

# BEYOND REHABILITATION: CONSTITUTIONAL VIOLATIONS ASSOCIATED WITH THE ISOLATION AND DISCRIMINATION OF TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM

**Abstract:** The juvenile justice system is predicated on a theory of rehabilitation with concern for protecting juveniles and society. For lesbian, gay, bisexual, and transgender (“LGBT”) youth, however, the system has developed into a punitive arrangement. LGBT youth face higher rates of criminalization and incarceration for non-violent crimes than any other group of youth. They also face unique threats, including sexual, physical, and emotional harassment; isolation; and a lack of medical care. Transgender youth are especially impacted. In response, victims have increasingly brought constitutional claims against federal prison officials for unconstitutional conditions of confinement. The courts are inconsistent on whether the judiciary should utilize the protections of the Fourteenth Amendment’s due process clause or the Eighth Amendment’s proscription against cruel and unusual punishment to evaluate juvenile conditions of confinement cases. This Note weighs the two approaches to determine that the due process clause is more protective of transgender and LGBT juveniles more broadly.

## INTRODUCTION

As President Obama keenly noted, “We’ve got to make sure our juvenile justice system remembers that kids are different. Don’t just tag them as future criminals. Reach out to them as future citizens.”<sup>1</sup> The juvenile justice system focuses on the needs of incarcerated juveniles because of an understanding that they are distinct from adults and should therefore be subject to different standards.<sup>2</sup> President Obama recently prohibited prisons from placing juveniles in

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<sup>1</sup> Barack Obama, President of the United States, Remarks by the President at the 106th NAACP National Convention (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<https://perma.cc/PE2K-55TR>] (discussing the necessity for reforms of the juvenile justice system to decrease incarceration and protect youth).

<sup>2</sup> See Jody Marksamer, *And by the Way, Do You Know He Thinks He’s a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Juvenile Delinquency Courts*, 5 SEXUALITY RES. & SOC. POL’Y 72, 75 (2008) (discussing how law, policy, and legal representation

solitary confinement, based on recommendations by the U.S. Department of Justice (“DOJ”) that describe the psychologically damaging effects of this practice, particularly on juvenile prisoners.<sup>3</sup>

Despite the purportedly greater protection for incarcerated youth in the justice system, lesbian, gay, bisexual, and transgender (“LGBT”) youth, especially transgender youth, are more likely to be incarcerated and face numerous abuses in confinement, due to the stigmatization of their gender identities and/or sexual orientation.<sup>4</sup> In one of many common stories, Destiny, a transgender girl with no record of a violent crime, was placed in T-Max, a boys’ juvenile detention center, normally meant for those with a prolonged history of violence.<sup>5</sup> Due to her gender expression, while in this facility, Destiny faced sexual assault and the threat of violence from other inmates, and endured harassment and emotional abuse from staff.<sup>6</sup> Additionally, facility staff punished Destiny for her gender expression, claiming that her everyday various behaviors, such as her walk and her manner of dress, were sexual.<sup>7</sup> Destiny’s file

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have regularly failed transgender youth in juvenile delinquency systems in the United States); Obama, *supra* note 1 (same).

<sup>3</sup> See U.S. DEP’T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 1, 101, 114 (2016), <https://www.justice.gov/dag/file/815551/download> [<https://perma.cc/2G9A-Q72K>] (discussing the problems associated with the use of solitary confinement in U.S. prisons); Barack Obama, Opinion, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST, Jan. 25, 2016, [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html?tid=a\\_inl](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl) [<https://perma.cc/MXK5-YPUB>] (discussing the need for punishment to correspond to the crime, which solitary confinement does not for juveniles).

<sup>4</sup> See KATAYOON MAJD ET AL., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 1, 51–52, 61, 104–06 (2009) (examining the circumstances facing lesbian, gay, bisexual, and transgender (“LGBT”) youth in juvenile courts across the country). The Equity Project, a coalition of advocacy groups, demonstrated how the juvenile justice system discriminates against LGBT youth in the form of intolerable living conditions, isolation, and abuse. *Id.* at 104–06. A 2010 survey illustrated that LGBT youth have experienced abuse, homelessness, and other strife at a rate twice their peers. See Angela Irvine, *We’ve Had Three of Them: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 689 (2010) (describing a national survey of the juvenile justice system to bring attention to incarceration of LGBT youth at disproportionate rates and the inhumane treatment they face while confined). The findings also showed that LGBT youth are more likely to be detained for minor crimes and continually abused and ostracized, resulting in a cycle of incarceration. See *id.*

<sup>5</sup> See Marksamer, *supra* note 2, at 77, 79 (describing how Destiny was sent to T-Max, not because she was violent, but because other facilities refused to take her on the basis of her transgender identity).

<sup>6</sup> *Id.* at 77. In one instance, a fellow inmate grabbed Destiny, pushed her onto the bed, got on top of her, and rubbed his erect penis against her backside as he made lewd remarks. *Id.* at 82.

<sup>7</sup> *Id.* at 82. For example, staff members tried to force Destiny to behave in a manner more commonly associated with boys. *Id.* This included banning her from crossing her legs or clicking her tongue in what was deemed a feminine manner. *Id.* Preventing someone from expressing their gender identity can create stress and anger, undermining an incarcerated youth’s rehabilitation. *Id.*

contained many violations related to Destiny's gender expression, including violations related to her manner of dress and dance.<sup>8</sup>

In a series of interviews by the Equity Project, a coalition between Legal Services for Children, the National Center for Lesbian Rights, and the National Juvenile Defender Center, it was found that many officials in the juvenile justice system believe that LGBT youth have mental health issues or are sexually aggressive toward others.<sup>9</sup> The interviews showed that LGBT youth are sexually objectified more than their peers.<sup>10</sup> This hyper-sexualization of LGBT youth results in increased prosecution for consensual sex in comparison to their non-LGBT peers.<sup>11</sup> This leads to the classification of many LGBT youth as sex offenders merely because of their gender identity or sexual orientation.<sup>12</sup> As a result of this classification, LGBT youth are often placed with legitimate sexual offenders, increasing their chances of sexual assault.<sup>13</sup>

In addition to sexual offender classifications, transgender youth specifically are often housed according to their birth sex in order to make them fit within the general population, which is inapposite to their gender expression.<sup>14</sup> Along with taking an emotion toll, this creates the opportunity for more sexual and physical abuse.<sup>15</sup> Unfortunately, reports show many instances of facility staff instigating fights and abuse between youth and consciously allowing injury to LGBT youth.<sup>16</sup>

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

<sup>9</sup> MAJD ET AL., *supra* note 4, at v, 52, 104. These perceptions lead to discrimination, including isolation or shaming under the guise of protecting other youths. *Id.* at 104–07.

<sup>10</sup> *Id.* at 104.

<sup>11</sup> See JEROME HUNT & AISHA MOODIE-MILLS, CTR. FOR AM. PROGRESS, *THE UNFAIR CRIMINALIZATION OF GAY AND TRANSGENDER YOUTH: AN OVERVIEW OF THE EXPERIENCES OF LGBT YOUTH IN THE JUVENILE JUSTICE SYSTEM* 5 (2012) (reviewing the experiences of LGBT youth in the juvenile justice system). This hyper-sexualization of gay and transgender youth results in overly restrictive confinement, conveying the message to LGBT youth that their sexuality and gender expression is wrong, and exposing them to further abuse. *Id.* at 5–6.

<sup>12</sup> Laura Garnette et al., *Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth and the Juvenile Justice System*, in *JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE* 156, 167 (Francine T. Sherman & Francine H. Jacobs eds., 2011) (discussing how many LGBT youth experience social stigma and abuse from their families and peers, resulting in negative outcomes, including involvement in the juvenile justice system, where they face even more abuse).

<sup>13</sup> See Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 428–29 (2006) (arguing that officials within the child welfare and justice systems react differently to LGBT youth than other youth, including limiting their access to services and allowing them to face violence and harassment); Sarah Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1094–95 (discussing why attorneys representing children who are perceived by others to be a sexual minority must zealously advocate on behalf of their clients because of the severe levels of danger facing the children).

<sup>14</sup> HUNT & MOODIE-MILLS, *supra* note 11, at 6.

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

<sup>16</sup> MAJD ET AL., *supra* note 4, at 103.

To add to these practices, some facilities will put transgender youth in solitary confinement or isolate them without any reason, purportedly for their own safety, which further stigmatizes them.<sup>17</sup> Other times, this isolation is justified for the safety of others, predicated on the mistaken assumption that LGBT youth are sexual predators.<sup>18</sup> Most often, placement in isolation is based purely on a LGBT youth's gender expression and/or sexual orientation.<sup>19</sup> The American Psychiatric Association ("APA") has stated that isolation is punitive and may have a lasting, negative emotional impact on transgender youth.<sup>20</sup> Isolation can stop youth from experiencing everyday activities including recreation and socialization, which is extremely important in this stage of their lives.<sup>21</sup> Courts have reiterated the punitive nature of the isolation or segregation of youth for long periods of time thus making it impermissible for such youth to be placed in isolation; a position reinforced by President Obama and the DOJ.<sup>22</sup>

Access to adequate health care is another issue specifically facing transgender youth.<sup>23</sup> Courts have found that the Fourteenth Amendment protects all juvenile detainees by ensuring that they have access to adequate health care as a basic condition of confinement, though the contours of this right are unclear.<sup>24</sup> This affirmative right to safety imposes a corresponding duty on the

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<sup>17</sup> See HUNT & MOODIE-MILLS, *supra* note 11, at 6 (discussing the stigmatization of LGBT youth in the juvenile justice system). Protecting the safety of LGBT youth is a valid concern considering the abuse they face. See MAJD ET AL., *supra* note 4, at 106 (discussing the numerous abuses facing LGBT youth in prison). Instead of isolating LGBT youth, there are much fairer safeguards, including better staffing, better management, and various programming. *Id.* at 106–07.

<sup>18</sup> See SHANNON WILBER ET AL., *SERVING LGBT YOUTH IN OUT-OF-HOME CARE: CWLA BEST PRACTICE GUIDELINES 7* (Julie Gwin ed., 2006), available at <http://www.nclrights.org/legal-help-resources/resource/child-welfare-league-of-america-cwla-best-practice-guidelines-serving-lgbt-youth-in-out-of-home-care/> [<https://perma.cc/79NC-24QX>] (providing a policy and practice guide for working effectively with LGBT youth in child welfare and juvenile settings).

<sup>19</sup> MAJD ET AL., *supra* note 4, at 107; Estrada & Marksamer, *supra* note 13, at 428.

<sup>20</sup> HUNT & MOODIE-MILLS, *supra* note 11, at 6.

<sup>21</sup> *Id.*; Marksamer, *supra* note 2, at 74. LGBT youth reported to the Equity Project that isolation alienated them and made them feel that "it's not okay to be gay." MAJD ET AL., *supra* note 4, at 107.

<sup>22</sup> See *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1148 (D. Haw. 2006) (asking defendants to stop the discriminatory, abusive behavior, including isolation, against LGBT or LGBT perceived youth); U.S. DEP'T OF JUSTICE, *supra* note 3, at 101, 114 (discussing the problems associate with solitary confinement); Obama, *supra* note 3 (condemning solitary confinement for juveniles). Expert evidence supported the conclusion that such isolation was not allowed as a rehabilitative practice in the juvenile justice system. See *R.G.*, 415 F. Supp. 2d at 1148–49.

<sup>23</sup> MAJD ET AL., *supra* note 4, at 112.

<sup>24</sup> U.S. CONST. amend. XIV, § 1; *A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.*, 372 F.3d 572, 584 (3d Cir. 2004) (assessing the facility's treatment of the prisoner's medical needs under the Fourteenth Amendment); *Alexander S. v. Boyd (Alexander S. D)*, 876 F. Supp. 773, 788 (D.S.C. 1995) (recognizing minimal health care as a traditional due process interest of conditions of confinement claims).

state to provide protection from both mental and physical harm.<sup>25</sup> Advocates have reported stories where their clients were forced to undergo conversion therapy in order to change their gender expression or sexuality.<sup>26</sup> Furthermore, when transgender youth request medical intervention in order to transition to match their biological sex through hormone therapy, they are often denied care.<sup>27</sup> Such treatments are necessary for some youth to fully acclimate and achieve comfort with their gender identity, which would support their mental and emotional health.<sup>28</sup>

This Note analyzes conditions of confinement claims for incarcerated LGBT youth, with a focus on transgender youth, to determine whether such cases should be analyzed through the lens of the Eighth Amendment's prohibition on cruel and unusual punishment or through the Fourteenth Amendment's due process clause.<sup>29</sup> Part I of this Note describes the substantive due process framework for conditions of confinement claims for pre-trial adult detainees, and the Eighth Amendment framework for post-conviction adult detainees.<sup>30</sup> Part II discusses the development of the due process right for incarcerated juveniles in light of the specialized need to protect them while in custody.<sup>31</sup> Part III explains how and why courts differ on whether to apply the due process

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<sup>25</sup> *Alexander S. I.*, 876 F. Supp. at 797–98. Protection from harm thus implicitly includes protection from the violence and harassment of other inmates and officials. *Id.* at 798.

<sup>26</sup> See HUNT & MOODIE-MILLS, *supra* note 11, at 7 (describing social worker or court mandated conversion therapy, which have been determined to be unsafe); MAJDET AL., *supra* note 4, at 64 (describing this practice of “reparative therapy,” which has been condemned by every major U.S. health organization); Valentine, *supra* note 13, at 1058 n.21 (describing facilities where reparative therapy includes physical and behavioral modification techniques).

<sup>27</sup> See *De'Lonta v. Johnson*, 708 F.3d 520, 523 (4th Cir. 2013) (holding that the plaintiff plausibly plead that the denial of sex reassignment surgery for a gender identity disorder was deliberate indifference to a serious medical need and violated her Eighth Amendment rights); see also CATHERINE HANSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 20 (2014) (discussing the denial of transition health care, which is often necessary for the medical health of inmates); AISHA C. MOODIE-MILLS & CHRISTINA GILBERT, CTR. FOR AM. PROGRESS, RESTORING JUSTICE: A BLUE-PRINT FOR ENSURING FAIRNESS, SAFETY, AND SUPPORTIVE TREATMENT OF LGBT YOUTH IN THE JUVENILE JUSTICE SYSTEM 10 (2014) (arguing why adequate medical care, including transition related care, is necessary for transgender youth).

<sup>28</sup> MAJDET AL., *supra* note 4, at 50–51; MOODIE-MILLS & GILBERT, *supra* note 27, at 10. Some federal courts have determined the necessity of transition-related health care for transgender individuals, but it has not yet been mandated treatment provided by prisons. *De'Lonta*, 708 F.3d at 525; HANSENS ET AL., *supra* note 27, at 20; MOODIE-MILLS & GILBERT, *supra* note 27, at 10. Both the American Medical Association and the American Psychological Association (“APA”) have publicly recognized the necessity for transition-related medical care and have called for improved access to these treatments. MOODIE-MILLS & GILBERT, *supra* note 27, at 10. Appropriate medical care gives transgender youth greater hope and respect for the system. *Id.*

<sup>29</sup> See *infra* notes 130–186 and accompanying text.

<sup>30</sup> See *infra* notes 34–57 and accompanying text.

<sup>31</sup> See *infra* notes 58–75 and accompanying text.

clause or the Eighth Amendment to juvenile conditions of confinement cases.<sup>32</sup> Part IV evaluates why the due process clause is the necessary and reasonable standard to provide protection to incarcerated transgender juveniles through the judicial system as to the systemic conditions they face.<sup>33</sup>

## I. THE ADULT JUSTICE SYSTEM AND CONDITIONS OF CONFINEMENT CLAIMS

The adult justice system is fundamentally different from the juvenile justice system and calls for distinct standards of judicial review based on detainee status for conditions of confinement claims.<sup>34</sup> Section A of this Part describes the substantive due process requirements for conditions of confinement claims for pre-trial adult detainees.<sup>35</sup> In contrast, Section B explains the Eighth Amendment requirements for conditions of confinement claims for convicted adult detainees.<sup>36</sup>

### A. Pre-Trial Detainees Receive Substantive Due Process Protection

The Fourteenth Amendment provides citizens protection from state intrusions into “life, liberty, or property, without due process of law.”<sup>37</sup> The U.S. Supreme Court has recognized that due process has a substantive element, providing a remedy against governmental violations of rights even when those rights are not explicitly enumerated in the text of the Constitution.<sup>38</sup> In 1979, in *Bell v. Wolfish*, the Court established an objective standard by which pre-trial detainees’ conditions of confinement could be evaluated to prevent abuse

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<sup>32</sup> See *infra* notes 76–129 and accompanying text.

<sup>33</sup> See *infra* notes 130–186 and accompanying text.

<sup>34</sup> Compare *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (holding that a case involving prison inmates should be analyzed under the Eighth Amendment), with *R.G.*, 415 F. Supp. 2d at 1152 (holding that juveniles adjudicated delinquent have not been convicted and their conditions of confinement claims should be evaluated under the due process clause).

<sup>35</sup> See *infra* notes 37–44 and accompanying text.

<sup>36</sup> See *infra* notes 45–57 and accompanying text.

<sup>37</sup> U.S. CONST. amend. XIV, § 1.

<sup>38</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992) (recognizing that the due process clause provides implicit substantive protections from intrusions on a citizen’s liberty by the state); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (recognizing the right of privacy as implicit in the Fourteenth Amendment’s concept of personal liberty); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”). But see *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) (recognizing a substantive due process right but holding that prisoners did not have sufficient deprivation of their liberty by negligent state officials to amount to a violation of this right because substantive due process was traditionally applied to deliberate deprivations by government actors).

against incarcerated individuals.<sup>39</sup> The Court held that substantive due process protects pretrial adult detainees from conditions of confinement that objectively amount to punishment.<sup>40</sup>

Two factors must be present for conditions of confinement to be classified as punitive.<sup>41</sup> First, the detainee must establish they were subjected to a disability or a restrictive condition that harmed them beyond merely interfering with their comfort.<sup>42</sup> Second, a court must determine whether the condition imposed is an incident of some legitimate governmental purpose or whether it is imposed for the purpose of punishment.<sup>43</sup> As long as the condition applied to pre-trial detainees passes rational basis scrutiny, it does not amount to a substantive due process violation because it is not a punishment.<sup>44</sup>

### *B. Post-Conviction Detainees Receive Cruel and Unusual Punishment Protection*

On the other hand, the protections offered to post-conviction adult prisoners regarding conditions of confinement claims are very different.<sup>45</sup> The Eighth Amendment states that not just any punishments can be cruel and unusual.<sup>46</sup> The Supreme Court has interpreted this clause broadly beyond severe physically-damaging punishments to those that include the creation of unnecessary levels of pain or are disproportionate to the crime upon which the conviction

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<sup>39</sup> See *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979) (holding that the confinement of two inmates in individual rooms and other conditions in a federal short-term custodial facility did not deny the inmates due process); David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions of Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 423 (2009) (arguing that Eighth Amendment standards do not adequately address pretrial detainees' substantive due process rights).

<sup>40</sup> *Bell*, 441 U.S. at 535.

<sup>41</sup> *Id.* at 538

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

<sup>43</sup> *Id.* at 539. In part this turns on whether there is an alternative government purpose to which the condition may be rationally related and whether the condition is excessive in comparison to that purpose. See *id.* at 537–38 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (holding that statutes divesting an American of his citizenship for leaving or remaining outside of the United States at a time of war and national emergency to evade military service, are unconstitutional)).

<sup>44</sup> *Id.* at 539. For example, a prison may have a legitimate interest in maintaining security from the outside. *Id.* To determine if the condition of confinement rises beyond a reasonable condition to the level of punishment, courts weigh a variety of subjective and objective factors, including the level of restraint, the past punitive nature of the condition, the necessity of scienter, if it is meant to fulfill the goals of punishment, whether it involves a criminal act, and how closely related it is to another objective. *Kennedy*, 372 U.S. at 168–69.

<sup>45</sup> See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding that prison officials may be liable under the Eighth Amendment if there was a serious risk of harm that officials ignored by placing a transsexual prisoner in the general population).

<sup>46</sup> See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

rests.<sup>47</sup> Conditions of confinement amount to cruel and unusual punishment when imprisoned persons are not even given basic life necessities.<sup>48</sup> As society's decency norms evolve, the limitations of this provision become more fluid.<sup>49</sup> In 1994, in *Farmer v. Brennan*, the U.S. Supreme Court held that a subjective test must be used to hold a prison official liable under an Eighth Amendment claim for denying an inmate humane conditions of confinement.<sup>50</sup> The first prong of the test to establish a violation under the Eighth Amendment is whether there is serious harm caused by the restrictions of prison officials.<sup>51</sup> Second, prisoners must establish that prison officials exhibited subjective "deliberate indifference" to their basic needs.<sup>52</sup> This test requires a more particularized, fact-specific inquiry, requiring greater evidence of intent to harm than the test used in substantive due process claims.<sup>53</sup>

Some federal circuits have concluded that either the due process clause or Eighth Amendment standards can be utilized by the courts in conditions of confinement claims, resulting in similar protections for pretrial detainees and con-

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<sup>47</sup> Compare *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death sentence for rape was cruel and unusual punishment because it was disproportionate to the crime), with *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (holding that placing two prisoners in one cell was not cruel and unusual punishment because it does not create undue pain and is not disproportionate to the crime), *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that a death sentence for the crime of murder was constitutionally permissible because it is proportionate to the crime), and *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1879) (holding that capital punishment through shooting is not cruel and unusual punishment because it does not create unnecessary pain).

<sup>48</sup> *Rhodes*, 452 U.S. at 355–56.

<sup>49</sup> *Id.* at 346; James Alec Gelin, *Unwarranted Punishment: Why the Practice of Isolating Transgender Youth in Juvenile Detention Facilities Violates the Eighth Amendment*, 18 U.C. DAVIS J. JUR. L. & POL'Y 1, 33 (2014) (describing how society's standards of decency change over time).

<sup>50</sup> *Farmer*, 511 U.S. at 837 (holding that prison officials may be liable under the Eighth Amendment for conditions of confinement only if they knew about a serious harm risk and deliberately ignored this risk).

<sup>51</sup> *Id.* at 834.

<sup>52</sup> *Id.* In 1976, in *Estelle v. Gamble*, the Supreme Court held that convicted inmates had to prove that prison officials were deliberately indifferent to their serious medical needs to state an Eighth Amendment claim. 429 U.S. 97, 104–05 (1976) (holding that, although deliberate indifference to a prisoner's serious illness or injury constitutes cruel and unusual punishment, the plaintiff's complaint was insufficient to state a cause of action). The deliberate indifference requirement was then extended to Eighth Amendment claims alleging unconstitutional conditions of confinement. See *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (holding that prisoners claiming that conditions of confinement constituted cruel and unusual punishment were required to show deliberate indifference on the part of prison officials). Therefore, a prison official can be held liable under the Eighth Amendment for the denial of humane conditions of confinement only if the official knows of and disregards an excessive risk to inmate health or safety, forming the requisite intent. *Farmer*, 511 U.S. at 837.

<sup>53</sup> Compare *Farmer*, 511 U.S. at 837 (holding that a prison official can only violate the Eighth Amendment for conditions of confinement by actually knowing and ignoring a risk of serious harm), with *Bell*, 441 U.S. at 535, 538 (holding that a restriction violates the due process clause if it is not "reasonably related to a legitimate non-punitive governmental purpose").

victed prisoners under both standards.<sup>54</sup> Contrary to this conclusion, there is a clear break in the standard established in *Farmer* (setting the standard for Eighth Amendment protection) as opposed to *Bell* (setting the standard for substantive due process protection).<sup>55</sup> Requiring pre-trial detainees to establish deliberate indifference by prison officials for an Eighth Amendment claim requires an inquiry into officials' intent, unlike the objective standard under substantive due process, which requires only a determination as to whether the conditions themselves are punitive.<sup>56</sup> Therefore, an Eighth Amendment claim requires a plaintiff to have knowledge as to what the official's intention was at the time of the restriction, rather than a substantive due process claim, in which the court only looks at the objective effects of the condition to make a judgment about whether the conditions amounted to punishment.<sup>57</sup>

## II. THE DUE PROCESS RIGHTS ESTABLISHED FOR INCARCERATED JUVENILES

In contrast to the adult criminal justice system, the juvenile justice system was initially established based on the presumption that children deserve more care and protection than adults because of the philosophical purposes underlying each system.<sup>58</sup> The socially reformatory philosophy of the juvenile court focuses on the issues facing children and broader society and then provides protection and rehabilitation for both parties.<sup>59</sup> It does not seek to fix criminal responsibility or provide punishment.<sup>60</sup> U.S. Supreme Court jurisprudence has

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<sup>54</sup> See, e.g., *Suprenant v. Rivas*, 424 F.3d 5, 18 (1st Cir. 2005) (holding that the limitations of Fourteenth Amendment liberty interests are equal to those of the Eighth Amendment); *Marsh v. Butler County*, 268 F.3d 1014, 1024 n.5 (11th Cir. 2001) (stating that the 11th Circuit has previously stated that the standards for providing for the conditions of incarcerated people is the same under the Fourteenth and Eighth Amendments); Gorlin, *supra* note 39, at 426–27 (describing courts who use these standards “interchangeably,” applying *Bell*'s “amounts to punishment language,” along with the Eighth Amendment's definition of punishment to pre-trial detainees' claims).

<sup>55</sup> See Gorlin, *supra* note 39, at 431 (describing the two different standards).

<sup>56</sup> See *id.*

<sup>57</sup> Compare *Farmer*, 511 U.S. at 837 (establishing the subjective Eighth Amendment test), with *Bell*, 441 U.S. at 535, 538 (establishing the objective, substantive due process test).

<sup>58</sup> Marksamer, *supra* note 2, at 75; Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 JUV. JUST. 15, 16, 19 (2008) (arguing for a newer “developmental model” in reforming the juvenile justice system). When youth crime rates rose and were attributed to the failure of the rehabilitative model, more punitive policies developed, holding youth responsible and punishing them for their crimes. Scott & Steinberg, *supra*, at 16, 19. Because of these reforms, youth were regularly transferred into the adult system. *Id.* at 16. Scholars argue for the developmental model to allow for juveniles to be subject to a lower standard of punishment than adults while still remaining accountable for crimes. *Id.*

<sup>59</sup> *Kent v. United States*, 383 U.S. 541, 554 (1966) (holding that the juvenile defendant was entitled to certain statutory procedural protections uniquely offered by the juvenile court because of his status as a juvenile).

<sup>60</sup> *Id.* This is different from the traditional purpose of the adult criminal justice system, which is designed to punish individuals for their crimes to a proportionate degree—retribution for their crimes.

developed a line of cases around concerns for adolescent development and the limited culpability during this time in a juvenile's life.<sup>61</sup> The Court has limited the extent of punishment against juveniles because of this unique concern.<sup>62</sup> Section A of this Part describes the history of the juvenile justice system before juveniles had an established due process right.<sup>63</sup> Section B describes the development of due process rights for juveniles.<sup>64</sup>

### A. Juvenile Justice Before Juvenile Due Process Rights

In the history of juvenile justice, the focus on the guidance and rehabilitation of the child was achieved because the state was *parens patriae* and the system was not adversarial.<sup>65</sup> The right of the state, as *parens patriae*, to deny

See Megan F. Chaney, *Keeping the Promise of Gault: Requiring Post-Adjudicatory Juvenile Defendants*, 19 GEO. J. ON POVERTY L. & POL'Y 351, 352 (2012) (comparing the goals of the adult justice system with those of the juvenile justice system to illustrate why the role of the post-adjudicatory lawyer would help the juvenile court be accountable to its original purposes).

<sup>61</sup> See *Miller v. Alabama*, 132 S. Ct. 2455, 2463–64 (2012) (holding that the sentencing of two juvenile offenders to mandated life imprisonment without the possibility of parole was unreasonable because it did not consider the lesser degree of culpability and opportunity for change inherent to juveniles); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (overturning the trial court sentencing of the defendant to life in prison without parole for a juvenile because it conflates with the purpose of rehabilitation, which juveniles need the most); *Roper v. Simmons*, 543 U.S. 551, 572–73, 578–79 (2005) (setting aside the death sentence of a juvenile convicted of first-degree murder because of the lack of culpability of juveniles). This Note will refer to *Miller*, *Graham*, and *Roper* collectively as the “adolescent development cases.”

<sup>62</sup> See Marksamer, *supra* note 2, at 75 (describing the difference between the juvenile and adult justice system described in *Kent v. United States*). In 2005, in *Roper v. Simmons*, the U.S. Supreme Court held that the Eighth Amendment bans the execution of individuals under eighteen years of age because capital punishment must be limited to the worst offenders with such high degrees of culpability as to warrant execution. 543 U.S. at 568, 578–79. Unlike these worst offenders, the Court held that juveniles were not as mature as adults, lacked responsibility, were more easily pressured, and were still developing their personalities and characters. *Id.* at 568–70. Because of these differences, juveniles' conduct do not rise to the level of blameworthiness as the conduct of an adult. *Id.*

<sup>63</sup> See *infra* notes 65–68 and accompanying text.

<sup>64</sup> See *infra* notes 69–75 and accompanying text.

<sup>65</sup> See *In re Gault*, 387 U.S. 1, 16 (1967) (discussing the petition for writ of habeas corpus to secure release of a 15-year-old who had been committed as juvenile delinquent to a state industrial school). *Parens patriae* refers to the state as a sovereign in its “[c]apacity as a provider of protection to those unable to care for themselves.” *Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014). Undermining the purpose of a distinction for the juvenile justice system, prosecutors may effectuate the transfer of juvenile offenders to the adult court through waivers when a crime is particularly heinous. See *Kent*, 383 U.S. at 552–53 (holding that although prosecutors have discretion in waiver determinations, it still requires procedural process to satisfy basic fairness, statutory, and due process rules); Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights*, 110 PENN ST. L. REV. 233, 244 (2005) (discussing the need to carefully consider any state scheme that contradicts itself by promoting the protection of juveniles by the state and then turns around and tries a juvenile as an adult). The prosecutorial waiver is in conflict with the role of the prosecutor as *parens patriae* for the state and requires the prosecutor to fight against the best interests of the juvenile. See Green, *supra*, at 245 (same). This conflict is inherently unconstitutional because it is a conflict of interest in

children procedural rights available to adults was justified because a child, unlike an adult, had a right to custody, not to the liberties afforded under the due process clause.<sup>66</sup> If a child was delinquent, the state could intervene without depriving the child of his or her due process rights by merely providing the custody to which the child was entitled.<sup>67</sup> At this point, no due process right existed for juveniles.<sup>68</sup>

### B. Juvenile Due Process Rights Developed

In 1967, in *In re Gault*, the U.S. Supreme Court held that by denying juveniles due process requirements, they received unequal treatment and remedies compared to adults.<sup>69</sup> The Court compelled the state to provide and improve provisions for court action relating to juvenile confinement that were consistent with the due process clause, thereby creating a due process right for juveniles.<sup>70</sup> As a result of *In re Gault*, all restrictions of liberty within juvenile justice facilities were made subject to the substantive due process standard, requiring all measures be “reasonably related” to a legitimate state interest to be constitutional.<sup>71</sup>

The due process clause guarantees incarcerated juveniles the right to reasonably safe conditions of confinement, “freedom from unreasonable bodily

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violation of the defendant’s due process rights. *Id.* at 253–54. This harkens back again to the role of the state to protect the child, not punish the child. *See Kent*, 383 U.S. at 551–52 (ensuring that juveniles were provided certain constitutional rights because it would not make sense to give them less protection than to adults engaging in criminal activity). Moreover, the Court in *In re Gault* also read in a due process protection for juveniles in order to ensure that the state remains in the role of the child’s advocate and protects the child’s interest in conjunction with the doctrine of *parens patriae*. *In re Gault*, 387 U.S. at 25–26.

<sup>66</sup> *See* U.S. CONST. amend. XIV, § 1; *In re Gault*, 387 U.S. at 17 (granting the rights of “life, liberty and property” that cannot be taken away without “due process of law”); *see also* Curtis C. Shears, *Legal Problems Peculiar to Children’s Courts*, 48 A.B.A. J. 719, 720 (1962) (discussing the right of children to custody by the state when her parents cannot provide it, as opposed to liberty rights).

<sup>67</sup> *See In re Gault*, 387 U.S. at 17. The Court established that a delinquent child was one whose parents had not sufficiently performed their parental duties, requiring state intervention and custody for the child. *Id.* Thus, adjudications with these children were civil. *Id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.* at 19–20.

<sup>70</sup> *See id.* at 25. In fact, citing a past sociological study, the Court observed that juveniles may feel resentment when they are not provided with due process rights and may respond negatively to attempts at rehabilitation. *Id.* at 26 (citing STANTON WHEELER & LEONARD S. COTTRELL, *JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL* 33 (1966) (analyzing the history of juvenile justice and delinquency prevention)).

<sup>71</sup> *See Alexander S. v. Boyd (Alexander S. D)*, 876 F. Supp. 773, 798 (D.S.C. 1995) (holding that the Fourteenth Amendment due process clause, not the Eighth Amendment, governed action brought by incarcerated juveniles challenging conditions of confinement).

restraint,” and adequate training of prison officials to protect those interests.<sup>72</sup> The interest in “freedom from unreasonable bodily restraint” includes a requirement that a juvenile’s freedom can only be limited when there is a safety need that is reasonable under the circumstances.<sup>73</sup> Consequently, juvenile justice facilities have a legal obligation to protect the juveniles in their care from harm.<sup>74</sup> The facility administrators must make sure that there is an appropriate procedure in place in response to abuse to prevent further harm.<sup>75</sup>

### III. CONDITIONS OF CONFINEMENT CLAIMS AT JUVENILE DETENTION FACILITIES: JURISDICTIONAL DIFFERENCES

Courts differ on whether to analyze incarcerated juvenile’s conditions of confinement claims under the due process clause or the Eighth Amendment.<sup>76</sup> This Part describes and compares the two different constitutional standards applied by courts to juvenile conditions of confinement claims.<sup>77</sup> Section A

<sup>72</sup> See U.S. CONST. amend. XIV, § 1 (establishing citizen’s due process rights); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (holding that an intellectually disabled individual who was involuntarily committed to a state institution had constitutionally protected liberty interests under the due process clause in the conditions he faced while committed).

<sup>73</sup> See *Alexander S. I.*, 876 F. Supp. at 798. (holding that the due process clause guarantees the juvenile prisoners safety, meaning protection from others and from restrictions on the juveniles’ actions).

<sup>74</sup> See *Marksamer*, *supra* note 2, at 82 (discussing the constitutional protections to juveniles in facilities to be free from harm by other juveniles and officials).

<sup>75</sup> See *id.* (discussing how facility officials’ lack of response to abuse violates the Fourteenth Amendment rights of the juvenile being harmed and does not serve the purpose of rehabilitating the juvenile).

<sup>76</sup> See *Gelin*, *supra* note 49, at 6, 29–31 (arguing that the Supreme Court should provide Eighth Amendment protection to incarcerated juveniles rather than relying on the due process clause, though it has yet to decide this issue). Compare *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (reviewing the conditions of a state juvenile detention facility under the due process clause, which the court stated included the Eighth Amendment standard), *Hewett ex rel. H.C. v. Jarrard*, 786 F.2d 1080, 1085 (11th Cir. 1986) (applying the due process clause rather than the Eighth Amendment to a claim by a juvenile who was injured by a guard in a juvenile facility), *Santana v. Collazo*, 714 F.2d 1172, 1179–80 (1st Cir. 1983) (remanding the constitutionality of the isolation of juveniles in an industrial school based on the question of legitimate government purpose per the due process standard), *Milonas v. Williams*, 691 F.2d 931, 942–43 (10th Cir. 1982) (applying the *Bell v. Wolfish* due process standard to a claim against a school for youths with behavior problems placed there by the state), and *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1152 (D. Haw. 2006) (applying a due process analysis to the systemic harassment of LGBT youth in a juvenile facility), with *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 261 (3d Cir. 2010) (holding that a delinquent juvenile who was incarcerated in a maximum security center had a conditions of confinement claim falling within Eighth Amendment, not the Fourteenth Amendment), *Beers-Capitol v. Whetzel*, 256 F.3d 120, 144 (3d Cir. 2001) (holding that the Eighth Amendment *Farmer v. Brennan* test was the proper standard for a claim based on the sexual assault of a juvenile by an official at a juvenile detention facility), and *Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir. 1974) (holding that the use of beatings and tranquilizing drugs in a juvenile reformatory did not meet up to the societal standards of decency and violated the incarcerated juveniles’ Eighth Amendment rights).

<sup>77</sup> See *infra* notes 81–129 and accompanying text.

describes decisions of courts that have relied solely on the due process analysis for conditions of confinement claims for juveniles.<sup>78</sup> Section B describes courts that have responded to such claims under the Eighth Amendment, sometimes in conjunction with due process claims.<sup>79</sup> Finally, Section C compares the differences between the two analyses.<sup>80</sup>

### *A. Courts Which Rely Solely on Substantive Due Process for Juvenile Conditions of Confinement Cases*

Courts in several jurisdictions have held that claims relating to conditions of confinement in juvenile detention facilities require a due process analysis for juvenile detainees and juveniles declared delinquent.<sup>81</sup> The reasoning behind this application is that juveniles adjudicated delinquent have not been convicted and, because they should have more protections than adult detainees, their claims should be analyzed similarly to adult pre-trial detainees through a due process analysis.<sup>82</sup>

In 2006, in *R.G. v. Koller*, the U.S. District Court for the District of Hawaii held that harassment and isolation used by officials in a juvenile correctional facility against LGBT youth was a violation of the plaintiffs' substantive due process rights.<sup>83</sup> The court concluded that the correctional facility's actions were punishment for the juveniles' identities as LGBT people and were not justified by a legitimate governmental purpose.<sup>84</sup> In 1979, in *Bell v. Wolfish*,

<sup>78</sup> See *infra* notes 81–97 and accompanying text.

<sup>79</sup> See *infra* notes 98–108 and accompanying text.

<sup>80</sup> See *infra* notes 109–129 and accompanying text.

<sup>81</sup> *Gary H.*, 831 F.2d at 1432; *Hewett ex rel. H.C.*, 786 F.2d at 1084–85; *Santana*, 714 F.2d at 1179; *Milonas*, 691 F.2d at 942–43; *R.G.*, 415 F. Supp. 2d at 1152; see also *Alexander S. v. Boyd (Alexander S. II)*, 113 F.3d 1373, 1377 n.3 (4th Cir. 1997) (reviewing the conditions at state juvenile facilities under the standard of the due process clause of the Fourteenth Amendment); *Gelin*, *supra* note 49, at 28–29 (advocating for the extension of Eighth Amendment protections to transgender youth incarcerated in detention facilities instead of substantive due process protections).

<sup>82</sup> *R.G.*, 415 F. Supp. 2d at 1152; see *Gary H.*, 831 F.2d at 1432 (applying the Fourteenth Amendment to a conditions of confinement claim because “the Oregon juvenile justice system is noncriminal and nonpenal”); *Hewett ex rel. H.C.*, 786 F.2d at 1085 (applying the Fourteenth Amendment to a juvenile detainee’s claim based on his isolation and conditions while confined pending trial on delinquency charges); *Santana*, 714 F.2d at 1179 (noting the more careful due process interest and protections entitled to individuals who have not been convicted of a crime); *Milonas*, 691 F.2d at 942 (citing *Youngberg v. Romeo* and *Bell* to note that people who are involuntarily confined to a state institution are protected by the Fourteenth Amendment); *Gelin*, *supra* note 49, at 29 (discussing the logic of applying the due process analysis to juveniles as applied by *R.G. v. Koller*).

<sup>83</sup> *R.G.*, 415 F. Supp. 2d at 1154, 1156–57, 1162.

<sup>84</sup> See *id.* at 1133, 1152, 1156 (holding that three incarcerated LGBT youth would likely prevail at trial in showing that the correctional facility violated their due process rights by failing to protect them from relentless abuse). The court found that the facility did not protect LGBT youth from physical and psychological abuse, used isolation in misguided, ultimately punitive attempts to protect them, failed to create proactive policies to protect them, and failed to use a classification system that would help protect them, among other things. See *id.* at 1157.

the U.S. Supreme Court concluded that the legitimate governmental purpose test should be used to evaluate substantive due process violations in such circumstances.<sup>85</sup> In *R.G.*, the court held that the incarcerated youth had a liberty interest in personal security, which was violated by the systemic and continuous harassment against them based on their sexual orientation and gender identity.<sup>86</sup> In its analysis, the court refused to extend Eighth Amendment protection to the plaintiffs because it concluded that the Eighth Amendment applies to those who have been convicted of crimes, as opposed to the due process clause, which applies to those without convictions and juveniles adjudicated delinquent.<sup>87</sup> Moreover, the court reasoned that the Fourteenth Amendment was the proper avenue because the systemic treatment of LGBT youth created an inference of the officials' culpability without the requisite finding of intent necessary under the Eighth Amendment.<sup>88</sup> The Fourteenth Amendment had a lower evidentiary bar for the court to meet and enabled this decision to be made without the requirements of the Eighth Amendment.<sup>89</sup>

Similarly, the Ninth, Tenth, and Eleventh Circuits have applied the due process clause of the Fourteenth Amendment to judge state juvenile detention facilities.<sup>90</sup> In the juvenile justice setting, which is noncriminal, there must be a sufficient relationship between the purpose of the incarceration and the treatment of the person incarcerated.<sup>91</sup> For example, in 1987, in *Gary H. v. Heg-*

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<sup>85</sup> *Bell v. Wolfish*, 441 U.S. 520, 537–38 (1979).

<sup>86</sup> *R.G.*, 415 F. Supp. 2d at 1156. The record showed persistent, continuous harassment, rather than a few, discrete incidents. *See id.* If it had been merely a few, discrete incidents, this treatment would have implicated the Eighth Amendment's ban on cruel and unusual punishment, not the due process clause. *Id.* at 1154.

<sup>87</sup> *Id.* at 1152. This decision to not extend Eighth Amendment protection to the plaintiffs has been criticized by some. *See Gelin, supra* note 49, at 20 (arguing that society's "standards of decency" and traits unique to juveniles warrant that courts utilize the Eighth Amendment to protect youth in the juvenile justice system).

<sup>88</sup> *R.G.*, 415 F. Supp. 2d at 1154.

<sup>89</sup> *Id.* at 1152, 1154 (applying the "more protective" due process standard rather than the Eighth Amendment standard to conditions of confinement claims in a juvenile facility); Gorlin, *supra* note 39, at 433 (arguing that the substantive due process standard provides greater protections than the Eighth Amendment standard, which only creates a low baseline for the rights of pretrial detainees). Although the Eighth Amendment provides prisoners' protection only to the extent conditions are "cruel and unusual," substantive due process has no such limitations and offers protection for "fundamental liberties." Gorlin, *supra* note 39, at 436.

<sup>90</sup> *See, e.g., Gary H.*, 831 F.2d at 1431–32; *Hewett ex rel. H.C.*, 786 F.2d at 1084–85; *Milonas*, 691 F.2d at 942; *Alexander S. v. Boyd (Alexander S. I)*, 876 F. Supp. 773, 795–96 (D.S.C. 1995) (applying the due process standard to evaluate conditions of juveniles' confinement).

<sup>91</sup> *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that a detainee who is committed only because he is unable to proceed to trial cannot be held for longer than the time reasonably necessary to discover if he will be able to stand trial in the future). Moreover, in 1982, in *Youngberg v. Romeo*, the U.S. Supreme Court held that the due process clause guarantees involuntary committed individuals reasonably safe conditions of confinement. 457 U.S. 307, 315–16, 319, 324 (1982). This included physical safety and protection from overly restrictive conditions of confinement that unduly

strom, the Ninth Circuit Court of Appeals held that the protections offered by the due process clause included those of the Eighth Amendment, so the due process standard was the appropriate standard to review the conditions in a facility for the juvenile wards of the court.<sup>92</sup> The reasoning behind the application of the more protective substantive due process standard was the status of the detainees, as juveniles who had not been convicted and thus deserved more protection.<sup>93</sup>

Likewise, in 1997, in *Alexander S. v. Boyd* (“*Alexander S. I*”), the District Court of South Carolina heard a case where incarcerated juveniles challenged the conditions of confinement of the correctional facilities operated by the South Carolina Department of Juvenile Justice.<sup>94</sup> The court concluded that its role was limited to creating the minimal standards for constitutional violations on this issue, because of the two potentially contrasting concerns: juvenile rehabilitation and the crime rate.<sup>95</sup> The court determined that the due process clause was the appropriate constitutional standard to apply to conditions at the juvenile facilities because the juveniles were adjudicated delinquent, not convicted as adult criminals.<sup>96</sup> The court noted that the protections offered by the due process clause encompassed the lesser protections of the Eighth Amendment’s ban on cruel and unusual punishment because the due process clause is more broadly applicable to liberty interests.<sup>97</sup>

### *B. Courts That Rely on the Eighth Amendment for Juvenile Conditions of Confinement Cases*

Conversely, in 1994, in *Farmer v. Brennan*, the U.S. Supreme Court held that prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement when they are aware of the “substantial risk of serious harm” facing detainees and fail to limit this risk through reason-

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restrict freedom of action and are not reasonably related to legitimate security and safety needs. *Id.* at 324.

<sup>92</sup> *Gary H.*, 831 F.2d at 1432.

<sup>93</sup> *Id.* at 1432, 1437; *supra* notes 37–44 and accompanying text (examining the substantive due process standard).

<sup>94</sup> *Alexander S. I*, 876 F. Supp. at 777.

<sup>95</sup> *Id.* at 779. The court concluded that the rehabilitative efforts of the South Carolina Department of Juvenile Justice were ineffective and were returning juveniles back to the world with higher chances of engaging in crime than before, increasing rates of recidivism. *Id.* at 780. The court also recognized several liberty interests of the plaintiffs, including the right to sufficient medical care and sufficient programming. *Id.* at 788, 790. Programming was deemed sufficient if it allowed juveniles the chance to be rehabilitated per the purpose of their confinement, to protect both them and prison officials, and to ensure society’s safety once they were released. *Id.* at 790.

<sup>96</sup> *Id.* at 796.

<sup>97</sup> *Id.* (citing *Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977) (stating that the Eighth Amendment analysis applies only after the state has provided the due process protections relevant to criminal conviction, thus giving the state the right to impose punishment)).

able steps.<sup>98</sup> The Court relied on precedent, stating that the Constitution does not require that prisons be comfortable, but it also does not allow them to be unnecessarily cruel for adult prisoners.<sup>99</sup> Prison conditions for adults may be restrictive, but may not unnecessarily allow for harm that serves no legitimate punitive purpose.<sup>100</sup> This Eighth Amendment standard is much higher than that expected of due process claims because Eighth Amendment claims require proof of the subjective state of mind of officials, which is not implicated in the context of due process claims.<sup>101</sup>

Nonetheless, some courts, including the Third and Seventh Circuits do rely on the Eighth Amendment for juvenile conditions of confinement cases.<sup>102</sup> In 2001, in *Beers-Capitol v. Whetzel*, the Third Circuit Court of Appeals held that an Eighth Amendment analysis was proper to evaluate claims of sexual assault by a facility official brought by two female juveniles in a juvenile facility.<sup>103</sup> The court applied the two-step *Farmer* test to hold in favor of all but one defendant prison official who knew about the actions of the facility official who assaulted the girls.<sup>104</sup> The Third Circuit has stated that allegations concerning conditions of confinement by juveniles adjudicated delinquent are properly analyzed under the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>105</sup> Other courts have held that juvenile conditions of confinement cases should be examined under the Eighth Amendment, by justifying juvenile cases as somewhat criminal in nature, subject to similar procedures as criminal court and utilizing confinement as a form of punishment.<sup>106</sup>

For example, in 2011, in *Troy D. v. Mickens*, the U.S. District Court for the District of New Jersey held that the juvenile plaintiffs' claims that their

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<sup>98</sup> See *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (holding that a court could potentially find that the official knew of the risk present because of the presence of continuous, well-reported attacks against the detainee). The complaint alleged that, as a pre-operative, transsexual female, the plaintiff was especially prone to be subjected to sexual attack and, despite knowledge of this risk, the defendants placed the plaintiff in the general population. *Id.* at 830–31.

<sup>99</sup> *Farmer*, 511 U.S. at 832 (citing *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

<sup>100</sup> *Id.* at 833 (citing *Hudson v. Palmer*, 468 U.S. 517, 548 (1984) (holding that there was no legitimate punitive justification for the seizure of the plaintiff's letters and legal documents, his private property, because it did not threaten the security of the institution)).

<sup>101</sup> *R.G.*, 415 F. Supp. 2d at 1152; *Gorlin*, *supra* note 39, at 439–43 (arguing that the Court in *Bell* intended to use an objective standard for the substantive due process analysis, in keeping with the principles underlying due process).

<sup>102</sup> See, e.g., *Beets*, 621 F.3d at 261 (describing the Eighth Amendment analysis); *Beers-Capitol*, 256 F.3d at 125, 130 (same); *Nelson*, 491 F.2d at 355 (same).

<sup>103</sup> *Beers-Capitol*, 256 F.3d at 130 & n.5.

<sup>104</sup> *Id.* at 141, 144.

<sup>105</sup> *Beets*, 621 F.3d at 261.

<sup>106</sup> See *Nelson*, 491 F.2d at 357 (holding that the objective of the state incarcerating juveniles to protect society did not justify the use of beating and tranquilizers and amounted to "cruel and unusual" punishment); *In re J.M.*, 287 S.W.3d 481, 492 (Tex. Ct. App. 2009) (applying the Eighth Amendment to the constitutional claim against a juvenile facility because juvenile cases are "quasi-criminal" and often have constitutional concerns that are similar to criminal law).

prolonged periods of isolation of up to 178 days while in custody, which caused severe psychological harm, were properly analyzed under the Eighth Amendment.<sup>107</sup> Using the Eighth Amendment standard, the court required proof that prison officials acted with deliberate indifference under the *Farmer* test, which resulted in a denial of the motions to dismiss the claims.<sup>108</sup>

*C. Does an Eighth Amendment or a Substantive Due Process Analysis Really Make a Difference in Litigation of Conditions of Confinement Claims?*

LGBT youth, particularly transgender youth, face unique psychological, physical, and sexual trauma in detention facilities, resulting in litigation over the negative conditions of their confinement.<sup>109</sup> These youth are at particular risk for abuse while in detention.<sup>110</sup> Often LGBT youth are ignored by staff when verbal and physical abuse occurs, leaving them nowhere to turn for recourse.<sup>111</sup> Under the Civil Rights of Institutionalized Persons Act (“CRIPA”), the DOJ has been granted the power to investigate constitutional violations against youth in juvenile justice facilities, including instances when facility officials do not protect LGBT youth from physical harm, the denial of medical treatment, and the segregation of LGBT youth without cause.<sup>112</sup> In evaluating constitutional violations, the test applied, whether due process or Eighth Amendment, can make all the difference.<sup>113</sup> In evaluating conditions of confinement claims based on the isolation of incarcerated juveniles, the applica-

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<sup>107</sup> See *Troy D. v. Mickens*, 806 F. Supp. 2d 758, 762, 765, 772 (D.N.J. 2011) (holding that plaintiffs were juveniles adjudicated delinquent, as opposed to pre-trial detainees, so their conditions of confinement claims was properly analyzed under the Eighth Amendment, not under the due process clause as alleged by the plaintiffs).

<sup>108</sup> *Farmer*, 511 U.S. at 834, 837; *Troy D.* 806 F. Supp. 2d at 772–73.

<sup>109</sup> See HUNT & MOODIE-MILLS, *supra* note 11, at 5–6; WILBER ET AL., *supra* note 18, at x n.2 (describing various conditions facing incarcerated LGBT youth).

<sup>110</sup> See HUNT & MOODIE-MILLS, *supra* note 11, at 6 (describing the abuses facing incarcerated LGBT youth).

<sup>111</sup> See WILBER ET AL., *supra* note 18, at 7 (discussing the stigmatization and discrimination LGBT youth face in prison).

<sup>112</sup> U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., PROTECTING THE RIGHTS OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX INDIVIDUALS 34 (Oct. 2016), <http://www.justice.gov/crt/page/file/910161/download> [<https://perma.cc/EE68-B7YH>] (summarizing the work that the U.S. Department of Justice (“DOJ”) has undertaken to protect the rights of LGBTI individuals). After years of applying the Civil Rights of Institutionalized Persons Act (“CRIPA”), the DOJ has facilitated state reforms as to means of accountability, investigation into improper conduct, prisoner screening, and reporting in order to protect LGBT youth from harm. *Id.* at 35–37.

<sup>113</sup> See Gorlin, *supra* note 39, at 443 (discussing why the Eighth Amendment analysis is not enough to evaluate conditions of confinement claims by pre-trial detainees).

tion of these tests provided very different results, with more protections to juveniles provided by the due process test.<sup>114</sup>

The objective test of substantive due process claims provides the opportunity for the factfinder to make their determination solely by evaluating the conditions of confinement, rather than evaluating the unknown and subjective intent of prison officials, as required under the Eighth Amendment.<sup>115</sup> This offers a lower burden, in which detainees are only required to show that the harm caused to them lacks a reasonable relationship to the government's objective.<sup>116</sup> Due process violations may still follow from injuries that rise above the level of negligence by facility officials, but less than an intentional action, as required by the subjective standard of Eighth Amendment jurisprudence.<sup>117</sup>

In 1982, in *Youngberg v. Romeo*, the U.S. Supreme Court held that the Eighth Amendment is more narrowly applicable in protecting convicted prisoner's rights than substantive due process for non-convicted individuals, because persons who have been involuntarily committed are treated more gently than criminals whose confinement is designed to punish.<sup>118</sup> In *Youngberg*, the Court relied on the accepted notion that pre-trial imprisonment is not for punishment, but is for "safe custody."<sup>119</sup> Because of this sole purpose, it is accepted that pre-trial prisoners may not be unnecessarily restricted or harmed beyond the measures needed for safe confinement.<sup>120</sup>

In *Youngberg*, the Supreme Court, for the first time, considered the substantive due process rights of an involuntarily committed, intellectually disabled person under the Fourteenth Amendment.<sup>121</sup> The Court acknowledged the

<sup>114</sup> Compare *Troy D.*, 806 F. Supp. 3d at 773 (applying an Eighth Amendment analysis to juveniles adjudicated delinquent, requiring a determination of the subjective intent of the defendants in regard to the conditions of the juveniles' confinement), with *R.G.*, 415 F. Supp. 2d at 1156 (applying a due process analysis to the systemic harassment of LGBT youth in a juvenile facility to determine that this treatment fell below the minimum level of care required by the due process clause).

<sup>115</sup> *Farmer*, 511 U.S. at 837; *Bell*, 441 U.S. at 535, 538; Gorlin, *supra* note 39, at 443.

<sup>116</sup> *Bell*, 441 U.S. at 538–39; Gorlin, *supra* note 39, at 443.

<sup>117</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Farmer*, 511 U.S. at 534; Gorlin, *supra* note 39, at 427.

<sup>118</sup> *Youngberg*, 457 U.S. at 321–22, 325.

<sup>119</sup> *See id.* at 309–10, 324 (discussing the fact that the petitioner's mother was no longer able to provide him with care and he could not care for himself, requiring his involuntary commitment); 4 WILLIAM BLACKSTONE, COMMENTARIES \*297 (arguing that prisoners awaiting trial are entitled to more considerate treatment than are convicted inmates).

<sup>120</sup> BLACKSTONE, *supra* note 119, at \*297.

<sup>121</sup> *Youngberg*, 457 U.S. at 314; Rosalie Berger Levinson, *Wherefore Art Thou Romeo: Revitalizing Youngberg's Protection of Liberty for the Civilly Committed*, 54 B.C. L. REV. 535, 536 (2013). The Supreme Court did not even consider the rights of the respondent under the Eighth Amendment, relying on the Third Circuit, which held the Eighth Amendment did not apply when evaluating the liberty rights of the involuntarily committed. *Youngberg*, 457 U.S. at 312. The Third Circuit denied the use of the Eighth Amendment standard, because of the holding that the criminally convicted should be reviewed under the cruel and unusual standard, which did not apply to the civil confinement

right to personal security, which was a “historic liberty interest” substantively protected by the due process clause.<sup>122</sup> The Court concluded that the plaintiff’s liberty interests require the state to provide sufficient care and medical treatment, as reasonable, to him.<sup>123</sup> Following the purpose of the detainment, for “safe custody,” the involuntarily committed, who lack similar mental culpability to pre-trial prisoners, should be more protected than convicted adults.<sup>124</sup>

Although *Youngberg* does not explicitly extend a substantive due process right to juveniles and other non-criminally committed individuals, the Court did establish the state’s obligation of care to put into place such measures to provide for the safety and protection of the intellectually challenged plaintiff.<sup>125</sup> The underlying purpose of the confinement in *Youngberg* is similar to juvenile confinement cases, which are non-punitive but custodial.<sup>126</sup> The adolescent development cases in Supreme Court jurisprudence emphasize that more protection is offered to youth in the justice system than adults because of the lack of culpability and the unique nature of juveniles in the justice system.<sup>127</sup> Federal officials should provide at least the same amount of safety and protection to incarcerated LGBT juveniles as that provided to the intellectually challenged plaintiff in *Youngberg*.<sup>128</sup> Using this same reasoning, conditions of

at issue. *Romeo v. Youngberg*, 644 F.2d 147, 156 (3d Cir. 1980). The court relied on *Ingraham v. Wright* and *Bell* to avoid the application of the Eighth Amendment. *Id.*

<sup>122</sup> *Youngberg*, 457 U.S. at 315 (quoting *Ingraham*, 430 U.S. at 673).

<sup>123</sup> *Id.* at 319. The Court agreed with the Third Circuit’s assertion that the existence of a constitutional right to care and treatment is not a new legal standard, but an established constitutional right. *Id.* (citing *Romeo*, 644 F.2d at 176). Furthermore, the Court affirmed the Third Circuit in holding that the Constitution requires only that facility staff use their own informed discretion to ensure adequate conditions for those who are involuntarily committed. *Id.* at 321 (citing *Romeo*, 644 F.2d at 178). The Court relied on *Jackson v. Indiana*, establishing that there must be a relationship between the conditions of confinement and the objective of the confinement. *Id.* at 324; *Jackson*, 406 U.S. at 738. In order to make their determination, the Court balanced the liberty interests of the plaintiff against legitimate state objectives. *Youngberg*, 457 U.S. at 324.

<sup>124</sup> *Youngberg*, 457 U.S. at 309–10 (describing the plaintiff’s severe intellectual disability warranting his involuntary commitment); BLACKSTONE, *supra* note 119, at \*297. In *Youngberg*, the purpose of the plaintiff’s confinement was to protect him and those around him because he was unable to care for himself, was prone to violence, and was unable to control his violence. *Youngberg*, 457 U.S. at 309–10.

<sup>125</sup> See *Youngberg*, 457 U.S. at 319 (describing the rights given to the involuntarily, civilly incarcerated); 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, 701–02 (1998) (arguing that the authority established by *Youngberg* is most in line with civilly committed, juvenile detainees in keeping with the rehabilitative purpose of the juvenile justice system); see also *Kent v. U.S.*, 383 U.S. 541, 554 (1966) (establishing the objectives of the juvenile court to guide and rehabilitate the child). Despite this non-punitive purpose, the juvenile justice system has been impacted by pressure to be tough on crime, resulting in a system of punitive conditions that need judicial remedies. Dale, *supra*, at 677–79.

<sup>126</sup> *Youngberg*, 457 U.S. at 309–10; *Kent*, 383 U.S. at 554.

<sup>127</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012); *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Roper v. Simmons*, 543 U.S. 551, 572–73 (2005); see also *supra* note 61 and accompanying text (introducing the adolescent development cases decided by the U.S. Supreme Court).

<sup>128</sup> Dale, *supra* note 125, at 701–02.

confinement claims brought on behalf of incarcerated LGBT youth should utilize the substantive due process test, not the Eighth Amendment test.<sup>129</sup>

#### IV. COURTS SHOULD DECIDE CONDITIONS OF CONFINEMENT CASES FOR LGBT YOUTH IN CUSTODY UNDER THE SUBSTANTIVE DUE PROCESS RIGHT

This Part advocates for the use of the due process clause for conditions of confinement cases in the juvenile justice system in order to provide a systemic remedy for LGBT youth against the inhumane conditions they face within this system.<sup>130</sup> Section A explains why the substantive due process analysis is more in line with the purpose of the juvenile justice system than the Eighth Amendment analysis and addresses the opposing view.<sup>131</sup> Then, Section B applies and compares the due process clause and the Eighth Amendment tests to evaluate how such analyses would apply to the systemic issue of incarcerated LGBT youth facing horrible discrimination and abuse.<sup>132</sup>

##### A. Why the Due Process Clause Is a Better Option

The U.S. Supreme Court has not yet addressed the question of whether persons involuntarily confined in juvenile institutions must meet the burden of an Eighth Amendment analysis or, alternatively, a substantive due process analysis, to allege a constitutional violation for the conditions of their confinement.<sup>133</sup> Conditions of confinement claims for LGBT juveniles should be brought under the substantive due process clause because it provides a greater breadth of protection for the injured to prove a constitutional violation.<sup>134</sup> This more protective stance embodies the rehabilitative intent of the juvenile justice

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<sup>129</sup> U.S. CONST. amend. VIII; *id.* XIV, § 1; *Youngberg*, 457 U.S. at 320; *Kent*, 383 U.S. at 554. Compare *Bell*, 441 U.S. at 535, 538 (establishing the substantive due process test), with *Farmer*, 511 U.S. at 837 (establishing the cruel and unusual punishment test).

<sup>130</sup> See *infra* notes 133–186 and accompanying text.

<sup>131</sup> See *infra* notes 133–155 and accompanying text.

<sup>132</sup> See *infra* notes 156–186 and accompanying text.

<sup>133</sup> Gelin, *supra* note 49, at 30. Under the substantive due process jurisprudence, the Supreme Court has not clarified the scope of protection offered to juveniles in the justice system. Dale, *supra* note 125, at 700.

<sup>134</sup> See Gorlin, *supra* note 39, at 438 (relying on the reasoning in *Youngberg* to stand for the idea that a substantive due process claim would provide protection to a larger class of individuals because it does not only apply to convicted individuals, but to involuntarily committed individuals). Critics would argue that a juvenile detainee cannot be equated with a person with an intellectual disability, because the detainee would have had to have committed a crime to become a detainee, which is not the case for those with an intellectual disability. Dale, *supra* note 125, at 702. Because of the adolescent development cases, however, and the history of juvenile justice, the Court has still placed juveniles at a different level of culpability than adult criminals. *Id.* This is because of the different state objectives in the juvenile versus adult justice systems and the unique nature of juveniles themselves, who require more protection. *Id.*

system more than the punitive model of the adult justice system because it provides more opportunity for judicial remedy of infringements on the rights and safety of juveniles.<sup>135</sup> Due to the severe conditions disparately impacting LGBT youth in the juvenile justice system and the difficulty in proving the intent of officials who create these conditions, conditions of confinement cases for LGBT youth should be litigated through this substantive due process standard.<sup>136</sup>

In 2006, in *R.G. v. Koller*, the U.S. District Court for the District of Hawaii decided a seminal case involving the isolation and harsh treatment of a gay girl, a boy who was perceived to be gay, and a transgender girl in a juvenile detention facility.<sup>137</sup> In that case, the isolation practices at the facility in question were inherently punitive, but the court found that the Eighth Amendment's guarantee against cruel and unusual punishment was not the correct constitutional standard to apply to the case.<sup>138</sup> The Eighth Amendment is not applicable to youth who have been detained or adjudicated delinquent and cannot be treated as sentenced adult inmates.<sup>139</sup> Instead, the court applied the "more protective" Fourteenth Amendment substantive due process standard to evaluate the juvenile detention facility's liability.<sup>140</sup>

Although the Supreme Court has not yet determined what standard to utilize in juvenile conditions of confinement cases, they should not utilize the Eighth Amendment because it is less protective than the due process clause.<sup>141</sup> Again, this is due to the understanding in Supreme Court jurisprudence that juveniles must be treated differently than adults and protected by the state, as evidenced by the Court's willingness to limit sentencing because of perpetrators' youth.<sup>142</sup> Specifically, in 2012, in *Miller v. Alabama*, the Supreme Court clarified that nothing established in earlier jurisprudence regarding children is

<sup>135</sup> See Marksamer, *supra* note 2, at 75–76, 83 (arguing that despite the rehabilitative model of the juvenile justice system, it has had higher rates of incarceration and has become more punitive in nature, rather than oriented toward treatment).

<sup>136</sup> Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987); MAJID ET AL., *supra* note 4, at 1, 51–52, 104. Compare Bell v. Wolfish, 441 U.S. 520, 535, 538 (1979) (analyzing substantive due process claims through an objective standard), with Farmer v. Brennan, 511 U.S. 825, 837 (1994) (analyzing Eighth Amendment claims through a subjective standard).

<sup>137</sup> *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1133–34 (D. Haw. 2006).

<sup>138</sup> *Id.* at 1152, 1154.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (quoting *Gary H.*, 831 F.2d at 1432).

<sup>141</sup> *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977); *Gary H.*, 831 F.2d at 1432; Gelin, *supra* note 49, at 30.

<sup>142</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012); *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005); see also *supra* note 61 and accompanying text (introducing the adolescent development cases decided by the Supreme Court).

applicable to only certain crimes.<sup>143</sup> The underlying reasoning of the Supreme Court adolescent development cases is that the Court must be more protective of juveniles than adults when imposing penalties.<sup>144</sup> Extending the same rationale, the Court must consider conditions of confinement claims against juveniles differently than adults, because children are inherently vulnerable and the justice system seeks to rehabilitate rather than punish them.<sup>145</sup>

Nonetheless, some scholars would argue that the Eighth Amendment is the constitutional standard under which conditions of confinement claims evaluated in juvenile detention facilities, even though they have not been convicted of a crime as required for Eighth Amendment claims.<sup>146</sup> In 1977, in *Ingraham v. Wright*, the Supreme Court held that some punishments, though not criminal, may be similar enough to criminal punishments to apply the Eighth Amendment analysis to the conditions.<sup>147</sup> Proponents of the Eighth Amendment justify the application of an Eighth Amendment analysis because of the need to uphold “evolving standards of human decency.”<sup>148</sup>

To justify the reliance on the Eighth Amendment, proponents rely on the 2010 U.S. Supreme Court case *Roper v. Simmons*, which examined “evolving standards” of decency through both an objective and subjective lens to determine which punishments are so disproportionate as to be “cruel and unusual.”<sup>149</sup> According to some scholars, the Court’s acknowledgement of the dimin-

<sup>143</sup> *Miller*, 132 S. Ct. at 2458 (holding that the reasoning in *Graham v. Florida*, highlighting the importance of youth in determining the appropriateness of a lifetime of incarceration, applied to mandatory penalty schemes that prevented the sentence from considering youth).

<sup>144</sup> *Id.*; *Graham*, 560 U.S. at 74; *Roper*, 543 U.S. at 570.

<sup>145</sup> *Miller*, 132 S. Ct. at 2469, 2475.

<sup>146</sup> See Gelin, *supra* note 49, at 32–33 (arguing that the Eighth Amendment analysis must be tailored to the maturity levels of incarcerated juveniles and evolving standards of human decency).

<sup>147</sup> *Ingraham*, 430 U.S. at 669 n.37.

<sup>148</sup> Gelin, *supra* note 49, at 33 (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). In *Estelle v. Gamble*, the Court explained that the ideals of decency create a duty on the government to provide sufficient medical care for those whom it has confined in prison. See 429 U.S. at 103. This includes the obligation of prison authorities to treat inmates’ needs. See *id.* Under the Eighth Amendment jurisprudence, deliberate indifference to serious medical needs of prisoners constitute unnecessary and wanton infliction of pain. *Id.* at 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (2002) (holding that the legislature may weigh retribution and deterrence as considerations as to the form of punishment and effect on the prisoner)).

<sup>149</sup> See Gelin, *supra* note 49, at 35–36 (citing *Roper*, 543 U.S. at 561, 564 (“evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual”) (internal quotation marks omitted)). Justice Kennedy, writing for the majority in *Roper v. Simmons*, examined the laws of the various states and concluded that a majority no longer allowed juveniles under the age of eighteen to be sentenced to death (objective criteria). 543 U.S. at 568. Moreover, Justice Kennedy ultimately recognized the diminished culpability of juveniles (subjective criteria). *Id.* at 568, 571. Justice Kennedy has been particularly receptive to the use of substantive due process to protect the liberty interests of individual citizens. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (overturning the Defense of Marriage Act because no legitimate purpose overcomes the purpose to single out same-sex couples who are entitled to protection of their liberty—due process and equal protection interests).

ished culpability and comparative immaturity of juveniles provides a rationale to extend Eighth Amendment protections to them in detention centers.<sup>150</sup> The diminished culpability of juveniles, however, better justifies the use of the due process clause to protect incarcerated LGBT youth from punitive conditions, because it utilizes a clear, objective test, rather than an amorphous, subjective intent test.<sup>151</sup>

The Supreme Court has recognized the right to personal security as a liberty interest protected substantively by the due process clause.<sup>152</sup> This right does not disappear merely because confinement is lawful.<sup>153</sup> If it is unconstitutional to hold a convicted criminal in unsafe conditions, then the involuntarily committed must be held to at least the same standard of safety, as they are not held for punitive purposes.<sup>154</sup> This rationale suggests that a higher protection is offered to those who are involuntarily committed, such as juveniles, than only to those who are convicted of a crime and whom the justice system seeks to punish.<sup>155</sup>

### B. Implications for Incarcerated LGBT Youth

Although the juvenile justice system is grounded in a rehabilitative philosophy, many juvenile justice courts and facilities have moved away from this original intent toward harsher treatment of juveniles.<sup>156</sup> More and more young people are incarcerated in prison-like facilities because of public pressure to come down hard on juvenile offenders.<sup>157</sup> A 2010 survey by Ceres Policy Research illustrated that LGBT youth are more likely to be detained pre-trial for a variety of minor crimes, including truancy and other non-violent offenses, resulting in a large number of LGBT youth cycling through an abusive justice

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<sup>150</sup> Gelin, *supra* note 49, at 36–37 (justifying this extension by looking to evolving standards of decency).

<sup>151</sup> See MAJDET AL., *supra* note 4, at 1, 4, 12, 77, 107 (describing the various objective, negative conditions affecting incarcerated LGBT youth); *supra* note 61 and accompanying text (introducing the adolescent development cases decided by the United States Supreme Court). Compare *Farmer*, 511 U.S. at 837 (establishing the Eighth Amendment test), with *Bell*, 441 U.S. at 535, 538 (establishing the substantive due process test).

<sup>152</sup> See *Ingraham*, 430 U.S. at 673–74 (describing this liberty interest, including freedom from bodily restraint and punishment except in accordance with due process of law).

<sup>153</sup> *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (holding that the fact that the plaintiff was involuntarily committed does not deprive him of substantive liberty interests).

<sup>154</sup> See *id.* at 315–16 (making a corollary between previous jurisprudence which held that it is cruel and unusual punishment to hold convicted criminals in unsafe conditions and the same for the involuntarily committed).

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

<sup>156</sup> See Marksamer, *supra* note 2, at 75 (reflecting a more punitive model going against the philosophy of the juvenile system).

<sup>157</sup> See Dale, *supra* note 125, at 677 (discussing the system's tough on crime attitude, which has resulted in a more punitive system than intended); Marksamer, *supra* note 2, at 75.

system throughout their lives.<sup>158</sup> Rough estimates of the New York juvenile justice system indicate LGBT youth constitute between four to ten percent of the people in the juvenile justice system, though numbers are likely much higher.<sup>159</sup>

Moreover, LGBT juveniles are constantly facing harsh treatment as punishment for their actions and identities, contrary to the rehabilitative philosophy that is supposed to underlie the system.<sup>160</sup> LGBT youth face violence, isolation, and discrimination in the juvenile justice system due to their real or perceived gender identity and/or sexuality, often with the acknowledgement of facility staff.<sup>161</sup>

Due to the systemic discrimination against LGBT youth in the juvenile justice system, especially against transgender youth, there is a need for litigation as a means to remedy and reform this pervasive mistreatment.<sup>162</sup> Under the substantive due process analysis established by the Supreme Court in 1979 in *Bell v. Wolfish*, a large class of transgender-identified juveniles facing systemic mistreatment will receive judicial relief without having to prove the more burdensome standard of subjective intent under the Eighth Amendment.<sup>163</sup> The disparate physical and sexual violence, isolation, and discrimination against all LGBT youth fit the first prong of the *Bell* test, restrictive conditions that harm these youth beyond mere comfort, such that it becomes puni-

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<sup>158</sup> See Irvine, *supra* note 4, at 693 (describing a national survey of the juvenile justice system to highlight the disproportionate incarceration of LGBT youth and the horrible treatment they face). LGBT youth have twice the likelihood of being detained for non-violent crimes. *Id.* at 689, 693.

<sup>159</sup> See RANDI FEINSTEIN ET AL., JUSTICE FOR ALL?: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 6 (2001) (describing a study chronicling the experiences of LGBT youth in the New York juvenile justice system, commissioned by the Lesbian and Gay Youth Project of the Urban Justice Center). Due to the overrepresentation of LGBT youth in the juvenile system and a lack of accurate reporting, this percentage is likely much higher. *Id.*

<sup>160</sup> See MAJD ET AL., *supra* note 4, at 103–12 (describing the unsafe conditions and lack of protection for LGBT youth); Dale, *supra* note 125, at 677–78 (describing the increasingly harsh punishment facing juveniles in the justice system); Marksamer, *supra* note 2, at 74–75 (describing the impact of abuse by peers and staff on transgender youth). In recent years, protections and attempted reforms for children in the juvenile justice system have been limited and unsuccessful. Dale, *supra* note 125, at 678. Thus, more and more lawsuits have arisen to counteract the harms to juveniles in the justice system. *Id.* at 678–79.

<sup>161</sup> See MAJD ET AL., *supra* note 4, at 103–06 (describing the need for such a check to protect the rights of LGBT youth).

<sup>162</sup> See Valentine, *supra* note 13, at 1095 (discussing the lack of progress in reform and protections for LGBT youth in the welfare system, including the juvenile justice system).

<sup>163</sup> See Gorlin, *supra* note 39, at 438 (describing the higher ceiling for substantive due process claims brought by non-convicted individuals). Compare *Bell*, 441 U.S. at 538–39 (establishing the substantive due process standard), and *R.G.*, 415 F. Supp. 2d at 1156 (applying the due process test to the conditions facing incarcerated LGBT youth), with *Farmer*, 511 U.S. at 837 (establishing the Eighth Amendment standard), and *Troy D. v. Mickens*, 806 F. Supp. 2d 758, 773 (D.N.J. 2011) (applying the Eighth Amendment standard to claims arising from isolation of incarcerated youth).

tive.<sup>164</sup> For example, as noted earlier, the APA has found that isolation in incarceration is inherently punitive and thus is likely to have long-term emotional and mental impact for transgender youth.<sup>165</sup> Similarly, the United Nations has also found that the isolation of prisoners may be torture in certain circumstances and can result in abuse beyond the purpose of the justice system.<sup>166</sup> Additionally, courts have held that long-term segregation or isolation of youth is a punitive practice that does not fit within the rehabilitative model of the juvenile justice system.<sup>167</sup> Thus, the systemic practice of isolating transgender youth is punitive and meets the first prong of the *Bell* test.<sup>168</sup> The evidence of the conditions facing LGBT youth in the justice system, often with the acknowledgement of prison staff, suggests that the treatment of LGBT youth is punishment for LGBT youth's gender identity.<sup>169</sup>

Under the second prong of the *Bell* test, there is no legitimate government purpose for the conditions that LGBT youth face, beyond punishing these youth for their gender expression or attempting to have them conform to gender norms.<sup>170</sup> Similarly, under the rational basis test of the Fourteenth Amendment's equal protection clause, if a law does not burden a fundamental right or target a suspect class, the legislative classification and resulting disadvantage to various groups or persons will be upheld if it is rationally related to a legitimate end.<sup>171</sup> Nevertheless, if the law is merely imposed based on animus toward a person or group, it lacks a rational relationship to legitimate state inter-

<sup>164</sup> *Bell*, 441 U.S. at 538; MAJD ET AL., *supra* note 4, at 103–06.

<sup>165</sup> HUNT & MOODIE-MILLS, *supra* note 11, at 1, 6.

<sup>166</sup> Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on Its Sixty-Third Session, U.N. Doc. A/63/175, at 1, 18, 23 (July 28, 2008) (bringing attention to the mental and physical suffering that solitary confinement creates, which amounts to punishment and increases the risk of torture going undetected).

<sup>167</sup> *R.G.*, 415 F. Supp. 2d at 1148–49; *Lollis v. N.Y. Dep't of Soc. Servs.*, 322 F. Supp. 473, 478 (S.D.N.Y. 1970) (granting motions for temporary injunctions based on evidence that children in state training schools had been confined in isolated rooms).

<sup>168</sup> *See Bell*, 441 U.S. at 538–39 (establishing that the practice first must be punitive); HUNT & MOODIE-MILLS, *supra* note 11, at 6 (describing the abuse and isolation facing incarcerated transgender youth, which amounts to punishment); MAJD ET AL., *supra* note 4, at 1, 4, 12, 77, 107 (describing the practices and treatment of LGBT youth in the justice system).

<sup>169</sup> *See R.G.*, 415 F. Supp. 2d at 1154–55 (applying only to the persistent isolation of the LGBT youth); MAJD ET AL., *supra* note 4, at 103–06 (describing the facilitation of abuse of transgender youth by facility staff, as well as punitive practices for their gender expression).

<sup>170</sup> *See Bell*, 441 U.S. at 538–39 (establishing the second prong of the substantive due process test); HUNT & MOODIE-MILLS, *supra* note 11, at 6 (describing the justifications for the isolation and treatment of transgender youth).

<sup>171</sup> *See Romer v. Evans*, 417 U.S. 620, 631–36 (1996) (holding that Colorado laws classifying homosexual persons violated the equal protection clause because they do not rationally relate to a proper legislative end and instead were motivated only by animus toward the class of people).

ests.<sup>172</sup> Although prison officials often justify isolation for the safety of the LGBT person or for other juveniles, this disparate treatment is based on the assumption that LGBT youth are sexual predators, thus intended with specific animus toward LGBT youth.<sup>173</sup> Most often, placement in isolation is related to an LGBT youth's gender expression and/or sexual orientation, which is not a legitimate state interest and is unrelated to the safety interests espoused.<sup>174</sup> Moreover, even assuming that the governmental purpose of isolation to achieve safety is legitimate, the means to achieve this safety appear excessive and harmful to the juveniles affected, in proportion to the alleged governmental interest in safety, per the second prong in *Bell*.<sup>175</sup>

Should LGBT juveniles need to bear the greater burden of proving cruel and unusual punishment under the Eighth Amendment for conditions of their incarceration, it will be much harder for them to receive necessary relief.<sup>176</sup> By comparing two cases, both regarding a conditions of confinement claim for the prolonged isolation of incarcerated juveniles, it is apparent that the different constitutional tests provided vastly different results.<sup>177</sup> In 2011, in *Troy D. v. Mickens*, the U.S. District Court for the District of New Jersey relied on the Eighth Amendment's deliberate indifference standard, requiring proof of indifference in determining whether the juveniles' prolonged isolation and lack of mental health care was a plausible constitutional violation.<sup>178</sup> This case alleged similar constitutional violations as *R.G.*, namely prolonged isolation, but re-

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<sup>172</sup> See *id.* at 632 (requiring a rational requirement between the classification and a legitimate end); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 443 (1985) (applying a stronger standard of judicial review to an equal protection claim because of a continuing prejudice toward "mentally retarded" people).

<sup>173</sup> See WILBER ET AL., *supra* note 18, at 7 (describing the stigmatization of LGBT youth based on their perceived predatory nature).

<sup>174</sup> See MAJDET AL., *supra* note 4, at 106 (describing the APA's finding that this is punishment); Estrada & Marksamer, *supra* note 13, at 428 (describing that this practice is unconstitutionally punitive even with the safety justification, which could be alleviated in other ways).

<sup>175</sup> See *Bell*, 441 U.S. at 538–39 (establishing the test for substantive due process); MAJDET AL., *supra* note 4, at 106–07 (discussing the substantive due process test); Estrada & Marksamer, *supra* note 13, at 428–29 (same). To determine whether a condition is an incident of a legitimate governmental purpose, the Court looks at whether it appears excessive in relation to an alternative rationally connected to the condition. *Bell*, 441 U.S. at 538. This may amount to the condition being "arbitrary and purposeless" such that the Court can infer that the condition is punitive. *Id.* at 539.

<sup>176</sup> *Farmer*, 511 U.S. at 837; *Troy D.*, 806 F. Supp. 3d at 773.

<sup>177</sup> Compare *Troy D.*, 806 F. Supp. 3d at 773 (applying an Eighth Amendment analysis to juveniles adjudicated delinquent, requiring a determination of the subjective intent of the defendants in regard to the conditions of the juveniles' confinement), with *R.G.*, 415 F. Supp. 2d at 1156 (applying a due process analysis to the systemic harassment of LGBT youth in a juvenile facility to determine that this treatment fell below the minimum level of care required by the due process clause).

<sup>178</sup> *Troy D.*, 806 F. Supp. 3d at 763 (holding that the deprivation of other company and medical attention for post-delinquent adjudication fits into an Eighth Amendment claim, thus making no distinction that the detainees were juveniles). The court equates a delinquent adjudication with a conviction, thus presuming the punitive nature of the juvenile delinquency adjudication in contravention of the juvenile justice system. *Id.* at 772; Dale, *supra* note 125, at 701–02.

quired further inquiry into the minds of the facility officials to prove their subjective intent as to the isolation of the plaintiffs.<sup>179</sup> The due process test provides broader protection to transgender-identified youth facing the many harmful conditions of confinement resulting from being an LGBT person in a juvenile facility.<sup>180</sup>

Because of the need to systematically reform the juvenile system in terms of treatment of incarcerated youth, the Civil Rights Division of the DOJ is uniquely placed to make the most impact through due process litigation.<sup>181</sup> CRIPA gives power to the U.S. Attorney General and thus the DOJ to investigate juvenile detention centers for unconstitutional, punitive conditions.<sup>182</sup> This statute also allows the DOJ to sue states or local governments for equitable relief to correct systemic, problematic conditions, most effectively through the substantive due process claim established in *Bell*.<sup>183</sup> In 2003, in an effort to protect incarcerated individuals from sexual assault, the Prison Rape Elimination Act was signed into law, followed by DOJ regulations for implementation.<sup>184</sup> The DOJ made note of the particular vulnerability of LGBT youth to sexual assault, suggesting a potential for DOJ awareness and action to remedy the pervasive, punitive abuse facing incarcerated LGBT youth.<sup>185</sup> Thus, along

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<sup>179</sup> Compare *Troy D.*, 806 F. Supp. 3d at 772–73 (requiring a subjective standard of inquiry), with *R.G.*, 415 F. Supp. 2d at 1156 (requiring an objective standard of inquiry).

<sup>180</sup> Compare *Troy D.*, 806 F. Supp. 3d at 773 (holding that an issue of material fact existed as to the deliberate indifference of the defendants), with *R.G.*, 415 F. Supp. 2d at 1156 (holding that LGBT youth had their due process rights violated because of extended isolation); see also MAJD ET AL., *supra* note 4, at 103–06 (describing some of the intentional and negligent actions taken by facilities to perpetuate discrimination and harassment against LGBT youth); Gorlin, *supra* note 39, at 438 (describing the Court’s reasoning in *Youngberg* and the implication that there is a higher ceiling of prisoner’s rights for non-convicted individuals subject to substantive due process as opposed to convicted individuals subject to the Eighth Amendment).

<sup>181</sup> See Dale, *supra* note 125, at 729–30 (describing the DOJ’s authority to sue based on constitutional and statutory causes of action for institutionalized persons).

<sup>182</sup> Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(a) (2012).

<sup>183</sup> *Id.*; *Bell*, 441 U.S. at 535, 538 (establishing the substantive due process test); PATRICIA PURITZ, MARY ANN SCALI, & AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CTR., *BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY 1* (1998) (creating a report to help juvenile justice professionals improve the conditions facing incarcerated youth). Nevertheless, because the DOJ sometimes has trouble with enforcement, public pressure is needed by lawyers and advocacy groups to push for litigation regarding incarcerated LGBT youth. See Dale, *supra* note 125, at 730 (describing the DOJ’s lack of rigorous enforcement of CRIPA and the need for advocates to build coalitions to enforce juveniles’ rights).

<sup>184</sup> See Prison Rape Elimination Act, 42 U.S.C. §§ 15601–15609 (2003) (developing standards to detect, prevent, reduce, and punish prison rape and increase accountability); Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012) (establishing a zero tolerance policy toward sexual abuse and creating safeguards to protect incarcerated individuals).

<sup>185</sup> See Press Release, U.S. Dep’t of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), <https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape> [<https://perma.cc/9Y7X-BMBM>] (setting national standards for juvenile facilities aimed at protecting inmates in all facilities from sexual abuse, including setting training and screening protocols to account for LGBT people generally).

with advocates pushing for policy changes, lawyers litigating conditions of confinement for incarcerated LGBT youth may be most effective to protect such youth.<sup>186</sup>

### CONCLUSION

LGBT youth and especially transgender youth face harsh conditions from fellow inmates and staff while incarcerated in juvenile detention facilities. This is often due to their gender or sexuality expression and results in harassment and discrimination that may amount to a constitutional violation. Some circuits analyze conditions of confinement cases for juveniles through the lens of the Eighth Amendment's prohibition on cruel and unusual punishment, while others analyze such cases through the lens of the due process clause. There is no clear circuit split as to these cases because there is often confusion as to which test is actually being used and whether one is inclusive of the other. The Supreme Court has yet to make a decision on how courts should analyze conditions of confinement for juveniles. In order to remedy the punitive conditions facing LGBT youth in juvenile facilities, the due process clause is the only constitutional remedy that can systemically reform the system, providing protection to a population that faces disproportionate discrimination and harassment. There is an opportunity to utilize the protections offered by substantive due process, without placing an undue burden on plaintiffs to prove the requisite intent established by the Eighth Amendment. To alleviate some of the systemic injustices facing LGBT youth in the juvenile justice system, the DOJ should be pressured by the public to litigate conditions of confinement claims on behalf of marginalized, incarcerated transgender youth. With more awareness and notice of this issue, the Supreme Court may then apply its earlier adolescent development reasoning to establish the substantive due process standard for such cases. This will ultimately provide for greater protection for all LGBT youth in the juvenile justice system.

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<sup>186</sup> See Dale, *supra* note 125, at 730–32 (arguing for the efficacy of increased litigation to correct unconstitutional conditions facing incarcerated youth); Press Release, U.S. Dep't of Justice, *supra* note 185 (describing the increased need to protect incarcerated LGBT youth).