Notes

Fighting the Good Fight Without Facts or Favor: The Need to Reform Juvenile Disciplinary Seclusion in Texas's Juvenile Facilities

By Catherine McCulloch*

* This Note is dedicated to everyone who advocates for juvenile justice. Particular thanks to all of the organizations and individuals who advocated for the reform of juvenile disciplinary seclusion during Texas's 83rd legislative session, including: The American Civil Liberties Union (Texas), The American Civil Liberties Union (National), Texas Criminal Justice Coalition, Disability Rights Texas, Texas Interfaith Center for Public Policy, National Alliance on Mental Illness (Texas), and Senator Van de Putte's Office.

I. INTRODUCTION

Across the Lone Star State, youth are held in seclusion in juvenile detention facilities. In Texas, children in juvenile detention facilities can be held in seclusion in excess of twenty-four hours for low-level behavioral offenses such as "horseplay."[1] Current law permits this overuse of disciplinary seclusion, which is particularly concerning because experts, including the American Academy of Child and Adolescent Psychiatry, have concluded that prolonged periods of seclusion can lead to depression, anxiety, and psychosis in youth.[2] Recalling thirty-six hours spent in seclusion in a juvenile detention center in Travis County, Pete Garanzuay described his experience: "When you're in a room by yourself, you're not doing nothing . . . . Thinking about the bad things in life over and over again, just replaying it in your head."[3] Considering the particular developmental vulnerabilities of youth, children should not be placed in seclusion for prolonged periods unless absolutely necessary.

Texas needs legislative reform to address the problematic use of disciplinary seclusion in juvenile detention facilities. The costs of disciplinary seclusion are large and the benefits of reform are nationally recognized. However, history teaches us that legislative reform in Texas will not come easily. In Texas's 83rd legislative session, a model bill, Senate Bill (S.B.) 1517, addressed the problematic use of disciplinary seclusion in juvenile detention facilities. The bill inevitably failed in the face of stark opposition. Stricter policies need to be put in place to safeguard the mental health of juveniles held in disciplinary seclusion in Texas, but when and what form reform will take is unknown.

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[1] *Major Rule Violations by County*, on file with TEX. J. C.L. & C.R., *available at* http://www.utexas.edu/law/journals/tjclcr/permanent/2013FallMajorRuleViolationsbyCounty.pdf, <http://perma.cc/R67R-N5BT>.

[2] Jeff Mitchell & Christopher Varley, *Isolation and Restraint in Juvenile Correctional Facilities*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 251, 252–55 (1990); *see* Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., to Parris N. Glendening, Governor of Md. (2002), *available at* http://www.justice.gov/crt/about/spl/documents/baltimore_findings_let.php, <http://perma.cc/5RMM-ETZV> (finding that juveniles may experience paranoia, anxiety and depression after short periods of isolation).

[3] Michael Brick, *Thousands of Texas Juvenile Offenders Held in Solitary Confinement*, LUBBOCK AVALANCHE-J. (April 22, 2013, 11:00 PM), http://lubbockonline.com/texas/2013-04-23/thousands-texas-juvenile-offenders-held-solitary-confinement#.UaKkQbvLhfU, <http://perma.cc/LLK7-BDSA>.

II. A BRIEF HISTORY OF JUVENILE SECLUSION IN TEXAS

In the early years of the Texas Youth Commission, now the Texas Juvenile Justice Department (TJJD), inhumane conditions in juvenile facilities were common. In the 1973 *Morales v. Turman*[4] decision, the U.S. District Court for the Eastern District of Texas found a "widespread practice of beating, slapping, kicking, and otherwise physically abusing juvenile inmates" in many juvenile facilities.[5] The *Morales* decision helped establish the first national standards for juvenile justice and corrections.[6] Following the decision, Texas made a number of changes, including prohibiting corporal punishment.[7]

TJJD has come a long way since *Morales,* but youth held in Texas's juvenile facilities continue to experience similar inhumane conditions. In 2007, for example, there was a public sex scandal involving youth in Texas's juvenile facilities.[8] As a result of the scandal, legislators passed bills aimed at overhauling the corrupt juvenile justice system.[9] Despite the current abuse of disciplinary seclusion in Texas, the practice has not reached the level of a public scandal; for this reason, the Texas legislature has been unmotivated to pass substantive reform. Furthermore, because of a lack of transparency in the juvenile disciplinary seclusion apparatus, advocates have had no way of knowing whether and to what extent similar misconduct surrounds juvenile seclusion—making it difficult to overcome the stark opposition to reform.

III. THE PROBLEM WITH CURRENT LAW

Current law provides guidelines for the appropriate use of disciplinary seclusion in juvenile detention facilities. Juvenile detention facilities include post-detention, pre-adjudication, and short-term detention facilities.[10] Chapter 343 of the Texas Administrative Code

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[4] 364 F. Supp. 166 (E.D. Tex. 1973).

[5] *Id.* at 173.

[6] TEX. YOUTH COMM'N, A BRIEF HISTORY OF THE TEXAS YOUTH COMMISSION: FROM THE ROOTS OF TEXAS JUVENILE JUSTICE TO THE PRESENT 2 (2009), *available at* http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-70042(1).pdf, <http://perma.cc/FVY4-5FHE>.

[7] *Id.*

[8] *See* Sylvia Moreno, *In Texas, Scandal Rock Juvenile Justice System,* WASH. POST, Apr. 5, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/04/AR2007040402400.html, <http://perma.cc/7M7Y-8TX9> (describing a litany of scandals at Texas juvenile detention facilities).

[9] Enrique Rangel, *Texas Juvenile Justice System: Sex-Abuse Scandal Spurred Positive Changes,* AMARILLO GLOBE NEWS, Dec. 17, 2012, http://amarillo.com/news/local-news/2012-12-16/scandal-spurred-positive-changes, <http://perma.cc/JE3J-5KZZ>.

[10] *See generally* 37 TEX. ADMIN. CODE §§ 343, 351 (2013).

(TAC), in compliance with the Texas Family Code,[11] governs standards for discipline in pre-adjudication detention and post-detention correction facilities.[12] A different chapter of TAC, chapter 351, controls the discipline of juveniles held in short-term detention facilities.[13] However, because chapter 351 of TAC does not provide any guidelines on the use or the reporting of disciplinary seclusion in short-term detention facilities, this type of facility will not be discussed in this Note.

Chapter 343 of TAC defines disciplinary seclusion as "[t]he separation of a resident from other residents for disciplinary reasons, and the placement of the resident alone in an area from which egress is prevented for more than 90 minutes."[14] Officials can only use disciplinary seclusion when a resident violates a major rule or "poses an imminent physical threat to self or others."[15] TAC defines major rule violations as "serious behavior against persons or property and behavior that poses a serious threat to institutional order and safety."[16]

Under TAC, each facility creates its own disciplinary rules, including a list of major rule violations.[17] Therefore, facilities have the discretion to determine what conduct justifies the use of seclusions that have the potential of lasting for days.[18] Finally, juvenile facilities must report the total number of disciplinary seclusions to the TJJD.[19] Though TAC may appear to provide sufficiently structured guidelines for disciplinary seclusion, vagueness in the law and lack of transparency gives juvenile facilities the discretion to create disciplinary rules that are contrary to the intent of Texas law, that are contrary to the rehabilitative goals of the juvenile justice system, that are unconstitutionally vague, and that do not serve a legitimate purpose.

Current law permits facilities to use disciplinary seclusion for purposes outside the intent of the law. For instance, some counties define the following conduct as constituting a "major rule violation": "disrespectful behavior toward staff," "disrupting the group," "manipulating staff," and "horseplay."[20] However, a plain reading of TAC's definition of "major rule violation" brings these activities outside the scope of the legislative intent. The definition of "major rule violation" encompasses only high-level behavioral offenses; a commonsense interpretation of the term "horseplay" cannot include the type of high-level behavioral offense described in TAC's definition of

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[11] *See* TEX. FAM. CODE ANN. § 51.12 (2013) (listing the conditions of detention of juveniles).
[12] ADMIN. § 343.
[13] *Id.* § 351.
[14] *Id.* § 343.100(11).
[15] *Id.* § 343.288(a).
[16] *Id.* § 343.274(1).
[17] *Id.* § 343.274.
[18] *See id.* § 343.274 (2013) (allowing each "facility" to develop and implement a written resident discipline plan, including seclusion); *id.* § 343.288(c).
[19] *Id.* § 343.214 (6).
[20] *Major Rule Violations by County*, *supra* note 1.

"major rule violation."[21] A plain reading of TAC shows that disciplinary seclusion should only be used when necessary.[22] In allowing juvenile facilities discretion to determine what conduct qualifies as a major rule violation, the law effectively permits disciplinary seclusion to be used for arbitrary reasons.

The overuse of disciplinary seclusion is also contrary to the juvenile justice system's goal of rehabilitation—a goal that TJJD has explicitly named among its priorities.[23] Describing the psychological effects of placing juveniles in long periods of seclusion, Dr. Craig Haney, U.C. Santa Cruz psychology professor, stated "[y]ou're basically taking someone who's in the process of finding out who they are and twisting their psyche in a way that will make it very, very difficult for them to ever recover."[24] Some courts, including the court in *Morales,* have also found that the practice of placing juveniles in seclusion for prolonged periods can be anti-rehabilitative.[25] Given the malleability of an adolescent's brain development, juveniles may be particularly amenable to change and rehabilitation as they grow older.[26]

Moreover, some disciplinary rules in juvenile facilities are unconstitutionally vague. First, the Fourteenth Amendment requires that prison rules and regulations be sufficiently clear so as to place inmates on notice of what conduct is prohibited.[27] In the 1980s, the Fifth Circuit in *Ruiz v. Estelle*[28] upheld the district court's determination that specific Texas Department of Corrections disciplinary rules, such as those prohibiting "general agitation," "disrespectful attitude," and "laziness" were unconstitutionally vague.[29] Similarly, certain major rule violations currently implemented by juvenile facilities, including "disrespectful behavior toward staff,"[30] are unconstitutionally vague as they do not sufficiently define what conduct is prohibited. Because these rules are vague, they are open to the subjective interpretation of the guards at

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[21] *See* ADMIN. § 343.274 (defining major rule violations as those constituting "serious behavior against persons or property and behavior that poses a serious threat to institutional order and safety").

[22] *Id.* § 343.274 (1).

[23] TEXAS JUVENILE JUSTICE DEP'T, STRATEGIC PLAN 2013–2017, at 19 (2012), *available at* https://www.tjjd.texas.gov/publications/reports/TJJD%20Strategic%20Plan%20-%20FINAL%20-%20JULY%202012.pdf, <http://perma.cc/7ST-YJ2D>; 12 TEX. HUM. RES. CODE § 201.002(2)(d) (West 2013).

[24] Matt Olsen, *Kids in the Hole—Juvenile Offenders*, 67 PROGRESSIVE 26, 27 (2003).

[25] *See* Morales v. Turman, 364 F. Supp. 166, 174 (E.D. Tex. 1973) (holding that "placing inmates in solitary confinement or secured facilities, in the absence of any legislative or administrative limitation on the duration and intensity of the confinement and subject only to the unfettered discretion of correctional officers, constitutes cruel and unusual punishment"); Inmates of Boys' Training Sch. v. Affleck, 346 F. Supp. 1354, 1366–67 (D.R.I. 1972) (describing solitary confinement as an inevitable road to a juvenile's destruction).

[26] *See generally* LAURENCE STEINBERG ET AL., *The Study of Development Psychopathology in Adolescence: Integrating Affective Neuroscience with the Study of Context, in* 2 DEVELOPMENTAL PSYCHOL. 710 (2d ed. 2006).

[27] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[28] 666 F.2d 854 (5th Cir. 1982).

[29] *Id.* at 862, 869.

[30] *Major Rule Violations by County, supra* note 1.

juvenile facilities. Therefore, facilities are permitted to create rules that are contrary to the intent of the law, and these rules are so vague that they can be easily interpreted to encompass almost any behavior. TAC gives facilities too much discretion, and some facilities have abused the discretion in violation of the Constitution. The extent of that abuse is unknown to the general public due to a lack of transparency.

Finally, prolonged periods of seclusion serve little legitimate purpose. The First Circuit held in *Santana v. Collazo*[31] that juvenile detention facilities in Puerto Rico "failed to meet the[] burden of showing a legitimate interest in confining juveniles in isolation for as long as twenty days."[32] In its analysis, the court relied on the opinion of experts that "isolation for longer than a few hours serves no legitimate therapeutic or disciplinary purpose and is unnecessary to prevent harm unless a juvenile is severely emotionally disturbed."[33] Ultimately, the court acknowledged that there may be times when prolonged periods of seclusion are necessary.[34] While periods of seclusion may be necessary for a facility to maintain order, no legitimate purpose is served when disciplinary seclusions is used for low-level behavioral offenses. Prolonged periods of seclusion should only be used when absolutely necessary considering the anti-rehabilitative effect of the practice and the fact that the practice serves little legitimate purpose.

Increased transparency would help prevent the abuse and overuse of disciplinary seclusion in Texas that arises from the discretion given to disciplinary facilities in defining "major rule violations" and the vagueness of the related statutory definitions. New reporting requirements have recently been instituted in Texas; however these requirements are minimal and data have yet to be implemented.[35] Just as transparency could have prevented the type of abuse that was the subject of *Morales*[36] in the 1970s and the sex scandal in 2007, transparency can be essential to ensuring that juvenile seclusion is administered sparingly and appropriately.[37] Considering the public interest in knowing what is happening to youth in juvenile facilities coupled with the heightened potential for abuse when a facility is allowed to operate under a cloak of obscurity, greater transparency is needed.

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[31] 793 F.2d 41 (1st Cir. 1986).

[32] *Id.* at 48.

[33] *Id.* at 43; *see also id.* at 47 (citing as a question for remand the need for expert testimony from the defendant challenging plaintiff's testimony that "isolation of juveniles for longer than a few hours, *under any conditions*, is not reasonably related to any institution's legitimate objectives.").

[34] *Id.* at 46 (refraining from substituting the court's judgment for that of experts and correction officials charged with maintaining order and security).

[35] *See* S.B. 1003, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01003F.htm, <http://perma.cc/4JYC-K3U5> (providing for the collection of data on the length of seclusion for juveniles and their access to mental and health services during that time); *see also infra* Part V.B.2.a.

[36] *See* Morales v. Turman, 364 F. Supp. 166, 173, 176 (E.D. Tex. 1973) (describing the abuse in detail and ordering relief).

[37] Moreno, *supra* note 8.

IV. THE COST OF DISCIPLINARY SECLUSION AND THE BENEFITS OF REFORM

A. Psychological Harm

Current law does not adequately protect the mental health of juveniles placed in disciplinary seclusion, and it permits the overuse of prolonged periods of disciplinary seclusion.

Considering the psychological harm of seclusion, stricter policies are needed to safeguard the mental health of juveniles held in disciplinary seclusion. Both courts and studies have found that solitary confinement not only exacerbates mental illness in the already mentally ill, but also causes psychological harm to individuals without any known mental illnesses.[38]

Disciplinary seclusion is particularly harmful to juveniles with mental illnesses. In *Ruiz*, the Southern Federal District Court of Texas held that placing the mentally ill in solitary confinement "whose illness can only be exacerbated by the depravity of their confinement" violated the Eighth Amendment.[39] Solitary confinement is generally understood as prolonged periods, an average of twenty-three hours per day, of social isolation in a restricted environment.[40] Current Texas law allows officials to place juveniles with mental illnesses in disciplinary seclusion for periods in excess of twenty-four hours.[41]

Juveniles without any known mental illnesses are also at high risk of suffering from the adverse effects of disciplinary seclusion. In *Madrid v. Gomez*,[42] the U.S. District Court for the Northern District of California found that inmates who are at an unreasonably high risk of suffering serious mental illness, as well as mentally ill inmates, were especially vulnerable populations, and on that basis held that solitary confinement constituted cruel and unusual punishment for those two categories of inmates.[43] According to mental health experts, juveniles may be at a high risk of suffering from the psychiatric consequences of prolonged or even short periods of seclusion.[44] Furthermore, the typical onset for many

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[38] *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 913-15 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001) (noting that administrative segregation can cause severe psychological harm and aggravate already existing mental illnesses); Mitchell & Varley, *supra* note 2, at 252–53.

[39] *Ruiz*, 37 F. Supp. 2d at 915.

[40] *See* CHASE RIVELAND, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 5 (1999) (describing solitary confinement as "locking an inmate in an isolated cell for an average of twenty-three hours per day with limited human interaction, little constructive activity, and an environment that assures maximum control over the individual").

[41] 37 TEX. ADMIN. CODE § 343.288(c) (2013).

[42] 889 F. Supp. 1146 (N.D. Cal. 1995).

[43] *Id.* at 1267.

[44] *See* Mitchell & Varley, *supra* note 2, at 252–53 (suggesting that young people may be more vulnerable to the detrimental effects of isolation).

neuropsychiatric illnesses, such as schizophrenia, is late adolescence or early twenties.[45] Under current Texas law, officials must observe juveniles held in disciplinary seclusion at random intervals, not to exceed fifteen minutes.[46] However, the law does not require any assessment, evaluation, or counseling to determine whether the juvenile is facing any adverse mental health consequences as a result of the seclusion.

In fact, juveniles held in seclusion are more likely to commit suicide. The court in *Indiana Protection and Advocacy Services Commission v. Commissioner, Indiana Department of Corrections*,[47] a recent decision by the U.S. District Court for the Southern District of Indiana, held that subjecting persons with mental illnesses to solitary confinement violated the Eighth Amendment.[48] The court relied on findings that solitary confinement is associated with a disproportionately higher number of prisoner suicides than the number of suicides committed by prisoners in the general prison population.[49] A 2009 U.S. Department of Justice study on suicides by incarcerated juveniles found that juveniles held in behavioral seclusion committed nearly half the suicides analyzed.[50] Despite the high rate of suicides amongst youth held in seclusion, current Texas law allows for the overuse of disciplinary seclusion. In 2013, Texas youth experienced more than 36,000 disciplinary seclusions in county juvenile facilities.[51] Thousands of these seclusions lasted longer than twenty-four hours.[52] Because of the correlation between seclusion and suicide, disciplinary seclusion should be used infrequently, and protective policies should be enacted.

B. The Financial Cost of Disciplinary Seclusion

In addition to its psychological costs, disciplinary seclusion creates an additional financial burden on the state due to housing costs, potential litigation, and increased recidivism. Limiting the use of disciplinary seclusion will result in significant cost-savings for Texas.

Based on the costly housing and security requirements necessary for solitary confinement of persons in adult prisons and jails, it is

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[45] Nitin Gogtay et al., *Age of Onset of Schizophrenia: Perspectives from Neuroimaging Studies*, 37 SCHIZOPHRENIA BULL., 504, 504–05 (2011).

[46] ADMIN. § 343.288.

[47] No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012).

[48] *Id.* at *23.

[49] *Id.* at *15–16.

[50] LINDSAY M. HAYES, U.S. DEP'T OF JUSTICE, NAT'L CTR. ON INSTS. AND ALTS., JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 18 (2009), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf, <http://perma.cc/RU4X-YRC9>.

[51] *Number of Disciplinary Seclusions by County*, on file with TEX. J. C.L. & C.R., *available at* http://www.utexas.edu/law/journals/tjclcr/permanent/2013FallNumberofDisciplinarySeclusionsbyCounty.pdf, <http://perma.cc/G4HJ-BCDK>.

[52] *Id.*

possible that disciplinary seclusion in Texas's juvenile detention facilities—whose costs have not yet been studied—is a more costly option than housing inmates in the general population. Administrative segregation, which is a type of solitary confinement, may be a good indicator of the cost of disciplinary seclusion. In 2002, the cost of housing a prisoner in the general population in a Texas prison was $42.46 per day.[53] By contrast, the cost of housing a prisoner in administrative segregation was 45% higher, at $61.63 per day.[54] Evidence from Mississippi affirms the cost saving benefits of limiting the use of disciplinary seclusion; since 2007, the state has reduced the number of prisoners held in segregation from nearly 1,300 to 335, which has resulted in approximately $5.6 million in savings per year.[55]

Additionally, the relationship between disciplinary seclusion and recidivism may create long-term costs for the state. A 2006 report by the Commission on Safety and Abuse in America's Prisons described a study that found that solitary confinement was related to higher than average recidivism rates.[56] The study, conducted in Washington, tracked 8,000 former prisoners who were released in 1997 and 1998 and analyzed their rates of re-arrest.[57] It concluded that individuals who were released directly after being held in isolation had a recidivism rate of 64%, whereas those who had been subject to isolation but who had been held in the general prison population directly prior to being released had a recidivism rate of 41%.[58] Thus, not only is the practice of solitary confinement initially more expensive, but it creates additional consequences that have serious financial implications into the future.

Finally, limiting the use of disciplinary seclusion and creating tighter regulations could save the state of Texas money by avoiding the type of litigation discussed in the following section.[59] Increased regulation would reduce the need for litigation to clarify statutory

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[53] JULIE HOOK & NANCY ARRIGONA, CRIMINAL JUSTICE POLICY COUNCIL, MANGOS TO MANGOS: COMPARING THE OPERATIONAL COSTS OF JUVENILE AND ADULT CORRECTIONAL PROGRAMS IN TEXAS 12 (2003), *available at* http://www.lbb.state.tx.us/Public_Safety_Criminal_Justice/Reports/2003cpd.pdf, <http://perma.cc/RTQ2-697Y>.

[54] *Id.* at 34.

[55] Michael Jacobson, Dir., Vera Inst. of Justice, *Reassessing Solitary Confinement: Written Testimony Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 6 (June 19, 2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/michael-jacobson-testimony-on-solitary-confinement-2012.pdf, <http://perma.cc/9KC4-W3VV>.

[56] JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, THE COMM'N ON SAFETY AND ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 55 (2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf, <http://perma.cc/9YC5-8S7S> (citing DAVID LOVELL & CLARK JOHNSON, FELONY AND VIOLENT RECIDIVISM AMONG SUPERMAX PRISON INMATES IN WASHINGTON STATE: A PILOT STUDY (2004), *available at* http://www.son.washington.edu/faculty/fac-page-files/Lovell-SupermaxRecidivism-4-19-04.pdf, <http://perma.cc/W3CK-L6AY>).

[57] *Id.*

[58] *Id.*

[59] *See infra* text accompanying note 71.

ambiguities related to disciplinary seclusion.

C. National Trends

There is a national trend of treating juveniles more like children and less like adults. This includes the trend of rethinking the use of juvenile disciplinary seclusion.

National trends indicate that society has changed the way it views youth. The 1980s through the mid-1990s marked an era of increased criminalization of adolescent behavior. Juveniles were viewed as dangerous "superpredators" who deserved to be treated as adults and locked up.[60] Legislatures in nearly every state passed "adult crime, adult time" statutes, including waiver laws that allowed the prosecution of juveniles in adult criminal courts.[61]

However, the pendulum has started to swing back towards a more rehabilitative and less punitive model. Recent Supreme Court precedent emphasizes the need for a more rehabilitative system for juveniles, noting that there is a fundamental difference between juveniles and adults; in a recent line of U.S. Supreme Court decisions, including *Roper v. Simmons*,[62] *Graham v. Florida*,[63] and *Miller v. Alabama*,[64] the Court concluded that certain forms of punishments and sentencing schemes are unconstitutional when applied to juveniles.[65] The Court based these decisions on the understanding—driven by science and social science—that youth are fundamentally different from adults due to juveniles' capacity for change and rehabilitation, their lack of sense of responsibility, and their susceptibility to external pressures.[66]

States have started enacting legislation to reverse the increased criminalization of adolescent behavior. A growing number of states,

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[60] BARRY FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 208 (1999) (discussing laws that require juveniles to be tried in adult courts and the demonization of youth).

[61] Patrick Griffin et al., *Prevention, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS AND VICTIMS: NAT'L REP. SERIES BULL.1, 2–3 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf, <http://perma.cc/L8Y5-NPJZ>.

[62] 543 U.S. 551 (2005).

[63] 560 U.S. 48 (2010).

[64] 132 S. Ct. 2455 (2012).

[65] *Miller*, 132 S. Ct. at 2475 (holding sentencing schemes that mandate life without possibility of parole violated the Eight Amendment as applied to juveniles); *Graham*, 560 U.S. at 74 (holding sentencing juvenile non-homicide offenders to life without parole violated the Eighth Amendment); *Roper*, 543 U.S. at 578 (holding sentencing juveniles to death violated the Eighth Amendment).

[66] *See Graham*, 560 U.S. at 68 (citing Brief for American Medical Association et al. as Amici Curiae 16–24; Brief for American Psychological Association et al. as Amici Curiae 22–27) (describing juvenile developmental psychology); *see also Miller*, 132 S. Ct. at 2468 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."); *Roper*, 543 U.S. at 569–70 (noting that juveniles cannot be categorized among the worst offenders because juveniles, in contrast to adults, lack a sense of responsibility, are vulnerable to external forces, and have a personality traits that are not fixed).

including Texas, have enacted legislation permitting youth accused of adult crimes to be detained in juvenile facilities, pending trial.[67] Other states have expanded their juvenile court jurisdiction and have raised the minimum age to try youths as adults.[68]

As part of this movement, states in the U.S. are taking steps to reform policies and practices restricting the use of solitary confinement. As of October 2010, 198 juvenile facilities across twenty-eight states have implemented a "best practices" program—Performance-based Standards—from the Council of Juvenile Correctional Administrators.[69] The standards state that juveniles should only be isolated to protect themselves and others from harm, and they further state that isolation "should be brief and supervised."[70]

For the facilities in the United States that have not changed policies and practices on their own, lawsuits have resulted in settlements limiting the use of prolonged periods of juvenile disciplinary seclusion. In the past decade, several lawsuits have ended in settlement agreements that restrict the amount of time a juvenile can be placed in seclusion, and one lawsuit resulted in a settlement agreement requiring mental health counseling for juveniles housed in isolation.[71] Though these lawsuits ended in settlement agreements, and it is well understood that cases are settled for a myriad of reasons, they nevertheless indicate that the justice system is making changes to how youth are treated. These settlements are part of the big picture—a trend in the direction of reducing and restricting juvenile seclusion.

Furthermore, parties to international human rights treaties as well as human rights experts support the trend in rethinking the use of prolonged periods of juvenile disciplinary seclusion. The United Nations Committee on the Rights of the Child, the treaty body that monitors

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[67] CAL.WELF. & INST. CODE §§ 207–208 (West 2006); H.B. 12-1139, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012); S.B. 1209, 82nd Leg., Reg. Sess. (Tex. 2011); S.B. 1169, 2009–2010 Gen. Assemb., Reg. Sess. (Penn. 2010); S.B. 259, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

[68] CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 29–40 (2011), *available at* http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf, <http://perma.cc/JX6D-QPYS>.

[69] COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, PERFORMANCE-BASED STANDARDS: SAFETY AND ACCOUNTABILITY FOR JUVENILE CORRECTIONS AND DETENTION FACILITIES 2 (2011), *available at* http://www.in.gov/idoc/dys/files/PbS_InfoPacket.pdf, <http://perma.cc/4P47-HE3K>.

[70] COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, PERFORMANCE-BASED STANDARDS: REDUCING ISOLATION AND ROOM CONFINEMENT 2 (2012), *available at* http://pbstandards.org/uploads/documents/PbS_Reducing_Isolation_Room_Confinement_201209.pdf, <http://perma.cc/Q4AY-BEHM>.

[71] David Crary, *Solitary Confinement for Youths Should be Banned, Makes Juveniles 'Go Crazy': Human Rights Watch*, HUFFINGTON POST (Oct. 10, 2012), http://www.huffingtonpost.com/2012/10/10/solitary-confinement-for-youths-banned_n_1954848.html, <http://perma.cc/A38U-RN8Z> (listing settlement agreements over the past several years, including: Mississippi's lawsuit settlement with an agreement to stop placing minors in solitary confinement for more than 20 hours at a time; Montana's lawsuit settlement with an agreement to regulate the amount of time juveniles could be placed in isolation without a top-level review of the case; and West Virginia's Division of Juvenile Services partial lawsuit settlement with an agreement that young offenders should not be isolated as often and should be assessed by a counselor).

compliance with the United Nations Convention on the Rights of the Child, has recommended a strict limitation of juvenile solitary confinement.[72] Similarly, the United Nations Committee Against Torture, the treaty body that monitors compliance with the United Nations Convention Against Torture (ratified by the United States in 1994), has further called for the eventual abolition of solitary confinement.[73] These international opinions against juvenile solitary confinement support the current trends in the United States of restricting the use of juvenile seclusion.

Nationally, society no longer sees juveniles as "super predators"; rather, society expects juveniles to be treated more leniently than adults in the criminal system. By limiting the anti-rehabilitative practice of disciplinary seclusion, Texas would align itself with domestic and international legal trends.

V. LEGISLATIVE REFORM IN TEXAS

A. The 82nd and 83rd Sessions: In Search of a Legislative Model

In the 82nd legislative session,[74] held in 2011, the only two proposed bills addressing seclusion or segregation in detention facilities were House Bill (H.B.) 3764, "relating to the reporting of certain information regarding inmates and the use of administrative segregation by the Texas Department of Criminal Justice" (TDCJ),[75] and H.B. 3761, "relating to the treatment of and services provided to certain inmates in the custody of the [TDCJ]," including those held in administrative segregation.[76] Neither bill passed.[77]

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[72] U.N. Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child, ¶ 41, U.N. Doc. CRC/C/15/Add.151 (July 10, 2001) (recommending that children not be "subject to solitary confinement, unless it is in their best interest and subject to court review").

[73] U.N. Comm. Against Torture, Consideration of Reps. Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, ¶ 14, U.N. Doc. CAT/C/DNK/CO/5 (July 16, 2007).

[74] Texas's legislature is only in session every two years. TEX. GOV'T CODE § 301.001 (2013).

[75] House Committee Report, H.B. 3764, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB03764H.htm, <http://perma.cc/C9CL-XZ3U>.

[76] H.B. 3761, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB03761I.htm, <http://perma.cc/3HGN-C43M>.

[77] *See History, H.B. 3764, 82d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB3764, <http://perma.cc/K9C6-25P5> (demonstrating that H.B. 3764 did not advance past the House Committee on Corrections); *History, H.B. 3761, 82d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB3761, <http://perma.cc/8LPP-D2QQ> (demonstrating that House Bill 3761 died in the House Committee on Corrections).

In the 83rd legislative session, held in 2013, several bills relating to the use of seclusion or segregation in prisons, jails, and juvenile facilities were proposed. Although the rise in seclusion and segregation related bills may have reflected legislators' increasing interest in the subject, other tactical considerations also impacted the numerosity. Legislators and advocates working to secure legislative reform adopted a "don't put all of your eggs in one basket" strategy and worked to introduce several different approaches to the issue carried in bills by different authors. This tactic resulted in the passage of one bill—S.B. 1003.[78]

Among the proposed bills in the 83rd legislative session, H.B. 686 and companion bill S.B. 1802 would have required TDCJ to do a report on the use of administrative segregation in state prisons.[79] Neither bill advanced out of committee: H.B. 686 died in the House Committee on Corrections,[80] and S.B. 1802 died in the Senate Committee on Criminal Justice.[81] S.B. 1357, which would have regulated the use of administrative segregation in county jails, faced a similar fate, dying in the Senate Committee on Criminal Justice.[82]

H.B. 1266 and companion bill S.B. 1003 called for the independent third party review of seclusion practices in Texas.[83] S.B. 1003 was amended to contain a provision pertaining to data collection regarding disciplinary seclusion in juvenile facilities (potentially in anticipation of S.B. 1517's failure).[84] Although H.B. 1266 made it out of committee and was sent to Calendars,[85] it did not advance further.[86] S.B. 1003 passed

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[78] *See* S.B. 1003, 83d Leg., Reg. Sess., *supra* note 35.

[79] H.B. 686, 83d Leg., Reg. Sess. (Tex. 2013), http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/HB00686I.htm, <http://perma.cc/7BUK-DYQU>; S.B. 1802, 83d Leg., Reg. Sess. (Tex. 2013), http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01802I.htm, <http://perma.cc/Y5UT-AM6U>.

[80] *History, H.B. 686, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB686, <http://perma.cc/DN9-FV4S>.

[81] *History, S.B. 1802, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1802, <http://perma.cc/5ZMG-X9ZD>.

[82] *See History, S.B. 1357, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1802, <http://perma.cc/9KZM-AETU> (proposing to address the "use of administrative segregation or seclusion in county jails"); *History, S.B. 1357, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1357, <http://perma.cc/V82U-CFZJ> (noting that the bill died in the Senate Committee on Criminal Justice).

[83] *See* H.B. 1266, 83d Leg., Reg. Sess. (Tex. 2013), http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/HB01266I.htm, <http://perma.cc/YD97-JVAD> (proposing the creation of an "Adult and Juvenile Administrative Segregation Task Force"); S.B. 1003, 83d Leg., Reg. Sess., *supra* note 35 (proposing the appointment of "an independent third party to conduct a review of facilities").

[84] *See* Senate Committee Report, S.B. 1003, 83d Leg., Reg. Sess. (Tex. 2013), http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01003S.htm, <http://perma.cc/89RB-3QB2> (adding provisions requiring an independent third party to review, among other things, the access to mental and health services that detention facilities provide to adults and juveniles in seclusion, the number of adults and juveniles in seclusion who are "referred to mental health professionals," and the average length of seclusion for adults and juveniles).

[85] A "calendar" is a "list of bills or resolutions that is scheduled or eligible to be taken up for consideration on a specified date by the members of a chamber." *C*, GUIDE TO TEX. LEGIS. INFO.: GLOSSARY, http://www.tlc.state.tx.us/gtli/glossary/glossaryc.html, <http://perma.cc/6V6H-2V6H>.

[86] *History, H.B. 1266, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.

the Senate and proceeded to the House.[87] On May 6, 2013, the bill was issued a $127,854 fiscal note, thereby damaging its potential to pass.[88] Despite all odds, on June14, 2013, it was signed into law.[89]

S.B. 1517, authored by Senator Leticia Van de Putte, was a finely tailored bill that only affected the use of disciplinary seclusion in juvenile facilities.[90] As this paper will discuss, it passed the Senate Committee on Criminal Justice, but was unable to advance past the House Committee on Corrections.[91]

The failure of so many bills might indicate that the legislature is unwilling to regulate the disciplinary practices of prisons, jails, and juvenile facilities. However, the passage of S.B. 1003 may have been an indication that the legislature is only unwilling to pass substantive legislation without having access to additional data.[92] The passage of S.B. 1003 and the data collection it entails may pave the way for legislation similar to S.B. 1517 to gain more traction in the next legislative session.

B. S.B. 1517: Fighting the Good Fight Without Facts or Favor

On March 8, 2013, Democratic Senator Leticia Van de Putte introduced S.B. 1517, which was referred to the Senate Committee on Criminal Justice.[93] Several subsequent drafts were introduced in an attempt to compromise with county facilities, which were opposed to the bill.[94] Though the author of the bill attempted to appease the county facilities, often to the detriment of the bill's objectives, the attempted compromise was not enough to get the bill passed.[95]

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us/BillLookup/History.aspx?LegSess=83R&Bill=HB1266, <http://perma.cc/XRR3-M5M3>.

[87] *History, S.B. 1003, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1003, <http://perma.cc/3CGY-L4BV> [hereinafter *History, S.B. 1003*].

[88] *Legislative Budget Brd., Fiscal Note, S.B. 1003, 83d Leg., Reg. Sess. (Tex. 2013)*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/tlodocs/83R/fiscalnotes/html/SB01003E.htm, <http://perma.cc/H82J-MGZ8>.

[89] *History, S.B. 1003*, *supra* note 87.

[90] S.B. 1517, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01517I.htm, <http://perma.cc/7P8A-ML56> [hereinafter S.B. 1517].

[91] *History, S.B. 1517, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1517, <http://perma.cc/W85-KUBW> [hereinafter *History, S.B. 1517*].

[92] *See* S.B. 1003, 83d Leg., Reg. Sess., *supra* note 35 (requiring an independent third party to review statistics and collect data on the length of seclusion for juveniles and their access to mental and health services during that time).

[93] *History, S.B. 1517*, *supra* note 91.

[94] *Text, S.B. 1517, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=83R&Bill=SB1517, <http://perma.cc/7FS8-2PK2>.

[95] *See infra* Part V.B.1.

1. From S.B. 1517 to C.S.S.B. 1517: A Long and Futile Compromise

In response to the juvenile facilities' opposition to the bill, Senator Leticia Van de Putte's office drafted a five-page proposed committee substitute (proposed C.S.S.B. 1517), to address some of the opposition from county juvenile facilities.[96] This proposed substitute was presented to the Senate Committee on Criminal Justice at a public hearing on April 23, 2013.[97]

Despite the attempt to appease county officials, the proposed C.S.S.B. 1517 continued to face strong opposition at the hearing.[98] During the hearing, Senator Van de Putte, who sensed that the bill faced substantial obstacles, asked the probation officers testifying in opposition to the bill whether they were opposed to the data collection portion of the bill.[99] The officers unanimously responded that they had no problem with the reporting requirement.[100]

After the public hearing, Senator Van de Putte offered a committee substitute (C.S.S.B. 1517), which appeared to have been drafted as a direct reaction to the concerns that the county facilities expressed at the hearing.[101] C.S.S.B. 1517 gutted all of the substantive changes that the proposed C.S.S.B. would have required regarding the manner in which facilities were currently using disciplinary seclusion.[102] In apparent response to the feedback from the probation officers, the only thing left of the proposed C.S.S.B. 1517 in C.S.S.B. 1517 was the data collection requirement.[103]

Ultimately, the engrossed version of S.B. 1517 was substantially

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[96] Proposed Committee Substitute for S.B.1517, 83d Leg., Reg. Sess. (Tex. 2013), on file with TEX. J. C.L. & C.R., *available at* http://www.utexas.edu/law/journals/tjclcr/permanent/2013FallProposedCSSB1517.pdf, <http://perma.cc/8C3S-SD44> [hereinafter Proposed C.S.S.B. 1517]. A "committee substitute" is a "complete, new bill or resolution recommended by a committee in lieu of the original measure. A committee will report a committee substitute rather than a bill with a large number of individual amendments when the committee wishes to make a substantial number of changes to the original measure. The committee substitute must contain the same subject matter as the original measure." *C*, *supra* note 85.

[97] *Hearing on S.B. 1517 Before the S. Comm. on Criminal Justice*, 83d Leg., Reg. Sess. (Apr. 23, 2013), *available at* http://www.senate.state.tx.us/75r/senate/commit/c590/c590.htm, <http://perma.cc/7ULW-KBY7> [hereinafter *Hearing on S.B. 1517*].

[98] *Id.*

[99] *Id.* (statement of Sen. Leticia Van de Putte, Member, S.).

[100] *Hearing on S.B. 1517*, *supra* note 97.

[101] Committee Substitute S.B. 1517, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01517S.htm, <http://perma.cc/TQ42-FTEG> [hereinafter C.S.S.B. 1517].

[102] *Compare* Proposed C.S.S.B. 1517, *supra* note 96 (providing that "[a] child placed in or committed to a juvenile facility may not be placed in disciplinary seclusion for longer than a four-hour period unless the child is placed in disciplinary seclusion as a result of assault, escape or attempted escape from the facility, sexual misconduct, possession of contraband, or inciting riot" and that "[a] child placed in disciplinary seclusion for longer than a one-hour period must receive counseling from staff"), *with* C.S.S.B. 1517, *supra* note 101 (removing these sections and maintaining only the data collection requirements for juvenile facilities).

[103] *Id.*

the same as C.S.S.B. 1517, except for the addition of an amendment from Senator Van de Putte that clarified the definition of "disciplinary seclusion" and "juvenile facility."[104] Although the engrossed bill passed the Senate, it died in the House after being placed on the General State Calendar.[105] Although the county facilities did not oppose the final bill's data collection requirement, it nonetheless failed because of proponents' inability to combat the stark opposition they faced.

2. S.B. 1517: A Model Bill Surrounded by Controversy

Of the many bills addressing the use of seclusion and segregation in prisons, jails, and juvenile facilities, S.B. 1517 was a model bill. In the introduced and the proposed C.S.S.B. versions of the bill, the bill addressed a very specific type of seclusion, "disciplinary seclusion," and it proposed a very simple and very important resolution: forbidding the use of disciplinary seclusion in excess of 4 hours unless absolutely necessary and adding safeguards to protect the mental health of juveniles.[106] This section discusses the model provisions of S.B. 1517 in its introduced and proposed C.S.S.B. forms, and analyzes why the provisions ultimately failed.

a. Making the Disciplinary Rules Legitimate, Unambiguous, and Transparent

The first two versions of Van de Putte's bill—the introduced S.B. 1517 and the proposed C.S.S.B. 1517—created statewide standards governing the use of disciplinary seclusion in excess of four hours, stricter administrative approval requirements, and policies to promote transparency about the use of disciplinary seclusion.[107] Together, these standards would have cured disciplinary rules from being vague and arbitrary.

First, by defining the behavior eligible for disciplinary seclusion, both the introduced S.B. 1517 and the proposed C.S.S.B. 1517 would have eliminated the use of prolonged periods of disciplinary seclusion for minor offenses and would have required that the disciplinary rules used to justify prolonged periods of seclusion be sufficiently clear.[108] In the

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[104] Engrossed, S.B. 1517, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01517E.htm, <http://perma.cc/ES92-G5MB>.

[105] *S.B. 1517, History*, *supra* note 91.

[106] S.B. 1517, *supra* note 90; Proposed C.S.S.B. 1517, *supra* note 96.

[107] *Id.*

[108] *See* S.B. 1517, *supra* note 90 (providing that "[a] child placed in or committed to a juvenile facility may not be placed in disciplinary seclusion for longer than a four-hour period unless the

introduced bill, disciplinary seclusion in excess of four hours was only permitted as an institutional response to assault, escape, or attempted escape—significantly reducing the categories of behavior currently eligible for prolonged periods of disciplinary seclusion.[109] This provision was drastically changed in the proposed C.S.S.B. 1517, which allowed disciplinary seclusion in excess of four hours as an institutional response to assault, sexual misconduct, escape, attempted escape, possession of contraband, and inciting a riot.[110] The proposed C.S.S.B. 1517 also provided definitions for these violations.[111] The new categories were based on Harris County's list of major rule violations, and were defined based on the Texas Penal Code.[112] Neither bill sought to redefine "major rule violation"; rather, the bills limited the justifications that facilities could use for prolonged periods of seclusion. According to a staffer in Senator Van de Putte's office, the broadening of the definition between the two versions of the bill was made in response to opposition from county juvenile facilities.[113]

County officials argued that juvenile-facilities officials require discretion to tailor the rules so as to meet the needs of each facility's population. At the April 23, 2013, public hearing, county officials stated that the bill ignored the reality of running juvenile facilities and gave too much credence to the "opinions of outsiders."[114] Mark Williams, Tom Green County's chief probation officer, claimed that "the people that don't work with the kids are the ones that really like this bill . . . the ones that work with the kids are the ones that do not."[115] County officials alleged that limiting the instances of disciplinary seclusion to four hours would not be sufficient to make an impression on juveniles.[116] Given that the bill ultimately failed, this argument appears to have been convincing to the legislators, potentially because they also fell into this category of "outsiders."

Second, the proposed C.S.S.B. 1517 required a facility administrator to approve seclusions in excess of four hours—a sharp reduction from the current law's allowance for seclusion without

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child is placed in disciplinary seclusion as a result of an assault or an escape or attempted escape from the facility"); Proposed C.S.S.B. 1517, *supra* note 96 (providing that "[a] child placed in or committed to a juvenile facility may not be placed in disciplinary seclusion for longer than a four-hour period unless the child is placed in disciplinary seclusion as a result of assault, escape or attempted escape from the facility, sexual misconduct, possession of contraband, or inciting riot").

[109] *Compare* S.B. 1517, *supra* note 90, *with* 37 TEX. ADMIN. CODE § 343 (2013) (defining the "major rule violations" that permit the use of disciplinary seclusion).

[110] Proposed C.S.S.B. 1517, *supra* note 96.

[111] *Id.*

[112] *Id.*; Conversation between Catherine McCulloch and Staffer, Sen. Leticia Van de Putte's Office, Austin, Tex. (April 5, 2013) [hereinafter Conversation between McCulloch and Staffer].

[113] Conversation between McCulloch and Staffer, *supra* note 112.

[114] Patrick Michels, *Advocates, Officers Spar Over Solitary Confinement for Youth*, TEX. OBSERVER, Apr. 24, 2013, http://www.texasobserver.org/advocates-officers-spar-over-solitary-confinement-for-youth/, <http://perma.cc/9SQX-X4D7>.

[115] *Id.*

[116] *Id.*

approval up to twenty-four hours.[117] By requiring facility administrators to expedite the review of a guard's decision to hold a juvenile in disciplinary seclusion, this provision would have created an additional obstacle to the abuse and overuse of prolonged periods of disciplinary seclusion.

Third, though C.S.S.B. 1517 eliminated much of the substance of the original version of S.B. 1517, both versions required more transparency from juvenile facilities regarding the use of disciplinary seclusion. The introduced bill would have required juvenile facilities to report to TJJD the duration and reason for each juvenile held in disciplinary seclusion,[118] whereas the proposed C.S.S.B. 1517 required the facilities to report to TJJD and make public the number of disciplinary seclusions, categorizing them as being in excess of ninety minutes but less than twenty-four hours, in excess of twenty-four hours but less than forty-eight hours, or in excess of forty-eight hours.[119] According to a staffer in Senator Van de Putte's office, the change between the two versions of the bill was the result of a threatened fiscal note.[120]

The proposed C.S.S.B. 1517 was therefore an attempt to compromise between county facility officials, who opposed a profound change to the use of seclusion, and the original bill, which would have significantly restricted the manner in which the counties could have used disciplinary seclusion. Although this compromise was a major concession to the counties, it ultimately failed because proponents lacked the data to demonstrate—to county officials and to the legislators—that the practice of disciplinary seclusion is overused and abused. Although the original bill tried to rectify this problem, the proposed C.S.S.B. 1517 removed the requirement of reporting the *reason* why an individual was held in disciplinary seclusion.[121] In the future, additional data produced by S.B. 1003 on the frequency and circumstances under which disciplinary seclusion is used in Texas may allow legislators to make informed decisions on reforming disciplinary seclusion.[122]

b. Reducing the Psychological Harm to Juveniles in Disciplinary Seclusion

Though no version of S.B. 1517 prohibited placing the mentally ill in disciplinary seclusion, both the introduced S.B. 1517 and the proposed

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[117] *Compare* S.B. 1517, *supra* note 90, *with* 37 TEX. ADMIN. CODE § 343.288(c) (2013).

[118] S.B. 1517, *supra* note 90.

[119] Proposed C.S.S.B. 1517, *supra* note 96.

[120] Conversation between McCulloch and Staffer, *supra* note 112.

[121] Proposed C.S.S.B. 1517, *supra* note 96.

[122] *See* S.B. 1003, 83d Leg., Reg. Sess., *supra* note 35 (providing for the collection of data on the length of seclusion for juveniles and their access to mental and health services during that time).

C.S.S.B. 1517 would have put stricter policies in place to safeguard the mental health of juveniles held in disciplinary seclusion. Additionally, these versions of S.B. 1517 would have reduced the use of prolonged periods of disciplinary seclusion in Texas, thereby decreasing the number of youth at risk for experiencing psychological harm.[123]

As a safeguard to mental health, the proposed C.S.S.B. 1517 required consultation with a mental health professional prior to the authorization of any seclusion of a resident with a known serious mental illness beyond a ten hour period, rather than current law's twenty-four hour period requirement.[124] Requiring a more expedient consultation with a mental health professional would have decreased the potential for psychological harm for mentally ill juveniles.

Additionally, both versions of the bill required assessment for disciplinary seclusion, although the proposed C.S.S.B. 1517 reduced those requirements. The introduced S.B. 1517 required that "a child placed in disciplinary seclusion for longer than a one-hour period must complete a therapeutic self-analysis assignment."[125] Instead, in lieu of the self-analysis assignment, the proposed C.S.S.B. 1517 required that juveniles held in disciplinary seclusion receive counseling from "staff" after one hour of seclusion.[126] According to a staffer in Senator Van de Putte's office, this was the result of county officials voicing safety concerns surrounding giving a child a writing utensil.[127] However, there were indications that the county facilities saw this as too heavy of a burden on their resources, as the therapeutic self-analysis might require them to hire more mental health personnel.[128] Ultimately, this compromise weakened the bill's ability to achieve the objective of safeguarding a juvenile's mental health, as the proposed C.S.S.B. only required a staff member—and not a mental health professional—to counsel juveniles held in disciplinary seclusion.[129]

The limited public data describing the conditions of disciplinary seclusion put proponents of the bill at a disadvantage when trying to articulate the psychological harm that juveniles suffer in such confinement. At the April 23, 2013, public hearing, proponents of the bill who testified, namely representatives of non-profit organizations,[130] used the phrase "solitary confinement" interchangeably with disciplinary seclusion.[131] Opponents of the bill who testified, namely county

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[123] *See supra* Part IV.A.

[124] Proposed C.S.S.B. 1517, *supra* note 96.

[125] S.B. 1517, *supra* note 90.

[126] Proposed C.S.S.B. 1517, *supra* note 96.

[127] Conversation between McCulloch and Staffer, *supra* note 112.

[128] *Id.*

[129] Proposed C.S.S.B. 1517, *supra* note 96.

[130] Witness List, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/witlistbill/html/SB01517S.htm, <http://perma.cc/QY5F-52LJ> [hereinafter Witness List].

[131] *Hearing on S.B. 1517*, *supra* note 97.

probation officers,[132] rejected this comparison, and argued that disciplinary seclusion in juvenile facilities is nothing like "solitary confinement,"[133] a term associated with super-maximum security prisons.[134] Since little public information exists on the conditions of disciplinary seclusion in Texas, proponents of S.B. 1517 struggled to counter the opponents' assertion. The proponents therefore attempted to address the opponents' lack of knowledge on this issue by offering the testimony of an individual who had been held in disciplinary seclusion as a juvenile.[135] Some senators dismissed this testimony and attempted to discredit the witness by focusing on his past indiscretions that led to his incarceration.[136]

Despite scientific evidence to the contrary, some Texas legislators do not view youth in the juvenile justice system as children. During the April 23, 2013, public hearing, some members of the Criminal Justice Committee expressed bias against youth in the juvenile justice system. Senator Charles Schwertner asked a witness testifying in favor of S.B. 1517: "How would you define 'juvenile'?"[137] When the witness responded that a juvenile is an individual under the age of eighteen, Senator Charles Schwertner pressed the witness: "So you're telling me that a seventeen year-old, 200-pound male is a child?"[138] Senator Leticia Van de Putte, author of the bill, responded that developmentally, seventeen year-olds are still children.[139] Senator Charles Schwertner's image of a 200-pound, seventeen year-old person ignores the developmental differences between juvenile and adults. Similarly, in 2012 Senator John Whitmire, Chair of the Criminal Justice Committee, used the phrase "hug a thug," to refer to measures that were lenient towards youth in the juvenile justice system.[140] Some Texas legislators view youth in the juvenile justice system as dangerous criminals; it is this bias that prevents these legislators from acknowledging the scientific research regarding the developmental differences between juveniles and adults. As discussed in Part IV.C, most of the country, including the U.S. Supreme Court, has started to treat juveniles in the justice system more like children and less like adults.[141] In order to achieve successful legislative reform in the area of disciplinary seclusion, Texas legislators

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[132] Witness List, *supra* note 130.

[133] *Hearing on S.B. 1517*, *supra* note 97.

[134] *See generally* DANIEL P. MEARS, URBAN INST., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS (2006), *available at* http://www.urban.org/UploadedPDF/411326_supermax_prisons.pdf, <http://perma.cc/WDM8-Z7NN>.

[135] *Hearing on S.B. 1517*, *supra* note 97 (statement of Witness Pete Garanzuay, Texas Network of Youth Servs.).

[136] *Id.* (statement of Sen. John Whitmire, Chair, S. Comm. on Criminal Justice).

[137] *Id.* (statement of Sen. Charles Schwertner, Member, S. Comm. on Criminal Justice).

[138] *Id.*

[139] *Id.* (statement of Sen. Leticia Van de Putte, Member, S.).

[140] Mike Ward, *Juvenile Justice Officials Disagree on Reopening Waco-Area Lockup*, AUSTIN AM.-STATESMAN, May 24, 2012, http://www.statesman.com/news/news/state-regional-govt-politics/juvenile-justice-officials-disagree-on-reopening-w/nRn2d/, <http://perma.cc/BAQ2-RNHX>.

[141] *See supra* Part IV.C.

must make a more reasoned consideration of the science involving this population.

c. Final Arguments in the Debate: Reducing Cost & Aligning Texas with National Trends

Although unattached to particular provisions in the bill, two final arguments were important parts of the debate: reducing the cost of seclusion and aligning Texas with national trends. First, although data from adult prisons points to the unnecessary expense of solitary confinement, Texas lacks similar data regarding the cost of disciplinary seclusion in juvenile facilities. As a result, proponents of the bill faced difficulties demonstrating the cost-saving advantages of a restriction on the use of disciplinary seclusion.

At the April 23, 2013, public hearing, county juvenile facility officials asserted that disciplinary seclusion is necessary to control inmates' behavior in juvenile facilities.[142] Proponents argued that the bill, if passed, would only *limit* prolonged periods of disciplinary seclusion.[143] Therefore, officials would still be able to use short periods of disciplinary seclusion for low-level behavioral offenses and prolonged periods of disciplinary seclusion when necessary. Furthermore, research has shown a correlation between the use of solitary confinement and levels of violence and other behavioral problems within penal systems.[144] In Mississippi, there was a reduction in prisoner-on-prisoner violence and prisoner-on-staff violence as a result of limiting the use of administrative segregation.[145] However, the arguments of the county officials were yet again more convincing to the legislators because of their practical experience working with youth in juvenile facilities.

Second, S.B. 1517 would have put Texas in line with national trends because it would have required juvenile facilities to discipline juveniles in a way that would have taken into account their age and developmental vulnerabilities. The introduced S.B. 1517 and the proposed C.S.S.B. 1517 required that "[t]he board shall review . . . and incorporate best practices."[146] This provision would have ensured that Texas would not only be on par with other states, but that Texas would be an exemplary state.

However, some Texas legislators continue to view juveniles in the justice system as hardened criminals. The argument that rethinking the use of disciplinary seclusion puts Texas in line with national trends may

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[142] *Hearing on S.B. 1517*, *supra* note 97.

[143] *Id.*

[144] *See generally* Holly Miller & Glenn Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. & MENTAL HEALTH 85 (1997).

[145] Jacobson, *supra* note 55.

[146] Proposed C.S.S.B. 1517, supra note 96; S.B. 1517, *supra* note 90.

not have been convincing for a state that prides itself on its unique character.

VI. CONCLUSION

Considering the harmful effects of juvenile disciplinary seclusion and the potential for facilities to abuse the practice, legislative reform is necessary. While legislation is clearly the answer, the path to reform remains a question. Must there be another lawsuit like *Morales* to highlight the issue?[147] Must there be another sex scandal, like the one in 2007, to move legislators to action?[148] Although the 83rd legislative session did not result in meaningful legislative reform, the S.B. 1517 saga exposed the main weaknesses of the legislative campaign to reform juvenile seclusion in Texas: 1) a lack of substantive data; and 2) opposition from detention facilities. However, there are cures to these two ills. First, the 83rd legislative session did yield a bill, S.B. 1003, which requires improved data collection and allows for an independent third party review of seclusion in juvenile facilities. This bill might produce some of the needed data to effectuate the arguments made regarding S.B. 1517. Second, in anticipation of the next legislative session and to communicate why the benefits of reform outweigh the potential cost to detention facilities, proponents can build relationships with the facilities, garner their support, and find a facility willing to represent itself as the model of reform. Texas must send its anti-rehabilitative juvenile justice policy to the history books, and ensure that it moves forward with the nation to protect juvenile mental health in a way that comports with American constitutional values.

[147] Morales v. Turman, 364 F. Supp. 166, 173 (E.D. Tex. 1973).
[148] Moreno, *supra* note 8.