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Jail Isolation After *Kingsley*: Abolishing Solitary Confinement at the Intersection of Pretrial Incarceration and Emerging Adulthood

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JAIL ISOLATION AFTER *KINGSLEY*: ABOLISHING SOLITARY CONFINEMENT AT THE INTERSECTION OF PRETRIAL INCARCERATION AND EMERGING ADULTHOOD

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In 2015, the U.S. Supreme Court held that allegations of excessive use of force in pretrial detention are subject to an objective standard. However, it is unclear whether the objective standard extends to claims arising out of different factual circumstances. The Second Circuit's recent decision in Darnell v. Pineiro *to extend* Kingsley v. Hendrickson *to conditions-of-confinement cases provides hope. This Note argues that* Kingsley *should extend to solitary confinement litigation—particularly the isolation of emerging adults in pretrial detention. Solitary confinement is a widespread practice in the criminal justice system, but the implications of its use in pretrial detention have not been fully explored. Since its inception, solitary confinement has demonstrated adverse psychological and physiological effects. Emerging adults are most likely to be exposed to the practice and are more vulnerable to its effects. Incarcerated emerging adults who are held awaiting trial already experience a significant disruption in their social and emotional development. This Note draws from psychological scholarship, arguing that isolating emerging adults in pretrial detention causes irreparable harm to their well-being—harm so severe that it amounts to unconstitutional punishment. Finally, this Note proposes a solution to this mass problem: abolishing solitary confinement for emerging adults who are incarcerated pretrial.*

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INTRODUCTION

Imagine that you are locked in a six-by-eight-foot cell for close to twenty-three hours per day—for days, weeks, or months.[1] When you wake up, you see a toilet.[2] Your cellmates are roaches and rodents, and the noise is incessant.[3] Late at night, people yell.[4] There is little to no natural light.[5] It

1. *See* Trey Bundy, *Sixteen, Alone, 23 Hours a Day, in a Six-by-Eight-Foot Box*, MEDIUM (Mar. 5, 2014), https://medium.com/solitary-lives/sixteen-alone-23-hours-a-day-in-a-six-by-eight-foot-box-26ab1e09632d#.4hst619c0 [http://perma.cc/69RV-NWB8].

2. *See* Dana Goldstein et al., *This Is Rikers: From the People Who Live and Work There*, MARSHALL PROJECT (June 28, 2015, 9:00 PM), https://www.themarshallproject.org/2015/06/28/this-is-rikers [http://perma.cc/DHG3-RVFT].

3. *See id.*

4. *See id.*

5. N.Y.C. JAILS ACTION COAL., PETITION TO THE NEW YORK CITY BOARD OF CORRECTION FOR ADOPTION OF RULES REGARDING THE USE OF ISOLATED CONFINEMENT 18 (2013), http://nycjac.org/wp-content/uploads/2016/02/JAC-Petition-to-BOC-for-Rule-Making-and-Reform-of-Solitary-Confinement-2013.pdf [http://perma.cc/J396-GLKS].

smells of "body odor and human waste."[6] You must be escorted anytime you wish to leave your cell.[7] To add to the distress, imagine you are between the ages of eighteen and twenty-five and have not been convicted of a crime.

Throughout all of this you feel hopeless, lonely, and depressed.[8] Maybe you think about committing suicide.[9] Maybe you attempt suicide.[10] This is solitary confinement.

Isolation alone is enough to cause a person to deteriorate mentally, emotionally, and physically.[11] Isolation during a critical phase of development and an especially traumatic phase of the criminal justice process can further this deterioration.[12]

In 1971, Richard G. Singer wrote:

> It seems remarkable that, in this the last third of the twentieth century, we still send men to small dank closets, deprive them of human companionship, sanitary needs, and clothing, feed them on a starvation diet, force them to sleep on thin mattresses, and then, after an unspecified period, remove them from this environment and proceed in the hope that they have been "rehabilitated."[13]

In the beginning of the twenty-first century, this practice is still widespread.[14] The long-lasting, detrimental effects of solitary confinement are well documented.[15] Solitary confinement as a penal practice was scrutinized by the United Nations Special Rapporteur on Torture,[16] President

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6. *Id.*
7. *Id.* at 17–18.
8. *Id.*
9. *See id.* at 18.
10. *See* Jennifer Gonnerman, *Kalief Browder Learned How to Commit Suicide on Rikers*, NEW YORKER (June 2, 2016), http://www.newyorker.com/news/news-desk/kalief-browder-learned-how-to-commit-suicide-on-rikers [http://perma.cc/KQP7-3H6W].
11. *See infra* Part I.B.
12. *See generally* Jessica Lee, Note, *Lonely Too Long: Redefining and Reforming Juvenile Solitary Confinement*, 85 FORDHAM L. REV. 845 (2016) (arguing that individuals between the ages of eighteen and twenty-five should be included in the broader push to eliminate or limit juvenile solitary confinement in the prison system).
13. Richard G. Singer, *Confining Solitary Confinement: Constitutional Arguments for a "New Penology,"* 56 IOWA L. REV. 1251, 1251 (1971).
14. ALLEN J. BECK, U.S. DEP'T OF JUSTICE, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, at 4 (2015), https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf (showing that approximately 18 percent of people incarcerated in jails and 20 percent of people incarcerated in prisons spent time in solitary confinement in a twelve-month period or since their arrival at the facility) [http://perma.cc/U9AP-WAHX].
15. *See infra* Part I.B.
16. *See* Juan E. Méndez (Special Rapporteur on Torture), *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 79–81, U.N. Doc. A/66/268 (Aug. 5, 2011) ("The Special Rapporteur stresses that solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals."); *see also* G.A. Res. 70/175, Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), at 17 (Jan. 8, 2016) ("Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible . . . .").

Obama,[17] and the U.S. Supreme Court.[18] Regrettably, the use of solitary confinement in local jails across the United States has not been similarly critiqued.[19]

Jails represent an important stage in the criminal justice system: the first point of exposure to incarceration.[20] Despite their importance, they have "remained largely under the radar of researchers and policy analysts alike."[21] Isolation during pretrial incarceration is "likely to significantly compound and worsen the already painful psychological transition from the freeworld to penal confinement."[22]

The traumatic combination of isolation and pretrial incarceration is even worse during emerging adulthood. The vocal movement to abolish solitary confinement in prisons and jails for youth has largely focused on juveniles under the age of eighteen.[23] However, research demonstrates that designating the age of eighteen as a marker of legal adulthood is largely arbitrary.[24] Development exists on a continuum, and people continue to develop through their midtwenties.[25]

Emerging adulthood, a critical developmental phase, is especially important in the critique of solitary confinement during pretrial incarceration.[26] Incarcerated emerging adults represent "'the perfect storm' of the potential perils of this developmental period."[27] Notably, people between the ages of eighteen and twenty-four are most likely to spend time

17. *See* Peter Baker, *Obama Calls for Effort to Fix a 'Broken System' of Criminal Justice*, N.Y. TIMES (July 14, 2015), http://www.nytimes.com/2015/07/15/us/politics/obama-calls-for-effort-to-fix-a-broken-system-of-criminal-justice.html [http://perma.cc/X4GR-PFYY].

18. *See, e.g.*, Davis v. Ayala, 135 S. Ct. 2187, 2208–09 (2015) (Kennedy, J., concurring) (addressing an issue that had no bearing on the legal question before the Court to emphasize the "human toll" of solitary confinement); *see also* Hutto v. Finney, 437 U.S. 678, 685 (1978) ("Confinement in . . . an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.").

19. *See* Craig Haney et al., *Examining Jail Isolation: What We Don't Know Can Be Profoundly Harmful*, 96 PRISON J. 126, 134 (2015) (reporting that there is an "absence of reliable data about exactly how often jail isolation is used, for how long, and with what effect").

20. *Id.* at 131 (referring to jails as "first responder" correctional facilities in the criminal justice system).

21. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 75 (2010).

22. Haney et al., *supra* note 19, at 143.

23. *See* Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1 (2015); Anthony Giannetti, Note, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 BUFF. PUB. INT. L.J. 31 (2012). *But see* Lee, *supra* note 12 (explaining the effects of solitary confinement on incarcerated emerging adults in prisons).

24. *See infra* Part I.C.

25. *See* Barbara L. Atwell, *Rethinking the Childhood-Adult Divide: Meeting the Mental Health Needs of Emerging Adults*, 25 ALB. L.J. SCI. & TECH. 1, 15 (2015).

26. The Jails Action Coalition, a New York City-based advocacy group, advocated for the exclusion of emerging adults from solitary confinement because of the population's heightened vulnerability to the practice. *See* N.Y.C. JAILS ACTION COAL., *supra* note 5, at 16.

27. Kristyn Zajac et al., *Juvenile Justice, Mental Health, and the Transition to Adulthood: A Review of Service System Involvement and Unmet Needs in the U.S.*, 56 CHILD. & YOUTH SERVICES REV. 139, 140 (2015).

in solitary confinement while incarcerated in local jails.[28] Given the unique vulnerabilities of emerging adults,[29] the practice of solitary confinement is likely to be ineffective in disciplining individuals and maintaining safety, and it simultaneously exacerbates detrimental health effects.[30]

New York City has officially eliminated the use of pretrial solitary confinement—or "punitive segregation"—for individuals under the age of twenty-one.[31] While this is a welcome improvement, there is already fear that the New York City Department of Correction is beginning to replace the practice with ad hoc solitary confinement units and new, equally restrictive conditions.[32] In addition, ending the practice for individuals under the age of twenty-one does not encompass the rest of the population most vulnerable to its use.[33]

The Supreme Court has repeatedly confirmed that people who are incarcerated pretrial[34] receive a different level of constitutional protection than people who have been convicted.[35] Under the Fifth and Fourteenth Amendments, people who are incarcerated pretrial have a substantive due process right to be free from punishment.[36] Under the Eighth Amendment,

28. *See* BECK, *supra* note 14, at 4 (showing that 24.8 percent of those between the ages of eighteen and nineteen and 23.4 percent of those between the ages of twenty and twenty-four spent time in a restricted housing unit between 2011 and 2012).

29. *See infra* Part I.C.

30. *See infra* Part I.B.

31. *See* Irene Plagianos, *Solitary Confinement for Prisoners Under 21 Scrapped in New York City*, DNAINFO (Oct. 12, 2016, 9:19 AM), https://www.dnainfo.com/new-york/20161012/civic-center/punitive-segregation-solitary-confinement-ends-teens-young-people ("New York has become the first city in the nation to end solitary confinement for all inmates under the age of 21.") [http://perma.cc/L4B9-TVWT].

32. *See, e.g.*, Letter Regarding Notice of Violation of Minimum Standards at West Facility from Stanley Brezenoff, Chair, N.Y.C. Bd. of Corr., to Joseph Ponte, Comm'r, N.Y.C. Dep't of Corr. (Sept. 29, 2016), http://www1.nyc.gov/assets/boc/downloads/pdf/News/2016.09.29%20-%20Letters%20from%20BOC%20to%20DOC%20re%20West%20Facility%20Violations.pdf (finding that an ad hoc solitary confinement unit, West Facility, was in operation and that people were sent there without any due process) [http://perma.cc/V4KB-UDJ2]; *see also* Erin Corbett, *New York Corrections Head Defends Chaining Rikers Inmates to Desks for 7 Hours a Day*, RAW STORY (Jan. 18, 2017, 6:30 PM), https://www.rawstory.com/2017/01/new-york-corrections-head-defends-chaining-rikers-inmates-to-desks-for-7-hours-a-day/ (reporting that after young adults were barred from punitive segregation on Rikers Island, administrators approved a practice of shackling them by their ankles and chaining them to desks for the seven hours that they are entitled to be outside of their cells) [http://perma.cc/CY6Y-DW8Y].

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

34. Person-first language is used throughout this Note rather than "prisoner," "inmate," or "detainee." To the extent that such words are used, they are in direct quotes. For more information about person-first language, see Eddie Ellis, *An Open Letter to Our Friends on the Question of Language*, CTR. FOR NULEADERSHIP ON URB. SOLUTIONS (Nov. 2013), http://centerfornuleadership.org/cnus/wp-content/uploads/2013/11/CNUS-lang-ltr_regular.pdf [http://perma.cc/PLH4-2B82].

35. *See* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473–74 (2015) (holding that claims brought by people incarcerated pretrial are subject to an objective standard); Sandin v. Conner, 515 U.S. 472, 484–85 (1995) (dismissing a convicted person's claim that he is entitled to the same liberty protections as people who are incarcerated pretrial); Bell v. Wolfish, 441 U.S. 520, 535–36 (1979) (holding that people incarcerated pretrial have a substantive due process right to be free from punishment).

36. *See infra* Part II.B.

people who are incarcerated following a conviction have a right to be free from cruel and unusual punishment.[37] Despite the shared experience of incarceration, it is logical to differentiate between the legal rights of those who have been convicted from those who are languishing in local jails despite their legally presumed innocence.[38]

The Supreme Court's jurisprudence has been murky,[39] and many circuit courts have historically applied the Eighth Amendment to claims brought by people incarcerated pretrial.[40] In *Kingsley v. Hendrickson*,[41] the Supreme Court held that the standard for excessive use of force in pretrial detention is objective.[42] This holding provides room to argue that an objective standard should extend to other factual circumstances.[43] In fact, the Second Circuit recently held that *Kingsley*'s objective standard applies to conditions-of-confinement claims.[44] As the issue percolates through the circuits, a risk still remains that other courts will analyze claims that fall outside the factual contours of *Kingsley* under the Eighth Amendment.[45]

This Note, echoing much of the Second Circuit's recent opinion, argues that courts should extend *Kingsley*'s holding to emerging adults' exposure to solitary confinement in pretrial detention. Specifically, this Note argues that the intersection of pretrial incarceration, solitary confinement, and emerging adulthood is uniquely dangerous. Part I addresses and explains each factor of this intersection. Then, Part II explains the Supreme Court cases that delineate the rights afforded to people who are incarcerated. Finally, Part III offers a solution to reducing the harmful effects of pretrial incarceration during emerging adulthood: abolishing solitary confinement. It argues further that subjecting emerging adults to solitary confinement during pretrial incarceration is unconstitutional punishment that is objectively unreasonable and excessive in relation to its stated governmental purpose.

I. BACKGROUND: A DANGEROUS CONVERGENCE OF FACTORS

The combination of pretrial detention and emerging adulthood presents a unique challenge to the practice of solitary confinement. Before delving into

37. *See infra* Part II.A.

38. The author does not intend to justify, by virtue of their conviction, the use of solitary confinement for people who have been convicted of a crime. This Note's purpose is simply to respond to a newly created opportunity to advocate for its abolition in a particular context.

39. *See generally* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013).

40. *See infra* Part II.C.

41. 135 S. Ct. 2466 (2015).

42. *Id.* at 2472.

43. *See infra* Part III.

44. Darnell v. Pineiro, 849 F.3d 17, 30 (2d Cir. 2017).

45. *See, e.g.*, Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees?: The Potential Impact of* Kingsley v. Hendrickson *on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2083–84 (2016) (responding to the confusion over whether *Kingsley* was actually intended to apply to other claims and arguing that *Kingsley*'s holding should extend to jail suicide litigation).

the constitutional rights afforded to individuals incarcerated pretrial, this part explains each component of this dangerous convergence in more detail.

A. Jails Matter: Pretrial Incarceration as an Entry Point

Jails and prisons are often conflated.[46] Both prisons and jails incarcerate people, but they are distinct entities. First, jails are primarily locally funded and operated.[47] As such, they are "subject to local political agendas."[48] The local nature of jails' operation also suggests that a wide variety of institutional practices exist across the country and uniformity is unlikely.[49]

Second, given the "transience of the jail population,"[50] jails incarcerate a significant number of people per year. In 2015, approximately 10.9 million people were admitted to local jails across the country and approximately 721,300 were housed in jails per day.[51] On average, jails admit approximately 12 million people per year[52] and hold approximately 731,000 individuals per day.[53] Prisons, by contrast, hold approximately twice the number of people as jails on a given day,[54] but they admit significantly fewer per year.[55] Not surprisingly, jails have a much larger impact on society than prisons do.[56]

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46. *See, e.g.*, RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 4 (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf [http://perma.cc/K8FK-YKRL].

47. *See* Jeanne B. Stinchcomb et al., *Moving Toward Utopia: Visions of Progress for American Jails*, 28 J. CONTEMP. CRIM. JUST. 23, 30 (2012); *see also* AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INST., JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES 5 (2008), http://www.justicepolicy.org/images/upload/08-04_rep_jailingcommunities_ac.pdf ("Jails are correctional facilities operated and funded by counties and localities, and they are usually centrally located in a community.") [http://perma.cc/MYP6-WSXZ].

48. Stinchcomb et al., *supra* note 47, at 30.

49. *See* Rick Ruddell & G. Larry Mays, *Rural Jails: Problematic Inmates, Overcrowded Cells, and Cash-Strapped Counties*, 35 J. CRIM. JUST. 251, 252 (2007) ("Jails within the United States ranged in size from only four or five beds, to the Los Angeles jail system that housed an average of 18,693 inmates from October to December 2005."); *see also* David C. May et al., *Going to Jail Sucks (and It Really Doesn't Matter Who You Ask)*, 39 AM. J. CRIM. JUST. 250, 251 (2013) ("Jail operations vary considerably.").

50. *See* Haney et al., *supra* note 19, at 132.

51. TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, JAIL INMATES IN 2015, at 1 (2016), https://www.bjs.gov/content/pub/pdf/ji15.pdf [http://perma.cc/2B2S-5HFG].

52. *See* Arthur J. Lurigio, *Jails in the United States: The "Old-New" Frontier in American Corrections*, 96 PRISON J. 3, 3 (2016); *see also* SUBRAMANIAN ET AL., *supra* note 46, at 46.

53. SUBRAMANIAN ET AL., *supra* note 46, at 4.

54. *See, e.g.*, E. ANN CARSON & ELIZABETH ANDERSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015, at 1 (2016), https://www.bjs.gov/content/pub/pdf/p15.pdf (reporting that 1,526,800 people were confined in prisons at the end of 2015) [https://perma.cc/39AC-NW22].

55. *See id.* at 10 (reporting that 608,300 people were admitted to prisons in 2015).

56. *See* PETTERUTI & WALSH, *supra* note 47, at 15 ("[M]any people reenter the community from jail every day. . . . As a result, people in jails often have many interactions with the community around the jail facility, in a way that people held in prisons do not. This has implications for the health and well-being of the people in the jail as well as of the people in the community."); *see also* Haney et al., *supra* note 19, at 129 ("[T]he social and psychic

Third, jails and prisons typically serve different populations. People incarcerated in state and federal prisons have been convicted of a crime and are typically serving sentences that are greater than one year.[57] People incarcerated in jails are typically awaiting trial or are serving a sentence of under one year.[58] Most people in jails have been arrested but not convicted of any crime.[59] These individuals are "legally presumed innocent."[60]

While pretrial release decisions are supposed to be made based on factors such as risk of flight and community safety,[61] low-risk individuals who are too poor to afford bail are increasingly likely to remain in jail while high-risk individuals who can afford bail are more likely to be released.[62] The Vera Institute of Justice found that 54 percent of individuals incarcerated in New York City jails remained incarcerated "because they could not afford bail of $2,500 or less."[63]

Jails tend to incarcerate vulnerable people. They are "repositor[ies]" of the mentally ill,[64] the poor,[65] and communities of color,[66] and their conditions have far-reaching ripple effects. Most people who are incarcerated are eventually released, and the psychological, social, emotional, and physical effects of incarceration in general, and solitary confinement in particular, have implications for society as a whole.[67]

The Department of Justice found that approximately 18 percent of individuals who were incarcerated in local jails spent time in solitary

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'footprint' of conditions and practices in jails is broader if not necessarily deeper than for prisons."); Wacquant, *supra* note 21, at 75 ("[J]ails create more social disruption and family turmoil . . . than do prisons.").

57. *See* PETTERUTI & WALSH, *supra* note 47, at 5; *see also* CARSON & ANDERSON, *supra* note 54, at 6 (reporting that approximately 97 percent of the prison population in 2015 was sentenced to more than one year in prison).

58. SUBRAMANIAN ET AL., *supra* note 46, at 6.

59. *See id.* (estimating that approximately three out of five individuals incarcerated in jails across the United States are incarcerated pretrial).

60. *Id.* at 4–5.

61. *See, e.g.*, Bail Reform Act of 1984, 18 U.S.C. § 3142 (2012); United States v. Salerno, 481 U.S. 739, 742 (1987) (upholding the Bail Reform Act's provision that individuals charged with an offense may be held if a judicial officer reasonably believes that it is necessary to assure appearance at trial or necessary for community safety); *see also* SUBRAMANIAN ET AL., *supra* note 46, at 4.

62. SUBRAMANIAN ET AL., *supra* note 46, at 32.

63. *Id.*

64. *See* Linda A. Teplin, *The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees: Comparison with the Epidemiologic Catchment Area Program*, 80 AM. J. PUB. HEALTH 663, 663 (1990); *see also* Jillian Peterson & Kevin Heinz, *Understanding Offenders with Serious Mental Illness in the Criminal Justice System*, 42 MITCHELL HAMLINE L. REV. 537, 538 (2016) (explaining that "[t]he Los Angeles County jail system is one of the largest mental health treatment facilities in the country"). *See generally* Melissa Kong, *Cook County Jail: A De Facto Hospital for the Mentally Ill*, 19 LOY. PUB. INT. L. REP. 141 (2014).

65. *See* SUBRAMANIAN ET AL., *supra* note 46, at 4.

66. *See id.* at 11; *see also* PETTERUTI & WALSH, *supra* note 47, at 4. *See generally* Jonathan Oberman & Kendea Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York's Poor Communities of Color?*, 37 CARDOZO L. REV. 931 (2016).

67. *See* Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 264 (2013).

confinement in a twelve-month period.[68] This practice, which has been described as "criminality at one of its highest levels"[69] and "solely punitive[,] [without] any health or safety justification,"[70] deserves increased attention when individuals who have not been convicted of a crime are at risk of developing long-lasting detrimental health effects.

B. Solitary Confinement: Creating Madness

Solitary confinement typically consists of isolation in a "windowless cell [that is] no larger than a typical parking spot"[71] for twenty-two to twenty-four hours per day.[72] A quintessential characteristic of the practice is "extreme sensory deprivation."[73] Individuals placed in solitary confinement are often "allowed little or no opportunity for conversation or interaction with anyone" in the limited time that they are allowed outside of their cells.[74]

Initially established as a tool for criminal justice reform,[75] solitary confinement is now used primarily for security purposes.[76] Despite judicial deference to jail and prison administrators,[77] research demonstrates that the practice is more likely to cause long-lasting, sometimes permanent, adverse health effects than to increase institutional order and security.

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68. *See* BECK, *supra* note 14, at 4 (reporting that 18.1 percent of people incarcerated in prisons spent time in solitary confinement in a twelve-month period).

69. Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265, 296 (1977).

70. Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 526 (2014).

71. Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

72. *See, e.g.*, Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. LEGIS. 1, 2 (2015); *see also* G.A. Res. 70/175, *supra* note 16, at 17 (defining solitary confinement as isolation for twenty-two or more hours per day).

73. Mariam Hinds & John Butler, *Solitary Confinement: Can the Courts Get Inmates out of the Hole?*, 11 STAN. J. C.R. & C.L. 331, 332 (2015).

74. *Davis*, 135 S. Ct. at 2208 (Kennedy, J., concurring).

75. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 236 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

76. *See* ALISON SHAMES ET AL., VERA INST. OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 4 (2015), http://archive.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report.pdf (explaining that solitary confinement is "used by corrections officials in the United States today, largely as a means to fulfill a prison or jail's top priority: the safety of its staff and the incarcerated people under its care") [http://perma.cc/L29N-P2GR].

77. *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2045–47 (2011); *see also* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2474 (2015) ("[A] court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate."); Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("Courts must be sensitive to . . . the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals."); Turner v. Safley, 482 U.S. 78, 84–85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.").

1. Justification and Effects on Institutional Violence

Solitary confinement was first introduced to reform criminal punishment.[78] The practice's proponents were concerned with the barbaric nature of criminal punishment as a public spectacle.[79] In the early nineteenth century, isolation was "intended to redeem the soul through quiet contemplation."[80] However, the practice's justifications have shifted over time. As one scholar noted, solitary confinement has "changed from an open, optimistic experiment in social reform into a hidden, secretive place of punishment and control."[81]

Today, jail administrators primarily support the use of solitary confinement as a security measure. Administrators and officers must be able to effectively manage their facilities,[82] and solitary confinement provides officers with an easy-to-enforce sanction for the violation of disciplinary rules.[83] Jails cannot refuse admission.[84] They house populations that are transient and often in crisis.[85] Thus, correction officers are forced to make choices about how to care for a variety of individuals who may pose a threat to institutional safety, often without sufficient time to deliberate.[86]

Correction officers are, first and foremost, concerned with assaults on staff and other people who are incarcerated.[87] Marc Steier, the director of legal affairs for the Correction Officers' Benevolent Association, justified solitary confinement by explaining that he does not know of another way to deal

78. *See* FOUCAULT, *supra* note 75, at 236.

79. *See* JOSHUA M. PRICE, PRISON AND SOCIAL DEATH 93 (2015) (explaining that examples of public punishment that used to characterize the criminal justice system are "the stocks, the pillory, the ducking or cucking stool, public flogging, and transport, . . . hanging and other forms of public execution").

80. *Id.* at 92.

81. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 343 (2006).

82. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); *see also Turner*, 482 U.S. at 89 (justifying judicial deference because "an inflexible strict scrutiny analysis would seriously hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration").

83. *See generally* SCARLET KIM ET AL., N.Y. CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS (2012), https://www.nyclu.org/sites/default/files/publications/nyclu_boxedin_FINAL.pdf [http://perma.cc/BM84-7UKR].

84. *See, e.g.*, Stinchcomb et al., *supra* note 47, at 28.

85. *See, e.g.*, Haney et al., *supra* note 19, at 131.

86. *See* May et al., *supra* note 49, at 253 ("In addition to places of violence and idleness, jail staff are challenged by the broad range of offenders they must supervise."); *see also* Haney et al., *supra* note 19, at 134 ("[People who are incarcerated in local jails] are an especially complex and challenging population for jail staff to effectively monitor and control. When combined with the relative lack of support staff to whom they can turn, the high turnover of inmates, and the typically very limited range of classification, alternative housing, and management options at their disposal, there is a high likelihood that jail guards will employ forceful, punitive responses to inmate conflict and misconduct. Isolation can easily become a normative response in such environments.").

87. *See, e.g.*, Wacquant, *supra* note 21, at 75 (writing that "minimiz[ing] violent incidents" is a "top priorit[y] of jail wardens").

"with people who have assaulted staff 20, 40, 60 times."[88] He believes that the solution is simple: "[I]f I can't reach you, I can't attack you."[89]

Isolation, in Steier's mind, is a regulatory mechanism to ensure that the most dangerous people do not have access to others.[90] However, justifying solitary confinement as an instrument necessary to reduce levels of institutional violence is likely "unsubstantiated."[91] First, it is important to clarify that the use of solitary confinement is not exclusively reserved for people who pose a serious threat to institutional safety.[92] Second, research suggests that solitary confinement does not decrease levels of institutional violence. One researcher has found that solitary confinement has no effect on violence—overall levels of violence in his study neither increased nor decreased.[93] Others have found that solitary confinement actually increases violence.[94] In some instances, isolation will drive people to throw "feces, urine, and/or semen" at officers.[95] Isolation can also lead to "uncontrollable outbursts of anger, rage and aggression."[96] The penal response to such behavior is more time in solitary confinement, creating a feedback loop where institutionally unacceptable conduct is met with a sanction that tends to increase the likelihood that the conduct will recur.[97]

2. Effects of Solitary Confinement

The potential harmful effects of solitary confinement were known as early as 1890.[98] In *In re Medley*,[99] the Supreme Court found that, while in solitary confinement,

> [a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not

88. Victoria Law, *Four Deadline Extensions Later, Teenagers Are Still Locked Up in Solitary on Rikers Island*, VILLAGE VOICE (July 13, 2016, 10:00 AM), http://www.villagevoice.com/news/four-deadline-extensions-later-teenagers-are-still-locked-up-in-solitary-on-rikers-island-8856237 [http://perma.cc/W574-7MKG].

89. *Id.*

90. *See id.*

91. *See* SHAMES ET AL., *supra* note 76, at 18 ("Colorado has decreased its use of segregated housing by 85 percent and prisoner-on-staff assaults are the lowest they have been since 2006."); *see also* N.Y.C. JAILS ACTION COAL., *supra* note 5, at 16 ("Punitive segregation fosters violence in DOC facilities and exacerbates threats to institutional security.").

92. *See* SHAMES ET AL., *supra* note 76, at 12–14.

93. Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1367–70 (2003).

94. *See* SHAMES ET AL., *supra* note 76, at 18; *see also* Grant Henderson, Comment, *Disciplinary Segregation: How the Punitive Solitary Confinement Policy in Federal Prisons Violates the Due Process Clause of the Fifth Amendment in Spite of* Sandin v. Conner, 99 MARQ. L. REV. 477, 497–99 (2015).

95. Lindley A. Bassett, Note, *The Constitutionality of Solitary Confinement: Insights from Maslow's Hierarchy of Needs*, 26 HEALTH MATRIX 403, 417 (2016).

96. *See* KIM ET AL., *supra* note 83, at 44.

97. *Id.*

98. *In re* Medley, 134 U.S. 160, 160 (1890).

99. 134 U.S. 160 (1890).

> generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[100]

Dr. Stuart Grassian, an expert on the effects of solitary confinement, addressed and rebuked concerns that the self-reports typically characterizing solitary confinement research might be exaggerated.[101] He found that his interviewees actually rationalized and avoided full engagement with the extent of the deprivation they were facing until he probed further.[102] For example, he reported that one of his interviewees rationalized his self-harm while in solitary confinement with a desire to leave.[103]

Grassian found a pattern of initial denial and rationalization, progressing to overt anxiety once subjects were pressed through questioning.[104] Some of the interviewees expressed fear that the guards would exploit their weaknesses or that they were, in fact, "going insane."[105] This research suggests that interviewees' potential biases typically point toward a lack of acknowledgment of the practice's effects as opposed to exaggeration.

In his studies, Grassian identified a distinct psychiatric syndrome associated with solitary confinement, explaining that many of the associated symptoms are either rare or not found elsewhere.[106] In his evaluation of forty-nine individuals incarcerated in Pelican Bay State Prison's solitary confinement unit, he found that "at least seventeen were actively psychotic and/or acutely suicidal . . . , and twenty-three others suffered serious psychopathological reactions to solitary confinement."[107] The most severely affected by solitary confinement often suffer from delirium, hallucinations, and disorientation.[108] In these mental states, individuals often dissociate and cannot recall what occurred.[109]

Among the more resilient in Grassian's sample—whom he described as highly educated and high functioning—he found symptoms of "perceptual disturbances, free-floating anxiety, and panic attacks."[110] Grassian concluded that the conditions inherent in solitary confinement "are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances."[111]

A study conducted in Denmark demonstrated that individuals placed in solitary confinement experienced significantly higher incidences of

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100. *Id.* at 168.
101. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1451 (1983).
102. *Id.*
103. *Id.* (quoting an interviewee who said, "As soon as I got in, I started cutting my wrists," and "I figured it was the only way to get out of here").
104. *Id.* at 1452.
105. *Id.*
106. *See* Grassian, *supra* note 81, at 337.
107. *Id.* at 349.
108. *See id.* at 332; *see also* Grassian, *supra* note 101, at 1452.
109. *See* Grassian, *supra* note 81, at 353.
110. *Id.*
111. *Id.* at 354.

psychiatric disorders than those in general population housing.[112] The researchers found that individuals in solitary confinement were at a higher risk for developing adjustment disorders such as depression and anxiety, coupled with psychosomatic symptoms.[113] Panic attacks, posttraumatic stress disorder, "chronic hyper-vigilance," and obsessive thoughts are also symptomatic.[114]

In solitary confinement, an individual's emotional well-being also suffers. Humans are social creatures,[115] and healthy brain functioning thrives on "social thinking and sensory interpretation."[116] People need "continuous *meaningful contact* with the outside world" to function.[117] Health and well-being improve with access to "close social relationships and rich social networks," from which people in solitary confinement are necessarily restricted.[118] Complete isolation, in many ways, can be worse than negative social interaction.[119]

People who are isolated can suffer a great deal of emotional damage, cycling between "bitterness and despair."[120] They feel like incarceration is trying to "break" them and "describe a complete loss of control over their emotions."[121] Stemming from these thoughts, they also feel a tremendous amount of rage, resentment, and hopelessness.[122]

Dr. Craig Haney identified five social pathologies that emerge from isolation: dependence on the institution, inability to initiate behavior, a pervading "feeling of unreality," frustration and anger, and social withdrawal,.[123] Solitary confinement can also cause regression into primary

112. H.S. Andersen et al., *A Longitudinal Study of Prisoners on Remand: Psychiatric Prevalence, Incidence and Psychopathology in Solitary vs. Non-Solitary Confinement*, 102 ACTA PSYCHIATRICA SCANDINAVICA 19, 23 (2000) (finding that solitary confinement is "a significant risk factor for the development of non-psychotic psychiatric morbidity in comparison with imprisonment in [general population]").

113. *Id*.

114. *See* Jacob Zoghlin, *Punishments in Penal Institutions: (Dis)-Proportionality in Isolation*, 21 HUM. RTS. BRIEF 24, 26 (2014).

115. Bandy X. Lee & Maya Prabhu, *A Reflection on the Madness in Prisons*, 26 STAN. L. & POL'Y REV. 253, 260 (2015) ("Isolation can be more harmful than negative human contact because human beings are neurologically and psychologically social animals. Social contact is like oxygen or food: we do not notice how essential it is until we have known suffocation or hunger.").

116. *See* Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Unusual Punishment*, 90 IND. L.J. 741, 755 (2015).

117. *See* Benjamin & Lux, *supra* note 69, at 270.

118. *See* Lane Beckes & James A. Coan, *Social Baseline Theory: The Role of Social Proximity in Emotion and Economy of Action*, 5 SOC. & PERSONALITY PSYCHOL. COMPASS 976, 976 (2011); *see also* Abdul Rashid et al., *The Influence of Social Support on Cognitive Impairment in the Elderly*, 9 AUSTRALIAN MED. J. 262, 264 (2016) (finding that a lack of social support is a risk factor for cognitive heath and that "[e]lderly with good social support . . . are less likely to experience cognitive decline").

119. *See* Lee & Prabhu, *supra* note 115, at 259 ("Still, *negative* human contact within prisons is better than *no* contact.").

120. *See* Benjamin & Lux, *supra* note 69, at 277.

121. *Id.*

122. *Id.*

123. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 138–40 (2003).

processes, consisting of "unrealistic, prelogical modes of thought, or [thoughts] which contain[] inappropriate drive intrusions."[124] Consistent with this regression are a lack of impulse control, fantasies of revenge, and paranoia.[125]

Solitary confinement also impacts sensitivity to external stimuli. One's attention to the environment and levels of alertness are diminished during isolation.[126] Those who are isolated may lose "perceptual constancy," characterized by "objects becoming larger and smaller, seeming to 'melt' or change form, [and] sounds becoming louder and softer."[127] In addition, they demonstrate an extreme hypersensitivity to stimuli, which "become[] intensely unpleasant," and report that "small irritations become maddening."[128]

Further, the effects of solitary confinement are physical. Solitary confinement can be "as strong a risk factor for . . . mortality as are smoking, obesity, a sedentary lifestyle, and high blood pressure."[129] Solitary confinement also causes "sleep disturbances, headaches, lethargy, dizziness, heart palpitations, appetite loss, weight loss, severe digestive problems, diaphoresis, back and joint pain, deterioration of eyesight, shaking and feeling cold, and aggravation of pre-existing medical problems."[130]

The harm of solitary confinement is often permanent, even if symptoms subside over time after one's release.[131] This can have implications for successful reentry to society.[132] In fact, prolonged isolation can cause lasting detrimental emotional damage and, in the worst cases, permanent "functional disability."[133] Harms associated with solitary confinement can become permanent even after a short duration.[134]

Immediately after release from segregation, whether into general population housing or society, individuals demonstrate difficulties with adjustment.[135] Solitary confinement can thus have a negative impact on public safety. Jails, pretrial detention in particular, are designed for short-term incarceration.[136] The majority of people incarcerated pretrial will be released, and they will not be "well prepared to return to a social milieu."[137]

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124. *See* Benjamin & Lux, *supra* note 69, at 275.
125. Grassian, *supra* note 101, at 1453.
126. *See* Grassian, *supra* note 81, at 330.
127. *Id.* at 337.
128. *Id.* at 331.
129. Bennion, *supra* note 116, at 755.
130. Zoghlin, *supra* note 114, at 26.
131. *See* Grassian, *supra* note 81, at 332.
132. *See* Gordon, *supra* note 70, at 506–07.
133. Terry A. Kupers, *What to Do with the Survivors?: Coping with the Long-Term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005, 1006 (2008).
134. *See* Méndez, *supra* note 16, at 23 (stating that even a short duration in isolation can amount to torture).
135. Kupers, *supra* note 133, at 1010.
136. *See, e.g.*, PETTERUTI & WALSH, *supra* note 47, at 5 ("[J]ails are intended to hold people who are at risk of reoffending, are unlikely to return for their court date, and/or are sentenced to a year or less.").
137. Kupers, *supra* note 133, at 1011.

The permanence of the harm and the likelihood that individuals will develop psychiatric disorders render emerging adults especially vulnerable to the practice. Further, emerging adults are the most likely age demographic to be exposed to solitary confinement in jail.[138]

In his call to "banish" solitary confinement for juveniles in the United States, Professor Ian M. Kysel "suggest[s] that there are both practical and jurisprudential reasons for viewing children as different from adults when it comes to evaluating how the constitution protects them when they are deprived of their liberty" while incarcerated.[139] The following section, through a discussion of the empirical research surrounding emerging adulthood, demonstrates that there are similar practical and jurisprudential reasons to view emerging adults differently.

C. Emerging Adulthood: A Critical Developmental Period

With some exceptions, legal adulthood begins at the age of eighteen in the United States.[140] However, many scholars reject the designation of eighteen as a marker of adulthood.[141] Eighteen as legal adulthood is simply a default rule "unless the legislatures or courts have prescribed a higher or lower age in particular contexts."[142]

The age of responsibility depends on the context. For example, in most states, foster care and parental support obligations end at the age of eighteen, but health insurance plans are mandated under parents' health insurance coverage until the age of twenty-six.[143] Between the ages of fourteen and sixteen, adolescents are able to make autonomous medical decisions, but alcohol consumption is prohibited until twenty-one.[144] The age of criminal responsibility is eighteen in most states but can be as low as sixteen or seventeen in others.[145]

Strict dividing lines are undoubtedly easier to enforce, but they ignore "the reality of human development, which occurs on a continuum."[146] Between the ages of eighteen and twenty-five, individuals are likely to experience more instability and unpredictability than those in different age groups.[147]

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

139. Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jails and Prisons*, 40 N.Y.U. REV. L. & SOC. CHANGE 675, 679 (2016).

140. *See* Atwell, *supra* note 25, at 15.

141. *See* Melissa S. Caulum, Comment, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 732; *see also* David P. Farrington et al., *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL'Y 729, 730 (2012).

142. Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult?: Implications for Law and Policy*, 88 TEMP. L. REV. 769, 770 (2016).

143. *Id.*

144. *Id.* at 776.

145. *See* Kysel, *supra* note 139, at 681.

146. *See* Atwell, *supra* note 25, at 15.

147. *Id.* at 19.

1. Defining Emerging Adulthood

Dr. Jeffrey Jensen Arnett identifies the period from adolescence through the twenties as a distinct stage of maturation.[148] He argues that emerging adulthood is "theoretically and empirically distinct from" both adolescence and young adulthood, characterized by increased risk-taking.[149] He also justifies defining emerging adulthood as a distinct developmental stage rather than a transitional period by indicating that seven years is a longer period than both infancy and adolescence.[150]

Professor David Farrington and his colleagues look to justifications for treating juveniles as a protected, separate group to justify similarly protecting emerging adults. Emerging adults, while distinct in many ways, are more similar to adolescents "with respect to features such as their executive functioning, impulse control, malleability, responsibility, susceptibility to peer influence, and adjudicative competence."[151] Results show that college-aged individuals may be more similar to adolescents than older adults in their inclination to engage in "antisocial decision making."[152] These similarities justify treating emerging adults as a distinct midway group deserving of increased legal protection.[153]

Some disagree with the calls for increased protection. Professor John Lunstroth, for example, argues that the law should recognize formal, legal adulthood as early as fourteen.[154] He is worried that arguments in favor of treating youth as less culpable could be damaging for the variety of rights youth should be entitled to in other contexts.[155]

In the seminal case *Roper v. Simmons*[156]—which declared the death penalty unconstitutional when imposed on youth under the age of eighteen—Justice Antonin Scalia dissented and was similarly perplexed by the disconnect among youth advocates.[157] Justice Scalia pointed to the American Psychiatric Association's brief in *Roper*—supporting a finding of diminished criminal liability for those who are under eighteen—as inconsistent with a prior brief in support of declaring youth under eighteen as competent to make decisions about obtaining an abortion.[158]

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148. Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 469 (2000).

149. *Id.* at 469–75.

150. Jeffrey Jensen Arnett, *Emerging Adulthood: What Is It, and What Is It Good For?*, 1 CHILD DEV. PERSP. 68, 70 (2007).

151. *See* Farrington et al., *supra* note 141, at 741.

152. Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 LAW & HUM. BEHAV. 78, 89 (2008) (researching a sample population of adolescents aged fourteen to seventeen, college-aged people eighteen to twenty-one, young adults twenty-two to twenty-seven, and adults twenty-eight to forty).

153. *See* Farrington et al., *supra* note 141, at 730.

154. John Lunstroth, *Recognizing Younger Citizens: Statutes and Structures in Support of Earlier Adulthood*, 18 MICH. ST. U. J. MED. & L. 161, 164 (2014).

155. *Id.* (discussing a child's ability to make decisions in relation to terminal illnesses, ability to vote, etc.).

156. 543 U.S. 551 (2005).

157. *Id.* at 617–18 (Scalia, J., dissenting).

158. *Id.*

These seemingly incompatible arguments cease to be incompatible when emerging adulthood research is consulted.[159] Developmental change depends on the outcome being assessed.[160] For example, people "mature intellectually before they mature emotionally or socially," with emotional and social maturation extending past the age of eighteen.[161]

This Note does not argue that youth should not have the right to be independent agents. Rather, it argues that emerging adults should not be subjected to a practice, especially absent a formal finding of guilt, that has demonstrated severe and permanent negative effects. This argument is based on the evidence that emerging adults will often act rashly and take risks.[162] In other words, the argument is not that adolescents and emerging adults are wholly incapable of thinking for themselves and making their own decisions in all circumstances but that we should be concerned about how they are to be held accountable.

2. Increased Risk-Taking

Emerging adults are more likely than both adolescents and older adults to engage in risky behavior.[163] Rather than conceptualizing the age of eighteen as a marker of the end of an unstable developmental period, eighteen is more appropriate as the marker of the "*beginning* of a particularly problematic developmental phase."[164] The evidence that risk-taking actually peaks during emerging adulthood then begins to desist weakens the argument that eighteen-year-olds are embarking on a period of increased sensibility.[165]

In one study, researchers found that most risky behaviors decrease from adolescence to adulthood, but the age at which they decline differs.[166] While desistance from offending is typically related to the age of onset of criminal behavior, the early twenties mark the largest concentration of desisting

159. Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 586 (2009).

160. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 648–49 (2016).

161. *Id.* at 648.

162. *See infra* Part I.C.2.

163. *See* Krisna N.K. Duangpatra et al., *Variables Affecting Emerging Adults' Self-Reported Risk and Reckless Behaviors*, 30 J. APPLIED DEVELOPMENTAL PSYCHOL. 298, 298 (2009); *see also* Brandon G. Bergman et al., *"The Age of Feeling In-Between": Addressing Challenges in the Treatment of Emerging Adults with Substance Use Disorders*, 23 COGNITIVE & BEHAV. PRAC. 270, 271 (2016) (finding that emerging adults have the highest rates of substance use disorders of any age group).

164. Elizabeth Cauffman, *Aligning Justice System Processing with Developmental Science*, 11 CRIMINOLOGY & PUB. POL'Y 751, 752 (2012); *see also* Jeffrey J. Arnett et al., *The New Life Stage of Emerging Adulthood at Ages 18–29 Years: Implications for Mental Health*, 1 LANCET PSYCHIATRY 569, 571 (2014) ("Emerging adulthood is arguably the most unstable period of the lifespan.").

165. *See* Cauffman, *supra* note 164, at 752.

166. *See* Jeannette Brodbeck et al., *Comparing Growth Trajectories of Risk Behaviors from Late Adolescence Through Young Adulthood: An Accelerated Design*, 49 DEVELOPMENTAL PSYCHOL. 1732, 1737 (2013).

regardless of the age of onset.[167] By the midtwenties, approximately three-quarters of all people who engage in criminal behavior are expected to stop engaging in such behavior altogether.[168]

Self-control theory's basic thesis is that the absence of self-control leads to criminal behavior.[169] Researchers are increasingly finding that self-control continues to change and develop into emerging adulthood.[170] Evidence of increased risk-taking among unincarcerated youth is a sign that the inherent stressors of incarceration could lead emerging adults to engage in the types of behaviors that may eventually cause their placement in solitary confinement.

In a study of prison violence, researchers found that incarcerated people under the age of twenty-one were 3.5 times as likely to engage in violence, and people between the ages of twenty-one and twenty-five were 63 percent more likely to engage in violence than those between the ages of thirty-one and thirty-five.[171] As age increases, people who are incarcerated are less likely to engage in violent behavior.[172]

Professor Barbara Bennett Woodhouse cautions that the theory of emerging adulthood, encompassing identity exploration and risk-taking, is a privilege that only the middle and upper classes can enjoy.[173] The increased vulnerabilities of emerging adulthood among those who do not have that privilege are similarly intensified during incarceration and solitary confinement. Emerging adulthood is typically "characterized by myriad opportunities for greater autonomy and independent living that comes with reaching the age of majority."[174] Incarcerated emerging adults are necessarily foreclosed from this period of exploration because "'growing up' [incarcerated] creates a developmental bind."[175] It is imperative that they are not left behind.

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167. *See* Farrington et al., *supra* note 141, at 734.

168. Andrew Michaels, *A Decent Proposal: Exempting Eighteen-to-Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U REV. L. & SOC. CHANGE 139, 164 (2016).

169. Callie H. Burt et al., *Self-Control Through Emerging Adulthood: Instability, Multidimensionality, and Criminological Significance*, 52 CRIMINOLOGY 450, 453–54 (2014).

170. *Id.* at 474.

171. Allison M. Schenk & William J. Fremouw, *Individual Characteristics Related to Prison Violence: A Critical Review of the Literature*, 17 AGGRESSION & VIOLENT BEHAV. 430, 432 (2012).

172. *Id.*

173. Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DEPAUL L. REV. 743, 758 (2002).

174. *See* Bergman et al., *supra* note 163, at 270.

175. Joyce A. Arditti & Tiffaney Parkman, *Young Men's Reentry After Incarceration: A Developmental Paradox*, 60 FAM. REL. 205, 207, 215 (2011) ("Young adults who 'grow up' in prison are severely restricted in terms of having the opportunity and freedom to explore positive life directions, master social competence, and establish themselves in social structures necessary for status attainment.").

3. Increased Vulnerability to Negative Conditions

Emerging adulthood is a challenge for "even the most well-adjusted youth."[176] Incarcerated emerging adults "have yet to establish conventional social ties, roles, and activities prior to their incarceration."[177] A failure to successfully navigate this developmental period can have lifelong effects.[178] Additionally, emerging adults are at a heightened risk for developing mental illnesses.[179] Prevalence of a mental health disorder for individuals aged eighteen to twenty-nine is higher than any other age group.[180]

Evidence suggests that stressful environments may actually be regressive. Youth aged eighteen to twenty-one behave more like adolescents when exposed to "negative emotional arousal."[181] Further, an emerging adult's cognitive functioning is especially "vulnerable to negative emotional influences."[182] During emerging adulthood, individuals begin to develop and acquire both practical and interpersonal skills that will enable them to navigate adulthood more effectively. Incarceration during this critical period in itself disrupts this development; solitary confinement will unmistakably aggravate this disruption.

II. PUNISHMENT: A TERM OF ART

The Supreme Court has stated, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[183] In keeping with this assertion, the Court has attempted to define the contours of the rights afforded to people who are incarcerated. The Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause applies only to people who are incarcerated following a conviction.[184] Until 2015, there was no clear dividing line between standards applicable to pretrial incarceration and imprisonment.[185]

Part II.A outlines the development of the Supreme Court's prison jurisprudence, and Part II.B similarly tracks the development of the Supreme Court's pretrial incarceration jurisprudence.[186] While *Kingsley v. Hendrickson*[187] held that claims of excessive force in pretrial detention are

176. *See* Zajac et al., *supra* note 27, at 139.
177. *See* Arditti & Parkman, *supra* note 175, at 205.
178. *See id.*; *see also* Zajac et al., *supra* note 27, at 140 ("The importance of this developmental period lies not only in key milestones but also in the risk for impediments.").
179. *See* Zajac et al., *supra* note 27, at 140 (finding that a "majority of mental health disorders have onset by the early 20s"); *see also* Lee & Prabhu, *supra* note 115, at 262 (finding that "schizophrenia and bipolar disorder[] most often have their onset during adolescence or early adulthood").
180. *See* Arnett et al., *supra* note 164, at 569.
181. *See* Cohen et al., *supra* note 142, at 786.
182. *Id.* at 787.
183. Turner v. Safley, 482 U.S. 78, 84 (1987).
184. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 243–44 (1983).
185. Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015).
186. *Id.*
187. 135 S. Ct. 2466 (2015).

subject to an objective rather than subjective test,[188] it is still unclear whether the *Kingsley* test is applicable in other contexts and factual circumstances.[189] Part II.C explains lower courts' conflation of pretrial incarceration and imprisonment claims prior to *Kingsley* and demonstrates the risk that this conflation will continue if *Kingsley*'s holding is confined to its facts.

A. The Eighth Amendment and Imprisonment

The Court repeatedly grounds its prison jurisprudence on the fact that the complainants have been convicted of a crime.[190] Additionally, the Court continually emphasizes a rigorous deference to prison administrators.[191] The Court concretized this deference in *Turner v. Safley*.[192] The majority was wary of the competing interests of protecting the rights of incarcerated individuals and exercising judicial restraint.[193] For this reason, the Court articulated the following standard: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[194] While there must be a logical connection between the regulation that curtails fundamental rights and its stated goals,[195] the Court also reinforced the suggestion that prison officials are experts who should have the latitude to make decisions qualified by that expertise.[196]

The Supreme Court, mindfully exercising restraint, developed its jurisprudence to safeguard the rights of people who are incarcerated postconviction so that they are not subjected to cruel and unusual punishment. Today, prison officials must act with subjective deliberate indifference to a person's health or safety to be found liable.[197] Further, solitary confinement in itself does not trigger a protected liberty interest unless it amounts to an "atypical, significant deprivation."[198]

188. *Id.* at 2475 (emphasizing that respondents' assertion that the applicable standard should be subjective fails due to their reliance on Eighth Amendment jurisprudence).

189. *See id.* at 2473 (maintaining that the objective standard should not be applied "mechanically").

190. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 561–63 (1974) (referencing lawful conviction status as a justification for the articulated procedural protections).

191. *See, e.g.*, *supra* note 82 and accompanying text.

192. 482 U.S. 78 (1987).

193. *Id.* at 84–85.

194. *Id.* at 89.

195. *Id.* at 89–91 (maintaining that the goals must be objective but that courts can also take account of whether there are other avenues for complainants to assert constitutional rights, whether allowing a complainant to assert those rights will have a "ripple effect" on others, and whether there are "ready alternatives" to the regulation).

196. *See id.* at 84–85 ("Running a prison is an inordinately difficult undertaking that requires expertise."); Pell v. Procunier, 417 U.S. 817, 827 (1974) (deferring to the "professional expertise of corrections officials").

197. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

198. Sandin v. Conner, 515 U.S. 472, 486 (1995).

1. Culpable State of Mind: Subjective Deliberate Indifference

The Supreme Court first presented the subjective deliberate indifference standard in a claim alleging unconstitutionally inadequate medical care.[199] The Court found that the Eighth Amendment "proscribes more than physically barbarous punishments" and extends an obligation to the government to "provide medical care for those whom it is punishing by incarceration."[200] The Court found an affirmative duty in the prison context because people who are incarcerated cannot turn elsewhere for medical care.[201] Accidents and "inadvertent failure[s]" to provide care, however, will not constitute violations of the Eighth Amendment, despite the level of pain and suffering that might ensue as a result.[202] The Court emphasized that officials may not be found liable for mere negligence.[203]

The Court additionally refused to distinguish between short-term conditions of confinement and "systemic" conditions.[204] In *Wilson v. Seiter*,[205] the plaintiff alleged that one-time conditions should have a culpable state of mind requirement but in continuous conditions, a prison official's state of mind should be irrelevant.[206] In response, the Supreme Court wrote:

> We perceive neither a logical nor a practical basis for that distinction. The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.[207]

The Court thus reiterated that a subjective inquiry is required in cases alleging unconstitutional conditions of confinement.[208]

The Court was once again tasked with answering whether the deliberate indifference standard is objective or subjective in a failure-to-protect claim.[209] Dee Farmer—a transgender woman who was sometimes housed in general population with cisgender men but more often segregated—brought a civil suit alleging deliberately indifferent failure to protect her from harm.[210] Within two weeks of a transfer to general population in March of 1989, Farmer was physically and sexually assaulted by another incarcerated

199. *Farmer*, 511 U.S. at 835 (noting that the term "deliberate indifference" was first used in Estelle v. Gamble, 429 U.S. 97 (1976)).
200. *Estelle*, 429 U.S. at 102–03.
201. *Id.* at 103.
202. *Id.* at 105–06 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").
203. *Id.* at 106.
204. Wilson v. Seiter, 501 U.S. 294, 300–01 (1991).
205. 501 U.S. 294 (1991).
206. *Id.* at 300.
207. *Id.*
208. *Id.* at 301–03.
209. Farmer v. Brennan, 511 U.S. 825, 837 (1994).
210. *Id.* at 829–32.

person in her cell.[211] Farmer's complaint alleged that she was placed in general population housing despite the officers' knowledge of the violent environment and history of assault and despite knowledge that her appearance and gender identity would make her especially vulnerable.[212]

The Supreme Court conceded that officials have a duty to ensure that those in their care are protected from violence at the hands of other people who are incarcerated.[213] However, not every injury suffered at the hands of another constitutes a violation of the Eighth Amendment.[214] The Court established a two-part test: the alleged deprivation "must be, objectively, 'sufficiently serious'" and the official alleged to have caused the deprivation must be subjectively deliberately indifferent to the individual's health or safety.[215]

The Court rejected Farmer's contention that deliberate indifference is a solely objective test.[216] The Court instead held that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety."[217] The Court did not hold that the official must know that harm is inevitable.[218] A failure to act despite "knowledge of a substantial risk of serious harm" suffices to satisfy deliberate indifference.[219]

2. Solitary Confinement in the Context of Prison Discipline: Liberty and Procedural Due Process

The standards articulated in *Estelle v. Gamble*[220] and *Farmer v. Brennan*[221] establish rights afforded to incarcerated people in claims arising out of the conditions of their confinement. During their incarceration, individuals may also be disciplined for various reasons. The Supreme Court accords prison officials discretion in discipline and allows them to place individuals in solitary confinement to "effectuate[] prison management and prisoner rehabilitative goals."[222]

Sandin v. Conner[223] is a leading case addressing solitary confinement in the prison context. In response to disrespectful language directed at an officer, DeMont Conner was issued a disciplinary infraction and subsequently sentenced to thirty days in disciplinary segregation.[224] Conner

211. *Id.* at 830.
212. *Id.* at 831.
213. *Id.* at 833.
214. *Id.* at 834.
215. *Id.* (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)).
216. *Id.* at 837.
217. *Id.*
218. *Id.* at 842.
219. *Id.*
220. 429 U.S. 97 (1976).
221. 511 U.S. 825 (1994).
222. Sandin v. Conner, 515 U.S. 472, 485 (1995).
223. 515 U.S. 472 (1995).
224. *Id.* at 475–76.

alleged that his segregation encroached on a protected liberty interest.[225] The Supreme Court disagreed, distinguishing the rights of those who are convicted from those who are incarcerated pretrial.[226] The Court found that "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law."[227]

The Supreme Court held that liberty interests are triggered by "atypical, significant deprivation[s]."[228] The Court subsequently found that thirty days in disciplinary segregation did not constitute an atypical and significant hardship and therefore did not encroach upon Conner's liberty interests in violation of the Eighth Amendment.[229]

To ensure that individuals are not arbitrarily deprived of their liberty, the Supreme Court outlined minimum procedural protections in *Wolff v. McDonnell*.[230] The Court justified its holding on the basis of the complainant's criminal conviction. The Court wrote: "Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so."[231]

Additionally, the Court acknowledged the often tense relationship between people who are incarcerated and prison staff.[232] To balance the competing interests of ensuring that individuals are not arbitrarily disciplined and allowing officials to effectively manage their facilities and people in their custody, the Court established that individuals who are charged with a disciplinary infraction are entitled to a hearing prior to being sanctioned.[233]

The Court outlined the following additional minimum protections: the individual is entitled to written notice, time to prepare for a disciplinary hearing (no less than twenty-four hours), a written statement by the fact-finders communicating the reasons for the infraction, and the right to call witnesses should the hearing administrator determine that doing so will not be "unduly hazardous to institutional safety or correctional goals."[234] An

225. *Id.* at 484.
226. *Id.* at 484–85.
227. *Id.* at 485.
228. *Id.* at 486.
229. *Id.* at 487.
230. 418 U.S. 539 (1974).
231. *Id.* at 561.
232. *Id.* at 562.
233. *Id.* at 557–58.
234. *Id.* at 564–66.

individual facing disciplinary charges has no right to counsel[235] and no right to cross-examine witnesses.[236]

All of the above cases were decided with the explicit acknowledgment that the complainants were lawfully incarcerated pursuant to a conviction. Consequently, their application to claims brought by individuals who are incarcerated pretrial should be avoided.

B. Substantive Due Process and Pretrial Incarceration

The Supreme Court's deference to prison administrators is clear.[237] The Court is similarly deferential to jail administrators.[238] In a series of cases, the Court, articulating and fine-tuning the standard applicable to people who are incarcerated pretrial, maintained that administrators are similarly best suited to make security and other considerations.[239]

The touchstone of the Supreme Court's pretrial incarceration jurisprudence is the doctrine of substantive due process. Embedded in the right to "due process of law"[240] is the notion that adequate process can safeguard individuals from arbitrary government action.[241] The Fifth and Fourteenth Amendments guarantee individuals the right to "due process of law," which appears to guarantee "only procedural protection."[242] However, the Due Process Clause also contains a substantive element.[243] Individuals have the right to be free from arbitrary government action "regardless of the fairness of the procedures used to implement them."[244]

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235. *Id.* at 570 ("The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.").

236. *Id.* at 567 ("Confrontation and cross-examination present greater hazards to institutional interests. If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability.").

237. *See* Struve, *supra* note 39, at 1015.

238. *Id.*

239. *Id.*

240. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

241. *See* Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 313 (1991) ("Although on its face, the due process clause appears to assure only procedural protection, the United States Supreme Court has long recognized that the clause contains a substantive element as well.").

242. *Id.*

243. *Id.*

244. Daniels v. Williams, 474 U.S. 327, 331–32 (1986); *see also* Ingraham v. Wright, 430 U.S. 651, 672–73 (1977) ("The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right

1. The Right to Be Free from Punishment: *Bell v. Wolfish* and Its Progeny

In 1979, the Supreme Court decided *Bell v. Wolfish*,[245] the seminal case legally differentiating between people who are incarcerated awaiting resolution of their cases and those who are incarcerated following a conviction.[246] People incarcerated pretrial at the Metropolitan Correction Center—a federal jail in New York—brought a class action challenging the conditions of their confinement.[247]

The Supreme Court noted that the government's interest in detaining individuals prior to trial is legitimate and not at issue in deciding conditions of confinement claims.[248] The Court held that the issue in such cases "is the detainee's right to be free from punishment."[249] The prevailing standard is whether conditions complained of amount to punishment "in the constitutional sense."[250] The Court elaborated that "[n]ot every disability imposed during pretrial detention" will amount to unconstitutional punishment.[251]

Courts must determine whether the disability complained of has a punitive purpose or whether it is related to a reasonable governmental interest.[252] Absent an express intent to punish, a regulation, procedure, or policy may be considered punitive if there is no rationally related purpose or if it "appears excessive in relation to the alternative purpose assigned [to it]."[253] One legitimate interest that the Supreme Court stresses is a jail's interest in maintaining order and security.[254]

The standard, as articulated in *Bell*, was vague, and the lack of a precise dividing line between constitutional and unconstitutional conditions of confinement in pretrial detention "provided few details to guide future cases."[255] In 1984, the Court reiterated that the articulated right to be free from punishment is qualified by great deference to jail administrators.[256] A jail's denial of contact visits even to people who are low risk was considered a legitimate and reasonable interest in light of the risk of smuggling contraband and the risk of harm to innocent visitors.[257] Additionally, the

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'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923))).

245. 441 U.S. 520 (1979).

246. *Id.*

247. *Id.* at 523–24.

248. *Id.* at 533–34.

249. *Id.* at 534.

250. *Id.* at 537.

251. *Id.*

252. *Id.* at 538.

253. *Id.* (alteration in original) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

254. *Id.* at 540. The use of solitary confinement is often rationalized as a method necessary to ensure jail security. *See supra* Part I.B.

255. *See* Struve, *supra* note 39, at 1015–18.

256. Block v. Rutherford, 468 U.S. 576, 591 (1984).

257. *Id.* at 586.

Court decided that the practice of conducting cell searches while individuals are away from their cells does not violate due process.[258]

The Supreme Court did not address another pretrial detention condition-of-confinement claim until 2012 in *Florence v. Board of Chosen Freeholders*.[259] The Court, once again deferring to administrators, upheld a jail's practice of strip-searching newly admitted individuals.[260]

2. *Kingsley v. Hendrickson*: Pretrial Incarceration's Objective Standard

Kingsley is the most recent case addressing the rights of people in pretrial detention. The complainant, Michael Kingsley, alleged that he was the victim of excessive force.[261] Some facts were disputed, but all parties agreed that Sergeant Hendrickson placed his knee in Kingsley's back (while he was still handcuffed), that Kingsley impolitely told him to get off, and that Deputy Sheriff Degner tased Kingsley.[262]

The Court faced the following issue: Must a plaintiff prove an officer's culpable state of mind to prove that the officer's use of force amounted to unconstitutional punishment?[263] The Court held that a plaintiff is not required to prove an officer's state of mind to succeed.[264] According to the Court, a person who is incarcerated pretrial "must show only that the force purposely or knowingly used against him was objectively unreasonable."[265]

The Supreme Court clarified *Bell*'s holding, explaining that objective evidence alone is sufficient to establish that an official act is not "rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."[266] Additionally, the Court affirmatively distinguished between excessive force claims brought by those who are incarcerated postconviction and those who are incarcerated pretrial.[267] In doing so, the Court emphasized that people who are incarcerated pretrial "cannot be punished at all, much less 'maliciously and sadistically.'"[268]

Continuing in its tradition of deference to administrators, the Court wrote that the objective reasonableness consideration is fact specific.[269] Thus, this holding does not categorically apply to all types of claims brought by people who are incarcerated pretrial. There is still a risk that circuit courts, even after *Kingsley*, may continue to apply standards established in the prison context to the pretrial context.

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258. *Id.* at 589–92.
259. 132 S. Ct. 1510 (2012).
260. *Id.* at 1523.
261. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015).
262. *Id.*
263. *Id.*
264. *Id.* at 2472.
265. *Id.* at 2473.
266. *Id.* at 2473–74.
267. *Id.* at 2475.
268. *Id.* (quoting Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977)).
269. *Id.* at 2473.

C. Applying the Objective Standard to Other Factual Circumstances: Kingsley*'s Fact-Specific Nature*

Citing *Bell*, the Supreme Court found that the rights of individuals who have been injured in the course of an arrest "are at least as great as the Eighth Amendment protections available to" a person who is incarcerated following a conviction.[270] Following this logic, many circuit courts conflated claims brought by people who are incarcerated regardless of their conviction status.[271]

Prior to *Kingsley*, the First,[272] Fourth,[273] Sixth,[274] Eighth,[275] Ninth,[276] and Tenth[277] Circuits treated claims brought by incarcerated people the same regardless of conviction. Illustrative of the risk that this conflation may continue in claims that do not allege excessive use of force is *Ruiz-Bueno v. Scott*.[278] *Ruiz-Bueno* was decided shortly after *Kingsley* but applied *Farmer*'s subjective deliberate indifference standard.[279]

The Sixth Circuit found that people who are incarcerated pretrial are "protected by the Fourteenth Amendment's Due Process Clause."[280] Yet, the court simultaneously held that "Supreme Court precedents governing prisoners' Eighth Amendment rights also govern the Fourteenth Amendment

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270. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

271. *See generally* Struve, *supra* note 39; *see also* 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 (2009).

272. *See, e.g.*, Ford v. Bender, 768 F.3d 15, 24 (1st Cir. 2014); Surprenant v. Rivas, 424 F.3d 5, 18 (1st Cir. 2005) (stating that unconstitutional conditions of confinement alleged by people who are incarcerated pretrial "implicate[] Fourteenth Amendment liberty interests," but the "parameters of such an interest are coextensive with those of the Eighth Amendment's prohibition against cruel and unusual punishment"); Collazo-Leon v. U.S. Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995).

273. *See, e.g.*, Hause v. Vaught, 993 F.2d 1079, 1082 (4th Cir. 1993) ("[T]he concern for security is the same for pretrial detainees as for convicted inmates."); Hill v. Nicodemus, 979 F.2d 987, 991–92 (4th Cir. 1992).

274. *See, e.g.*, Phillips v. Roane County, 534 F.3d 531, 539–40 (6th Cir. 2008) (applying *Farmer*'s subjective deliberate indifference standard to an allegation of inadequate medical care brought by a person who was incarcerated pretrial).

275. *See, e.g.*, Walton v. Dawson, 752 F.3d 1109, 1117 (8th Cir. 2014) (using Eighth Amendment jurisprudence to require subjective deliberate indifference in excessive force cases brought by people who are incarcerated pretrial); Smith v. Copeland, 87 F.3d 265, 269 (8th Cir. 1996) (holding that Smith's claim that overflowing raw sewage violated his constitutional rights should be dismissed "whether analyzed under Eighth Amendment or Due Process jurisprudence").

276. *See, e.g.*, Pierce v. County of Orange, 526 F.3d 1190 (9th Cir. 2008); Demery v. Arpaio, 378 F.3d 1020, 1030 (9th Cir. 2004); Redman v. County of San Diego, 942 F.2d 1435, 1441 (9th Cir. 1991).

277. Blackmon v. Sutton, 734 F.3d 1237, 1240 (10th Cir. 2013) (holding that rights afforded to persons incarcerated pretrial are at least the same as those afforded to persons incarcerated postconviction).

278. 639 F. App'x 354 (6th Cir. 2016).

279. *Id.* at 362 (citing Farmer v. Brennan, 511 U.S. 825 (1994)) (writing that the plaintiff's argument alleging unconstitutional conditions of confinement "does not square with the language of *Farmer*"); *see also* Bloom v. Pompa, 654 F. App'x 930, 934 (10th Cir. 2016) (finding that deliberate indifference in the pretrial context mirrors *Farmer*'s standards).

280. *Ruiz-Bueno*, 639 F. App'x at 358.

rights" of people who are incarcerated pretrial.[281] Applying *Farmer*, the court required that each individual involved in an alleged constitutional violation must act with subjective deliberate indifference.[282]

It is possible that the court's decision was based, at least in part, on the factual differences between *Ruiz-Bueno* and *Kingsley*. Some of the lower courts have not applied *Kingsley* to different factual circumstances, referencing the opinion's fact-specific language.[283] Other courts have expressed uncertainty over whether *Kingsley* applies to different circumstances but declined to make a decision.[284]

For future claims alleging that isolating emerging adults who are incarcerated pretrial infringes on a protected liberty interest and is unconstitutionally punitive, lower courts may be compelled to apply *Sandin*'s atypical and significant hardship test. Fortunately, some circuits have already held that *Sandin* does not apply to claims brought by people who are incarcerated pretrial.[285] Additionally, the justification in *Sandin* is explicitly based on the fact that the complainant was convicted of a crime.[286]

Wolff may also pose a barrier to successful litigation in this area. The significant risk of permanent, adverse psychological, emotional, and physical effects for incarcerated emerging adults and the differentiation between individuals who are incarcerated pretrial and postconviction warrant a finding that subjecting emerging adults who are incarcerated pretrial to solitary confinement is itself objectively unreasonable punishment proscribed by substantive due process. In other words, this practice is unconstitutionally punitive "regardless of the fairness of the procedures used to implement [it]."[287]

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281. *Id.*

282. *Id.* at 359.

283. *See, e.g.*, Smith v. Dart, 803 F.3d 304, 309–10 (7th Cir. 2015) (finding that conditions-of-confinement claims are subject to both a subjective and objective inquiry); Thomley v. Bennett, No. 5:14-cv-73, 2016 WL 498436, at *6–7 (S.D. Ga. Feb. 8, 2016) (declining to apply *Kingsley* to a claim alleging unconstitutionally inadequate medical care); Florer v. Hoffman, No. 15-00308 DKW/RLP, 2015 WL 5768946, at *3–4 (D. Haw. Sept. 29, 2015) (declining to apply *Kingsley* to failure-to-protect and inadequate medical care claims); Chyatte v. Missoula County, No. CV 13-174-M-JCL, 2015 WL 5560253, at *14–15 (D. Mont. Sept. 21, 2015) (applying *Farmer*, not *Kingsley*, to conditions-of-confinement claims). *But see* Castro v. County of Los Angeles, 833 F.3d 1060, 1069–70 (9th Cir. 2016) (writing that the *Kingsley* Court did not clarify whether the articulated standard applies to other claims, but finding that it logically follows to apply *Kingsley* to failure-to-protect claims); Abila v. Funk, No. CIV 14-1002JB/SMV, 2016 WL 7242731, at *40–42 (D.N.M. Nov. 23, 2016) (applying *Kingsley*'s objective standard to a conditions-of-confinement claim).

284. *See, e.g.*, Johnson v. Clafton, 136 F. Supp. 3d 838, 844 (E.D. Mich. 2015) (finding that "it is unclear whether courts should continue to use the Eighth Amendment's deliberate-indifference standard to analyze . . . claims brought by pretrial detainees pursuant to the Due Process Clause," and declining to answer because the outcome is the same under both standards).

285. *See, e.g.*, Stevenson v. Carroll, 495 F.3d 62, 69 n.4 (3d Cir. 2007); Surprenant v. Rivas, 424 F.3d 5, 16–17 (1st Cir. 2005); Mitchell v. Dupnik, 75 F.3d 517, 523–24 (1st Cir. 1996).

286. Sandin v. Conner, 515 U.S. 472, 485 (1995) ("Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the *sentence imposed* by a court of law." (emphasis added)).

287. Daniels v. Williams, 474 U.S. 327, 331–32 (1986).

III. OBJECTIVELY UNREASONABLE PUNISHMENT: ISOLATING EMERGING ADULTS IN PRETRIAL DETENTION

The minimal procedural protections in *Wolff* were based, in part, on the fact that the complainant was convicted of a crime and subsequently imprisoned.[288] Additionally, these protections are truly minimal, giving rise to the risk that individuals will be wrongfully disciplined.[289] The standard articulated in *Kingsley* should thus extend to conditions of confinement cases.[290] The Supreme Court emphasized that jail and prison litigation must be assessed on a case-by-case basis,[291] but it makes practical sense to apply the same objective standard to the context at issue in this Note.

The Court in *Kingsley* rested its objective standard on precedent:

> We have said that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." And in *Bell* we explained that such "punishment" can consist of actions taken with an "expressed intent to punish." But the *Bell* Court went on to explain that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose." The *Bell* Court applied this latter objective standard to evaluate a variety of prison conditions, including a prison's practice of double-bunking. In doing so, it did not consider the prison officials' subjective beliefs about the policy. Rather, the Court examined objective evidence.[292]

Perhaps the most compelling argument in support of finding that the standard for conditions-of-confinement cases must be objective is Justice Scalia's dissent in *Kingsley*.[293] Justice Scalia disagreed that excessive use of force claims brought by people who are incarcerated pretrial should be subject to an objective standard.[294] He argued that the "reasonable relation" test established in *Bell* was limited to challenges of conditions of confinement.[295]

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288. Wolff v. McDonnell, 418 U.S. 539, 561–63 (1974) ("Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.").

289. *Id.* at 582 (Marshall, J., concurring in part and dissenting in part) (arguing that the disciplinary process "will thus amount to little more than a swearing contest, with each side telling its version of the facts—and, indeed, with only the prisoner's story subject to being tested by cross-examination" and that "it seems obvious to me that even the wrongfully charged inmate will invariably be the loser").

290. *See generally* Darnell v. Pineiro, 849 F.3d 17 (2d Cir. 2017).

291. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015).

292. *Id.* (first quoting Graham v. Connor, 490 U.S. 386, 396 (1989); then quoting Bell v. Wolfish, 441 U.S. 520, 538, 541–43, 561 (1979)).

293. *See id.* at 2477–79 (Scalia, J., dissenting).

294. *Id.* at 2478.

295. *Id.* ("The conditions in which pretrial detainees are held, and the security policies to which they are subject, are the result of considered deliberation by the authority imposing the detention. If those conditions and policies lack any reasonable relationship to a legitimate, nonpunitive goal, it is logical to infer a punitive intent.").

According to Justice Scalia, it is more consistent with the Court's precedent to apply an objective test to allegations of unconstitutional conditions of confinement than to allegations of excessive force.[296] Given that the law now only requires an objective inquiry into the punitive nature of an officer's use of force,[297] it follows that, to be consistent with the Court's precedent, the same should apply to pretrial conditions-of-confinement cases.

Consistent with this proposition, the Second Circuit recently found that *Kingsley* "altered the standard for deliberate indifference claims under the Due Process Clause" and extended the Supreme Court's holding to conditions-of-confinement claims.[298] The court held that in challenging conditions-of-confinement in pretrial detention, two elements must be met: the alleged deprivation must be objectively sufficiently serious and the defendant must act with deliberate indifference.[299] The Second Circuit decided to apply an objective deliberate indifference standard.[300]

The Second Circuit followed *Kingsley* and held that the plaintiff does not have to prove the defendant's state of mind.[301] In particular, the court found:

> Unlike a violation of the Cruel and Unusual Punishments Clause, an official can violate the Due Process Clause of the Fourteenth Amendment without meting out any punishment, which means that the Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.[302]

Other circuits should follow the Second Circuit's finding that a person who is incarcerated pretrial "may not be punished at all under the Fourteenth Amendment, whether through the use of excessive force, by deliberate indifference to conditions of confinement, or otherwise."[303]

The decision to place an individual in solitary confinement is the "result of considered deliberation by the authority imposing the detention" and is thus a condition of confinement.[304] Looking back to *Bell*, subjecting emerging adults to solitary confinement during pretrial detention is excessive in relation to the governmental purposes assigned to it.[305] Whether an emerging adult is isolated for disciplinary or administrative purposes, the harm is often irreparable, and the practice has no demonstrated effect on institutional violence.[306] If there is an effect, it is typically that individuals become more

296. *Id.*
297. *Id.* at 2473 (majority opinion).
298. Darnell v. Pineiro, 849 F.3d 17, 30 (2d Cir. 2017).
299. *Id.*
300. *Id.* at 32 (noting that "'deliberate indifference,' which is roughly synonymous with 'recklessness,' can be defined either 'subjectively' in a criminal sense, or 'objectively' in a civil sense").
301. *Id.*
302. *Id.* at 35.
303. *Id.*
304. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2478 (2015) (Scalia, J., dissenting).
305. Bell v. Wolfish, 441 U.S. 520, 538 (1974).
306. *See supra* notes 93–97 and accompanying text.

violent once released from solitary confinement, and institutional violence may actually increase as a result of the practice.[307]

Deference to jail administrators in this context does not take account of the nature of pretrial incarceration and the harm of isolation at such a critical developmental phase.[308] Given that jails are locally (and less) funded and often cite a lack of funding as a significant issue impeding reform, jail officials are typically even less qualified and trained than prison officials.[309]

Such a reality gives weight to Eric Berger's contention that "[t]he Court's deference . . . is premised on institutional grounds without sufficient examination of the actual institutional practices at issue."[310] Deference based on the contention that jail staff and administrators are experts simply cannot be squared with the reality that many of them actually lack the appropriate expertise necessary to make such judgments.

Because the vast majority of jails operate on the county level,[311] advocates and rulemaking bodies should compel jail administrators to eradicate solitary confinement for individuals under the age of twenty-five.[312] Litigation challenging the placement of emerging adults in solitary confinement while they are incarcerated pretrial may also compel localities to eliminate the practice.[313]

In the prison context, courts have been reluctant to find psychological effects of isolated confinement actionable due to their "invisible" nature[314] and the subjective prong required in *Farmer*.[315] The same barrier should not exist in the pretrial context post-*Kingsley*, where the standard is objective.

In *Davis v. Ayala*,[316] Justice Kennedy critiqued the use of solitary confinement and wrote: "In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."[317] The

307. *See supra* notes 93–97 and accompanying text.

308. *See* Berger, *supra* note 77, at 2046 (arguing that "blanket deference to the expertise of prison officials fails to appreciate that many prisons lack qualified personnel or professional standards").

309. *See* Ruddell & Mays, *supra* note 49, at 257 ("Jails may be doubly challenged given their relatively disadvantaged economic position and the fact that the majority are not part of a correctional network.").

310. *See* Berger, *supra* note 77, at 2046.

311. Jess Maghan, *Dangerous Inmates: Maximum Security Incarceration in the State Prison Systems of the United States*, 4 AGGRESSION & VIOLENT BEHAV. 1, 1–2 (1999).

312. *See, e.g.*, Michael Winerip & Michael Scwhirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html [http://perma.cc/7LVY-4VF3].

313. *See* Magun, *supra* note 45, at 2097–98 ("Municipalities have incentives to avoid § 1983 lawsuits against their officers . . . and are ultimately responsible for paying damages in civil rights suits against indemnified officers.").

314. *See, e.g.*, Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 607–08 (1999).

315. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

316. 135 S. Ct. 2187 (2015).

317. *Id.* at 2210 (Kennedy, J., concurring).

intersection of pretrial incarceration and emerging adulthood presents a compelling argument that courts should abolish the practice of solitary confinement.

CONCLUSION

The potential for irreversible adverse health effects at the intersection of solitary confinement and emerging adulthood requires that the rights of emerging adults who are incarcerated pretrial be safeguarded with urgency. Isolating emerging adults who are incarcerated pretrial amounts to unconstitutional punishment. The risk of developing mental illnesses during emerging adulthood renders placing emerging adults in solitary confinement a "practice of illness generation."[318]

As such, the practice should be abolished and meaningful alternatives to addressing violence, order, and safety should be put into place. Should they need to be isolated as a last resort and in response to a violent act, emerging adults should be isolated only for a "cool-down" period after a consultation with a mental health professional.[319] Additionally, staff who interact regularly with emerging adults "should receive training on young adult brain development, and appropriate de-escalation tactics."[320]

Such an approach is consistent with the Supreme Court's customary caution of balancing the rights of people who are incarcerated and administrators. Ensuring that emerging adults' mental, emotional, and physical health is not damaged allows jail administrators to develop new practices that both nurture developmental growth and potentially make people less violent.[321]

The human cost is also tremendous. People who are incarcerated "retain the essence of human dignity inherent in all persons."[322] It is time that jails in the United States work toward ensuring that emerging adults retain their dignity. As Johnny Perez implores: "For every single day we wait, we risk—and are—damaging the people who are sitting in those cells. How can we continue to put people's humanity on hold?"[323]

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318. *See* Lee & Prabhu, *supra* note 115, at 262.

319. While the Department of Justice recommends this practice for juveniles, the same practice should apply for emerging adults in response to an immediate risk of harm. *See* U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 101 (2016), https://www.justice.gov/archives/dag/file/815551/download [https://perma.cc/M7U3-7P8J]; *see also* JAMES GILLIGAN & BANDY LEE, REPORT TO THE NEW YORK CITY BOARD OF CORRECTION (2013), http://nycjac.org/wp-content/uploads/2016/02/Gilligan-Report-Final.pdf ("Seclusion should be used only as a last resort when no less restrictive alternative appears to be capable of preventing violence, and then for only as long as the inmate appears to continue to represent an immediate or short-term danger to himself or others.") [http://perma.cc/6K62-5HD9].

320. *See* U.S. DEP'T OF JUSTICE, *supra* note 319, at 102.

321. *See id.*

322. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

323. Law, *supra* note 88.