *See also* *DeShaney v. Winnebago County*

Accordingly the *Farmer* Court erred in adopting a subjective, as opposed to objective, deliberate indifference test when formulating the second prong of the two part test to be used to determine if a condition of confinement constituted cruel and unusual punishment. *Farmer*, of course, involved the assertion by a convicted and sentenced adult inmate that a condition of confinement violated her Eighth Amendment rights. The same factors discussed in Part IV.A that require an extension of Eighth Amendment protection to youth detained or adjudicated delinquent and held in juvenile detention facilities also require that an objective deliberate indifference test be applied in considering allegations by such youth that being subject to certain conditions of confinement violates Eighth Amendment rights. In other words, just as the Court has found that juveniles under the age of eighteen should not be subject to the death penalty²⁰⁸ or life without parole in a case that does not involve a homicide,²⁰⁹ so too should the Court find that where juveniles are involved, an objective deliberate indifference test is more appropriate than a subjective one.

A proper objective deliberate indifference test for juveniles in conditions of confinement cases should be as follows: a juvenile detention facility officer or administrator is deliberately indifferent “when he *knows or should have known* of a sufficiently serious” condition affecting a

Dept. of Social Services, 489 U.S. 189, 199-200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”) (citations and footnotes omitted); *Estelle v. Gamble*, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting) (stating that “[i]f a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy.”).

Professor Dolovich also notes that agents of the state delegate authority (or, as she notes, the state's “carceral burden,”) to prison administrators, who in turn delegate authority to lower prison officials and ultimately the correctional officers who come into contact with inmates on a daily basis. Dolovich *supra* note 96, at 905, 929. In a challenge that a prison condition violates the Eighth Amendment, “there will [therefore] be some identifiable state official responsible for the challenged condition and thus the basis for a § 1983 action.” *Id.* at 937. This logic assists in overcoming any Eleventh Amendment concerns. *Id.* at 937.

²⁰⁸ See discussion of *Simmons*, *supra* Part IV.A.

²⁰⁹ See discussion of *Graham*, *supra* note 180.

ward,²¹⁰ yet fails “to take reasonable measures to abate it.”²¹¹ Once it is confirmed that isolation of a transgender youth is “objectively sufficiently serious,” as discussed *supra* this Part IV.B, this proposed objective deliberate indifference test would then be applied.

The application of this proposed objective deliberate indifference test would lead to a positive outcome for a transgender youth asserting that the period of isolation in question was cruel and unusual punishment in violation of the Eighth Amendment. For example, suppose that facility staff observes a male ward inappropriately fondling a transgender female ward, “Child A,” who has been housed with the males. Rather than discipline the male ward, the staff places Child A in isolation for her own “protection.” The conditions of the isolation are similar to those that C.P. endured in isolation in the Hawaiian Youth Correction Facility.²¹²

After two days in isolation, Child A files a grievance in which she states that the isolation is causing extreme anxiety and depression. The staff would then have notice of—*would know of*—the sufficiently serious condition. If Child A was left in isolation, then the objective deliberate indifference test is satisfied (as would, most likely, a subjective test), and a lawyer filing for a preliminary injunction to stop further isolation would accordingly be successful.

Suppose Child A does not file a grievance after two days in isolation, but is seen by staff crying in her room for hours on end. On the third day, a staff member notices that Child A’s arm is bleeding. Child A is sent to the nurse, who cleans and bandages the cut. Child A had in fact, purposefully scratched herself with a plastic fork that she managed to keep from her lunch that day. Neither the nurse nor any other facility staff ask Child A how she was cut, yet she is returned to isolation. In this case, the staff *should have known* of the sufficiently serious condition, and the objective deliberate indifference test would once again be satisfied. Under

²¹⁰ This portion of the proposed objective deliberate indifference test is based on and partially quotes language from, *Young v. Quinlan*, 960 F.2d 351, 361 (3d Cir. 1992), *superseded by statute on other grounds*, Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), *as recognized in* *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000) (emphasis added). As discussed *supra* note 136, *Young* was cited in *Farmer* as a Court of Appeal’s opinion that had formulated an objective deliberate indifference test. *Farmer*, 511 U.S. at 832.

²¹¹ This portion of the proposed objective deliberate indifference test partially quotes language from the *Farmer* Court’s mandated subjective deliberate indifference test. *Farmer*, 511 U.S. at 847.

²¹² See *supra* Part II, discussion of *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006).

this scenario as well, if a lawyer filed for a preliminary injunction to stop further isolation, the deciding court would have grounds to grant it.

In his wryly observant dissent in *Gamble*, Justice Stevens stated a definitive rationale detailing why the deliberate indifference test adopted by the majority (that was later clarified in *Farmer* to be a subjective test,) does not provide adequate Eighth Amendment protections.²¹³ Justice Stevens first noted that “[s]ubjective motivation” may in fact be relevant in determining what remedy, if any, “is appropriate against a particular defendant.”²¹⁴ However, Stevens then correctly pointed out that “whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it. Whether the conditions in Andersonville²¹⁵ were the product of design, negligence, or mere poverty, they were cruel and inhuman.”²¹⁶ Justice Stevens’ rationale identifies exactly why the subjective deliberate indifference test must be discarded in favor of an objective test.

C. Getting It Right – Using the Eighth Amendment to Prevent Isolation of Transgender Youth in Juvenile Detention Facilities

One might argue that there is no need to advocate for applying the Eighth Amendment to cases involving isolation of transgender youth. If a court chooses to apply the *Bell* due process analysis, as the *R.G.* court

²¹³ *Gamble*, 429 U.S. at 116 (Stevens, J., dissenting). See also Dolovich, *supra* note 96, at 899 (“Prison officials who create the conditions under which a prisoner will live are by their actions administering a state punishment whatever their mental state regarding the conditions they create . . . [and f]or this reason, all the conditions to which an offender is subjected at the hands of state officials over the course of his incarceration are appropriately open to Eighth Amendment scrutiny.”).

²¹⁴ *Id.* at 116 (Stevens, J., dissenting).

²¹⁵ Andersonville (also known as Camp Sumter,) was a Confederate prison for captured Union soldiers during the United States Civil War. The conditions in the camp were notoriously poor, with overcrowding, starvation and disease common. See, e.g., *Camp Sumpter/Andersonville Prison*, NATIONAL PARK SERVICE, http://www.nps.gov/ande/historyculture/camp_sumter.htm (November 17, 2013). Of the 45,000 prisoners housed at the camp during the war, 13,000 died there. *Id.*

²¹⁶ *Gamble*, 429 U.S. at 116-17 (Stevens, J., dissenting). See also Dolovich *supra* note 96 at 882. (“The problem with a recklessness standard is that it holds officers liable only for those risks they happen to notice – and thereby creates incentives for officers not to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse.”). The subjective deliberate indifference test then is bad enough where adults are involved, nevertheless youths.

did,²¹⁷ and this results in a successful outcome for juvenile plaintiffs, why drag the Eighth Amendment into the equation?

After all, as shown in Part II, in reaching its decision for the minor plaintiffs, the *R.G.* court declined to conduct an Eighth Amendment based inquiry. Instead, the *R.G.* court granted relief to the plaintiffs on due process grounds,²¹⁸ finding that there was no “legitimate nonpunitive government objective” in “[c]onsistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to separate LGBT wards from their abusers.”²¹⁹

Despite the current jurisdictional split (discussed in Part IV.A.) over how to approach conditions of confinement cases involving juveniles, courts need not have to choose between a *Bell* due process analysis and an Eighth Amendment inquiry. These two approaches are not mutually exclusive and both can serve as avenues to secure complete remedies. However, there are circumstances where the due process analysis may not result in a positive outcome for transgender youth, while an Eighth Amendment inquiry would. Suppose that a District Court gave deference to juvenile detention facility administrators while applying the *Bell* test and found that there was a “legitimate non-punitive government objective” in isolating a transgender youth? Where would this holding leave the youth if an Eighth Amendment claim had not also been filed?

Consider the following example. Child B is a male to female sixteen-year-old transgender youth. She is arrested for burglary, and the judge hearing her case adjudicates her delinquent. It is Child B’s third adjudication. Her first adjudication had her under court supervision for a year. During that year, she was adjudicated on a second offense and sent to an alternative placement group home. While in the group home, she was arrested on the burglary offense. Due to her history, upon adjudication, the judge sentences Child B to a juvenile detention facility for one year.²²⁰

Child B is assigned to housing in the general male population when she arrives at the facility. She is immediately subjected to verbal

²¹⁷ See *supra* Part II.

²¹⁸ *R.G.*, 415 F. Supp. 2d at 1152.

²¹⁹ *Id.* at 1156. As the *R.G.* court pointed out, other jurisdictions that had previously considered the issue before it had “likewise concluded that the use of isolation for juveniles, except in extreme circumstances, [was] a violation of Due Process.” *Id.* at 1155 (citing decisions of three different Circuit Courts of Appeals [1st, 10th and 11th] and two District Courts [Southern District of New York and Oregon]).

²²⁰ Note that the same analysis would be involved if Child B was simply detained pending her adjudication hearing on the burglary allegation.

abuse from other wards and even facility administrators. A few of the other wards begin trying to trip Child B whenever she walks by or they purposefully bump into her. Child B files several grievances with the facility administration, two verbal, and one written. These grievances are left unaddressed and Child B is unable to make contact with her attorney. In the fourth grievance, written and filed three months after her arrival, Child B threatens to harm herself if her grievances remain unresolved.²²¹ In response to this threat, Child B is placed in isolation and on suicide watch.

In isolation and on suicide watch, Child B is stripped of all but her undergarments, left to sleep on a bare mattress, subject to round the clock “eyeball” supervision and given only thirty minutes of solo outdoor recreation. There is no television in the cell and no contact with other wards. After two days in isolation, Child B makes verbal grievances to two separate staff members that if she is left in isolation, she will “go crazy.” Eighteen hours later and in response to intense depression and anxiety resulting from her continued isolation, Child B bangs her head three times against a cinder block wall. This action causes bleeding to her forehead and results in a severe concussion that leaves her with possibly permanent nerve damage in her left arm. While she is in the hospital, a cause of action is filed seeking to enjoin her return to the facility, as well as compensatory and punitive damages under section 1983.

At the preliminary injunction hearing, the evidence shows that the acknowledged policy at the facility and others in the State is to isolate any youth who threatens self-harm and to place said youth on suicide watch. Applying the *Bell* test, the court finds that the effects of isolation were “but an incident of a legitimate non-punitive governmental objective,”²²²

²²¹ C.P., the transgender youth/plaintiff in *R.G.*, relayed at one point that she was “having trouble adjusting to HYCF” [no doubt considering the physical and emotional taunts she was enduring there,] and that she was going to try to kill herself. Declaration of C.P., *supra* note 61, at 6. This resulted in her being placed in isolation. *Id.* The underlying causes went unaddressed. *See supra* Part II. *See also* *Nelson v. Heyne*, 355 F. Supp. 451, 455-56 (N.D. Ind. 1972), *aff’d*, 491 F.2d 352 (7th Cir. 1974), *cert denied*, 417 U.S. 976 (1974) (plaintiff mutilated himself three times during eight weeks of solitary confinement, and then was apparently punished for the self-mutilation with further isolation, without having received “recommended psychiatric treatment”).

²²² *R.G.*, 415 F. Supp. 2d at 1152, 1155. The language “legitimate non-punitive governmental objective” in the context of a due process analysis should not be read to preclude enforcement of Eighth Amendment rights. The due process inquiry focuses on the potential justifications for putting Child B in isolation. The Eighth Amendment

to prevent Child B from harming herself after she threatened to do so in her fourth grievance. The preliminary injunction is denied and summary judgment is granted to the defendants on the damages claims.

Applying the Eighth Amendment analysis described in Part IV.B, an entirely different outcome would be reached, one that would properly afford protection to Child B. First, the conditions of isolation would be found to be “objectively sufficiently serious.” Second, the objective deliberate indifference test would be satisfied as a result of the two verbal grievances made by Child B after she was placed in isolation and the lack of staff response to these complaints. Under these circumstances— where even a subjective deliberate indifference test would arguably be satisfied—an Eighth Amendment analysis would likely be successful, while a due process analysis would likely fail. This illustration accordingly shows why it is important to extend Eighth Amendment protection to transgender youth in juvenile detention facilities.

Conclusion

Ideally, recourse to the Eighth Amendment should not be necessary in order to prevent isolation of transgender youths housed in juvenile detention facilities. The goal of preventing isolation can easily be attained through common sense approaches. The states, counties and cities in which juvenile detention facilities are located should adopt policies and procedures that guarantee that all transgender youths in the juvenile justice system, whether or not detained or adjudicated and subsequently housed in juvenile detention facilities, are treated fairly and with respect.²²³ Above

inquiry focuses on the act itself, that is, whether, under the totality of circumstances, putting Child B in isolation is punishment, whether or not intended as such.

²²³ As noted *supra* in Part IV.A, jurisdictions are already adopting such policies and procedures. Model proposed policies have also been suggested. In 2007, Dr. Marty Beyer put forth a “Sample Policy for Facilities, Non-discriminatory, Developmentally-Sound Treatment of Lesbian, Gay, Bisexual and Transgender (LGBT) Youth.” MARTY BEYER, THE EQUITY PROJECT, SAMPLE PROPOSED POLICY: NON-DISCRIMINATORY, DEVELOPMENTALLY-SOUND TREATMENT OF LESBIAN GAY, BISEXUAL AND TRANSGENDER (LGBT) YOUTH (July 8, 2013), *available at* http://www.equityproject.org/pdfs/Beyer_%20proposed%20LGBT%20policy.pdf. The New Orleans Policy 12.3 referred to *supra* note 184 is largely based on Dr. Beyer’s model with some language lifted verbatim from that model. *See also*, MAJD ET AL., *supra* note 1, at 159-65. (“Appendix E: Model Non-Discriminatory Services Policy, Model Policy & Practice Guidelines for Providing Non-Discriminatory Services to Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth in Juvenile Justice Facilities”). Part D, concerning Youth Placement, contains isolation banning language identical to that in the New Orleans Policy 12.3.

all, these policies and procedures need to ensure that these youths' constitutional rights are not being violated.²²⁴

Juvenile detention facility administrators and staff must be trained to enforce these policies and procedures, with on-going training as needed. Adequate training should emphasize the protection of transgender (and other at risk) youth and include sensitivity training with respect to gender identity (and other LGBT-related) issues. Beyond training, effective grievance systems need to be adopted, with grievance channels that are well established, easy for youths to understand, and promptly responsive to grievances. Finally, there needs to be adequate staffing of juvenile detention facilities with sufficient numbers of supervisors in place to supervise both wards and staff.²²⁵

The practical approaches explained here would effectively eradicate the need to place transgender youth in isolation, whether as a means to resolve housing and protection issues, as punishment for expressing gender identity, or due to a perception that transgender youth are likely to be sexual predators. If facilities nevertheless place a transgender youth in isolation, the youth should be able to prevail in a claim that his or her Eighth Amendment rights were violated.

However, whether or not these common sense approaches are adopted, attorneys should diligently represent their juvenile transgender clients both in and outside the courtroom. Contact with an at-risk transgender client should be maintained after the youth is detained or adjudicated delinquent and sent to a juvenile detention facility. If policies are in place that curtail the use of isolation of transgender youth, attorneys must make sure that these policies are being enforced by following up on any client grievances with juvenile detention facility staff and presiding judges. Regardless, if working with these parties fails to end the practice

Several other sources also contain comprehensive recommendations meant to improve the treatment of LGBT youth in juvenile justice systems. *See e.g.*, MAJD ET AL., *supra* note 1, at 137-43; FEINSTEIN ET AL., *supra* note 2, at 43-53. Finally, see Letter from Masen Davis et al., *supra* note 56, at 6-24, for a comprehensive outline of proposed "specific standards" that would help lessen the risk of sexual assault of transgender adults and youth in incarceration settings.

²²⁴ *See R.G.*, 415 F. Supp. 2d at 1149-52.

²²⁵ The *R.G.* court points out several factors which could have prevented the substantiated abuse of the plaintiffs at the HYCF: adequate training to prevent abuse and harassment of LGBT youth, staffing numbers that would ensure proper supervision of all wards, a working grievance system in which complaints quickly reached the appropriate staff members and were quickly investigated, and "a classification system to protect vulnerable youth." *Id.* at 1157.

of isolating a transgender client, the attorney must seek injunctive relief to prevent further isolation, and if appropriate, compensatory and punitive damages.²²⁶

Finally, family and friends of transgender youth must advocate for transgender rights, motivating their local governments and legislatures to adopt these policies and procedures.²²⁷ The LGBT community must become more engaged in this effort as well.²²⁸ In the interim, expanding Eighth Amendment protections to transgender juveniles will result in positive outcomes in the courts. These positive outcomes will in turn give further incentive to state and local governments to adopt meaningful policies and procedures to prevent further violation of Eighth Amendment rights.

Attorneys can and should use the Eighth Amendment to effectively prevent isolation of transgender youth in juvenile detention facilities, whether detained or adjudicated delinquent. The rationales set forth in this paper can also be used to secure Eighth Amendment protection for all juveniles being housed in juvenile detention facilities. Enforcing the rights of juveniles housed in such facilities will lead to an abatement of conditions of confinement that violate the Eighth Amendment's proscription against cruel and unusual punishment.

²²⁶ See generally MAJDET AL., *supra* note 1, at 117-135. In *R.G.*, the court noted that J.D.'s public defender filed a petition for writ of habeas corpus demanding that J.D. be released from the HYCF out of concern for J.D.'s "emotional and physical well-being and safety." *R.G.*, 415 F. Supp. 2d at 1146.

²²⁷ See Dolovich, *supra* note 96, at 974-76. *Cf.* *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan, J., concurring) ("Public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of . . . prisons.").

²²⁸ In her 2009 article "Queer Lockdown", Ann Cammett points to the focus of LGBT communities in recent years to secure gay marriage rights and hate crimes legislation. Cammett, *supra* note 31, at 10. Cammett argues that more attention is also needed to address "the challenges flowing from [LGBT] involvement in the criminal justice system" *Id.* at 11.