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## The Solitary Confinement of Juveniles: It Is a Cruel and Unusual Punishment

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# THE SOLITARY CONFINEMENT OF JUVENILES: IT IS A CRUEL AND UNUSUAL PUNISHMENT

DEBORAH PARUCH\*

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## I. INTRODUCTION

The well-publicized case of Kalief Browder illustrates the devastating effects of solitary confinement on the many juveniles that are subjected to this treatment in the United States each year. On the evening of May 15, 2010, sixteen-year old Kalief and his friend were on their way home from a party when they were arrested for robbery.<sup>1</sup> Unable to post bond, Kalief remained in jail following his arraignment.<sup>2</sup> He was eventually transferred to the Riker’s Island Jail, where he spent over three years awaiting trial.<sup>3</sup> During this time, he turned down several plea offers, and

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1. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), [www.newyorker.com/magazine/2014/10/06/before-the-law](http://www.newyorker.com/magazine/2014/10/06/before-the-law).

2. *Id.*

3. *Id.*

consistently maintained his innocence.<sup>4</sup> He was released from prison in 2013 at the age of twenty, when his case was ultimately dismissed for lack of evidence.<sup>5</sup>

Kalif spent approximately two years of his imprisonment in solitary confinement.<sup>6</sup> He attempted suicide several times.<sup>7</sup> His attempts continued after his release, until he was ultimately successful two years later when he hung himself at his parents' home.<sup>8</sup> In 2016, President Obama announced a ban on solitary confinement for juveniles in federal prisons, citing Kalief's suicide, and his "constant struggle to recover from the trauma of being locked up alone for twenty-three hours a day."<sup>9</sup>

This article addresses the practice of subjecting juveniles to solitary confinement, and the shattering effects this has on their mental health. It presents the current state of national and international law on this issue, and argues that this nation's current practice of subjecting juveniles to extended periods of isolation is a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. Part I addresses the conditions and the history of the practice of solitary confinement in the United States. Part II discusses the devastating effects solitary confinement has on the individuals subjected to this treatment. It presents the current scientific studies that demonstrate the significant psychological and physical effects suffered by individuals, with a particular focus on juveniles. Part III presents the U.S. Supreme Court's Eighth Amendment Cruel and Unusual Punishment cases, and selected federal circuit and district court decisions. Part IV sets out the arguments why this practice violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. More specifically, it argues that the practice of subjecting juveniles to extended periods of isolation violates international law, contradicts current trends in state and federal law, and is contrary to evolving standards of decency. It also advocates for a different standard of culpability when applied to juveniles, which would be wholly consistent with the Court's sentencing decisions.

## II. THE CONDITIONS AND HISTORY OF SOLITARY CONFINEMENT

### A. The Conditions

Known as the bing, the hold, the hotbox, SHE (Secure Housing Unit), the block, the cooler, the pound, and the lockdown, solitary confinement is the physical and social isolation of an individual within a single cell for twenty-two and one-half to twenty-four hours per day.<sup>10</sup> Any remaining time is generally spent in a barren yard,

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4. *Id.*

5. *Id.*

6. *Id.*

7. Gonnerman, *supra* note 1.

8. Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html>.

9. *Id.*

10. Sharon Shalev, *Solitary Confinement as a Prison Health Issue*, PRISONS & HEALTH 27, 27 (Stefan Enggist, Lars Møller, Gauden Galea & Caroline Udesen eds., 2014).

or cage.<sup>11</sup> There are two main types of solitary confinement in use today.<sup>12</sup> The first, known as punitive or disciplinary segregation, is employed as punishment for prisoners who break the rules.<sup>13</sup> The second type, referred to as administrative solitary confinement, is employed when a prisoner is considered a safety risk either to himself, the staff, or other prisoners.<sup>14</sup> While the conditions vary, three factors are present in all solitary confinement schemes: “social isolation, reduced activity and environmental input, and loss of autonomy and control over almost all aspects of daily life.”<sup>15</sup> Furthermore, the resources that inmates may receive while in solitary confinement are at the discretion of the individual facilities and the officers;<sup>16</sup> while some facilities allow inmates the use of books or self-educational materials, others deny access to such materials altogether.<sup>17</sup>

### B. The History

Pennsylvania was the first state to permit the practice of solitary confinement.<sup>18</sup> The Pennsylvania Eastern State Penitentiary, known as Cherry Hill, instituted the “silent system” in 1826 where inmates were kept alone in their cells, and were required to don hoods over their heads during exercise.<sup>19</sup> They were forbidden to speak.<sup>20</sup> This form of confinement was predicated on the idea that silence would lead to moral reflection which, in turn, would aid in the rehabilitation of prisoners.<sup>21</sup> In 1842, Charles Dickens described his visit to Cherry Hill.

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11. *Id.*

12. Kristen Weir, *Alone, in ‘The Hole,’* 43 *MONITOR ON PSYCH.* 54 (May 2012), <https://www.apa.org/monitor/2012/05/solitary>.

13. *Id.*

14. *Id.* For example, under the policy of the State of Michigan, a prisoner may be classified to administrative segregation for a variety of reasons including, but not limited to:

- The prisoner demonstrates an inability to be managed with general population privileges.
- The prisoner is a serious threat to the physical safety of staff or other prisoners or to the good order of the facility.
- The prisoner is a serious escape risk.

Michigan prisoners can be held in administrative solitary confinement for any length of time and are allowed to leave their cells for only one hour per day: they are not allowed calls or visits from friends or family. Ray Wilbur, *Michigan Lags in Solitary Confinement Reform*, SPARTAN NEWSROOM (Dec. 9, 2016), <https://news.jrn.msu.edu/2016/12/michigan-lags-behind-in-solitary-confinement-reform>. For a more complete discussion of MDOC policies on this topic see Zachary R. Morgan, Note, *Torturing Mentally Ill and Juvenile Prisoners: An Examination of Michigan’s Administrative Segregation Policies*, 94 *U. DET. MERCY L. REV.* 319, 323–25 (2017).

15. Shalev, *supra* note 10, at 28.

16. Laura Ann Gallagher, Note, *More Than a Time Out: Juvenile Solitary Confinement*, 18 *U.C. DAVIS J. JUV. L. & POL’Y* 244, 248 (2014).

17. *Id.* at 248.

18. Laura Sullivan, *Timeline: Solitary Confinement in US Prisons*, NAT’L PUB. RADIO (July 26, 2006), <https://www.npr.org/templates/story/story.php?storyId=5579901>

19. Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Unusual Punishment*, 90 *IND. L.J.* 741, 746 (2015).

20. *Id.*

21. *Id.*

[The prisoner] is led to the cell from which he never again comes forth, until his whole term of imprisonment has expired. He never hears of wife and children; home or friends; the life or death of any single creature. He sees the prison officers, but with that exception he never looks upon a human countenance, or hears a human voice. He is a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but torturing anxieties and horrible despair.<sup>22</sup>

Other prisons adopted Pennsylvania's system, however, they were quick to abandon it amid reports as early as 1830 of prisoners experiencing hallucinations and dementia.<sup>23</sup> It was reported that prisoners kept in solitary "beg with the greatest earnestness, that they may be hanged out of their misery."<sup>24</sup> Similar reports followed the initiation of this practice in New York. "This experiment, of which such favourable results had been anticipated, proved fatal for the majority of prisoners. It devours the victim incessantly and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away."<sup>25</sup> The end result was that every state that tried the Pennsylvania model between 1830 and 1880 abandoned it within a few years.<sup>26</sup>

The rejection of solitary confinement continued into the latter part of the twentieth century.<sup>27</sup> However, this began to change in the 1970s.<sup>28</sup> It was during this time that the U.S. began to see an explosion in the growth of the prison population, which has steadily continued to the present.<sup>29</sup> The number of individuals in prisons in the U.S. grew from approximately 300,000 in the 1970s to almost 1.6 million in 2012, a 400% increase.<sup>30</sup> Unfortunately, funding did not keep pace with the explosive growth of this population, which resulted in seriously overcrowded conditions.<sup>31</sup> At the same time, there was widespread closing of mental health hospitals with many of those who were previously treated in

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22. *Apodaca v. Raemisch*, 139 S. Ct. 5, 9 (2018) (Sotomayor, J., concurring) (quoting CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* 148 (John Whitley & Arnold Goldman eds., 1972)).

23. Bennion, *supra* note 19, at 747.

24. Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent at 14, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (Nos. 17-1284 & 17-1289) [hereinafter Brief of Professors].

25. *Id.* at 15 (citation omitted).

26. Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U.L. REV. 1, 11–12 (2012). "This absolute solitude, if nothing interrupts it, is beyond the strength of man. . . . It does not reform, it kills." Ruth Marcus, *Why are we Subjecting Our Youths to Solitary Confinement?*, WASH. POST (Oct. 16, 2012), [https://www.washingtonpost.com/opinions/ruth-marcus-why-are-we-subjecting-our-youths-to-solitary-confinement/2012/10/16/76a7bc50-17b6-11e2-9855-71f2b202721b\\_story.html](https://www.washingtonpost.com/opinions/ruth-marcus-why-are-we-subjecting-our-youths-to-solitary-confinement/2012/10/16/76a7bc50-17b6-11e2-9855-71f2b202721b_story.html) (quoting Alexis de Tocqueville).

27. Hafemeister, *supra* note 26, at 12.

28. Hafemeister, *supra* note 26, at 13.

29. Hafemeister, *supra* note 26, at 13.

30. Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Unusual Punishment*, 90 IND. L.J. 741, 748 (2015).

31. *Id.* at 747–48.

hospitals ending up in prisons.<sup>32</sup> Penal organizations also abandoned the commitment to rehabilitation beginning in the 1970s.<sup>33</sup> All of these factors contributed to a significant increase in the level of violence in prisons, and prison administrators saw solitary confinement as the solution to these problems.<sup>34</sup> These same factors also contributed to the rise of supermax facilities.<sup>35</sup> This resulted in 80,000 to 100,000 prisoners being housed in solitary confinement in 2018.<sup>36</sup>

Juveniles have not escaped this practice. Because many states try juveniles as young as fourteen as adults for certain specified crimes, juveniles convicted under these circumstances are sentenced to adult prisons and treated as adult prisoners.<sup>37</sup> Human Rights Watch and the American Civil Liberties Union report that solitary confinement of youth is “a serious and widespread problem in the United States.”<sup>38</sup> These groups estimate that more than 95,000 youths were held in prisons and jails in 2011.<sup>39</sup> They also report that a large percentage of these facilities use solitary confinement for extended periods.<sup>40</sup> A 2012 survey from Texas found that the majority of Texas jails held juveniles in solitary confinement for six months to more than a year.<sup>41</sup> Other surveys indicate that two-thirds of attorneys for indigent minors report that they had clients who stated that they were placed in solitary confinement for periods ranging from a few hours up to seven months.<sup>42</sup>

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32. *Id.* at 748.

33. *Id.* at 748–49.

34. *Id.* at 750.

35. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 127, 127–30 (2003).

36. *Apodaca v. Raemisch*, 139 S. Ct. 5 (2018) (mem.) (Sotomayor, J., statement) (citing DEP’T OF JUST., BUREAU OF JUST. STAT., CAPITAL PUNISHMENT (2016)).

37. During the 20th century juvenile courts had discretion to waive jurisdiction in certain types of cases which would cause them to be tried in adult court. See generally 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 (2016). Beginning in the 1980s state legislatures enacted laws for the purpose of increasing the number of children subject to the adult criminal justice system. *Id.* These practices vary significantly among states. *Id.* In some jurisdictions, prosecutors have discretion to waive juveniles to adult courts, whereas some types of crimes are excluded entirely from juvenile court jurisdiction. *Id.* A conviction in adult court generally requires that the children be detained in adult facilities. *Id.*

38. AM. CIV. LIBERTIES UNION & HUM. RTS. WATCH, GROWING UP LOCKED DOWN: YOUTH IN CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 2 (2012), <https://www.aclu.org/files/assets/us1012webwcover.pdf> [hereinafter GROWING UP LOCKED DOWN].

39. *Id.*

40. *Id.* The American Psychiatric Association also reports that thousands of children are placed in solitary confinement each year. AM. PSYCHOL. ASS’N, *Solitary Confinement of Juvenile Offenders*, <https://www.apa.org/advocacy/criminal-justice/solitary.pdf> (last visited Feb. 10, 2021). Furthermore, The American Academy of Psychiatry and the Law reports that twenty-six states prohibit the use of punitive solitary confinement, fifteen states limit the amount of time spend in punitive confinement (six hours to ninety days) whereas seven states – Alabama, Georgia, Iowa, Kansas, Michigan, Texas, and Wyoming place no limit on or allow indefinite extension of punitive solitary confinement. Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, J. AM. ACAD. PSYCHIATRY & L. 45:350–57, 353 (2017), <http://jaapl.org/content/jaapl/45/3/350.full.pdf>.

41. Shalev, *supra* note 10, at 27–35.

42. Mike Ludwig, *Despite Reforms, Children in Jails are Still Held in Solitary Confinement*, TRUTHOUT (June 29, 2018), <https://truthout.org/articles/despite-reforms-children-in-jails-are-still-held-in-solitary-confinement>.

## II. THE EFFECTS OF SOLITARY CONFINEMENT

### A. Outward Manifestations

In 1890, United States Supreme Court Justice Samuel Freeman Miller, summarizing a hundred years of experience with solitary confinement, stated:

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 generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.<sup>43</sup>

More recent studies of solitary confinement have reached similar, and importantly, uniform conclusions regarding the psychological distress that this practice produces on the prisoners exposed to it.<sup>44</sup> In an Amicus Curiae brief filed in the U.S. Supreme Court in connection with *Wilkinson v. Austin*, the authors presented the results of a substantial number of studies that were conducted in a number of prisons over varying periods of time. They note: “The overall consistency of these findings – the same or similar conclusions reached by different researchers examining different facilities, in different parts of the world, in different decades, using different research methods – is striking.”<sup>45</sup> The symptoms and problematic behaviors reported include: “Negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity to stimuli, ruminations, cognitive dysfunction, hallucinations, loss of control, irritability, aggression and rage, paranoia, hopelessness, lethargy, depression, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior.”<sup>46</sup>

Other studies have documented the frequency of these conditions. Psychopathological effects, which included ruminations, irrational anger, oversensitivity to stimuli, confused thought process and social withdraws, were reported by over eighty percent of the inmates exposed to solitary confinement.<sup>47</sup> Additionally, over sixty percent of the inmates reported chronic depression, emotional flatness, emotional swings, overall deterioration, talking to self, and violent fantasies.<sup>48</sup> Finally, perceptual distortions and hallucinations were experienced by over forty percent while suicidal thoughts were reported by twenty-seven percent of the inmates.<sup>49</sup>

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43. *In re Medley*, 134 U.S. 160, 168 (1890).

44. *Brief of Professors*, *supra* note 24, at 14.

45. *Brief of Professors*, *supra* note 24, at 34.

46. *Brief of Professors*, *supra* note 24, at 34.

47. Haney, *supra* note 35, at 134.

48. *Id.*

49. *Id.* Another group of researchers analyzed data from the medical records of over 240,000 prisoners in the New York City jail system over the three-year period from 2010 to 2013. *See generally* Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH

The effect of solitary confinement on juveniles is even more alarming than on adults. A United States Attorney General task force reported:

Nowhere is the damaging impact of incarceration on vulnerable children more obvious than when it involves solitary confinement. . . . [J]uveniles experience symptoms of paranoia, anxiety, and depression even after very short periods of isolation. Confined youth who spend extended periods isolated are among the most likely to attempt or actually commit suicide.<sup>50</sup>

In its 2012 report, Human Rights Watch spoke with juveniles who reported the psychological, physical, social and developmental harms that they suffered both during and following their solitary confinement experiences.<sup>51</sup> They reported the following psychological harms: experiencing anxiety, rage and insomnia, physically harming themselves by cutting or other means, thoughts about or attempts at suicide and struggling with mental disabilities, and past traumas.<sup>52</sup> They also described the following physical harms: lack of adequate physical exercise along with physical changes and stunted growth resulting from inadequate nutrition.<sup>53</sup> Social and developmental harms resulted from denial of family contact, denial of education, struggles with intellectual

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442 (2014). The objective was to assess the instances of self-harm among the inmates. *Id.* Self-harm is defined as “an act performed by individuals on themselves with the potential to result in physical injury, and potentially fatal self-harm as an act with a high probability of causing significant disability or death.” *Id.* These researchers found that while only 7.3% of the prisoners were subjected to solitary confinement, 53.3% of the acts of self-harm (and 45% of potentially fatal self-harm) were performed by members of that group. *Id.* Furthermore, the data demonstrated that inmates assigned to solitary were 2.1 times more likely to self-harm during their time in solitary, but 6.4 times more likely to self-harm when they were released from solitary. *Id.* The data also demonstrated that inmates 18 years old and younger were significantly more likely to engage in self-harm. *Id.* They concluded that the length of stay in jail, serious mental illness, solitary confinement, and young age were the significant, and independent, predictors of self-harm among the prisoners. *Id.*

50. ERIC H. HOLDER, JR. ET AL., U.S. DEP’T OF JUST., REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 178 (2012).

51. AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 26–36 (2012). Young people describe their experiences in solitary confinement:

The only thing left to do is go crazy – just sit and talk to the walls. . . . I catch myself [talking to the walls] every now and again. It’s starting to become a habit because I have nothing else to do. I can’t read a book. I work out and try to make the best of it. But there is no best. Sometimes I go crazy and can’t even control my anger anymore. . . . I can’t even get [out of solitary confinement] early if I do better, so it is frustrating and I just lost it. Screaming, throwing stuff around. . . . I feel like I am alone, like no one cares about me – sometimes I feel like, why am I even living.

*Id.* at 22.

52. *Id.*

53. *Id.* at 37–41.

disabilities and the failure to receive rehabilitation or social development education and training.<sup>54</sup>

The effects of solitary confinement on juveniles are compounded by the fact that 70% of incarcerated youth have been found to have a mental health disorder, putting them at a high risk of depression, memory loss, psychosis and paranoia.<sup>55</sup> Juveniles in solitary confinement are “nineteen times more likely to commit suicide than juveniles in the general detained population.”<sup>56</sup> Furthermore, once they are released from prison, juveniles are frequently unable to adjust to society.<sup>57</sup> Studies show that more than 50% attempt suicide.<sup>58</sup>

### B. Neurobiological Effects of Isolation

There is a consensus among psychological, sociological, neuroscientific, and anthropological disciplines that social interaction, connection, and belongingness are “innate and universal survival needs among humans to the same degree as food and water.”<sup>59</sup> Recent social neuroscience research has led scientists to conclude that the need to belong is a fundamental human need.<sup>60</sup> This is explained by the fact that the brain is a “social organ”<sup>61</sup> in which an “ineradicable bidirectional relationship” exists between our brains and the social environment.<sup>62</sup> When the brain is presented with social stimuli, it prompts cerebral processes that form behavioral responses that contribute to social skills and aid in developing relationships.<sup>63</sup> At the same time, physiological and neurological reactions are “directly and profoundly shaped by social interactions.”<sup>64</sup>

Research also demonstrates that social interaction in enriched environments is a crucial factor in protecting brain health and function. Research on brain plasticity suggests that positive social encounters produce positive changes to the neural circuits that underlie cognitive functions, social-affective skills and social

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54. *Id.* at 41–47.

55. Colleen Murphy, *The Solitary Confinement of Girls in the United States: International Law and the Eighth Amendment*, 92 TUL. L. REV. 697, 700 (2018).

56. *Id.*

57. Sanjana Biswas, *Solitary Confinement of Juveniles in the Florida Prison System: Analyzing National and State Issues & Strategies for the Protection of America’s Children*, 17 WHITTIER J. CHILD & FAM. ADVOC. 1, 4 (2018) (citing AM. CIV. LIBERTIES UNION, *Alone & Afraid, Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities* (June 2014)).

58. *Id.*

59. Federica Coppola, *The Brain in Solitude: An (Other) Eighth Amendment Challenge to Solitary Confinement*, 6 J.L. & BIOSCIENCES 184, 204 (2019).

60. Roy Baumeister & Mark Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497 (1995).

61. Coppola, *supra* note 59, at 205 (citing DANIEL SIEGEL, *THE DEVELOPING MIND: HOW RELATIONSHIPS AND THE BRAIN INTERACT TO SHAPE WHO WE ARE* 27 (2012)).

62. Coppola, *supra* note 59, at 206.

63. *Id.* at 205 (citing Daniel Goleman, *Social Intelligence: The New Science of Human Relationships* 4 (2006)).

64. *Id.* at 206.

behavior.<sup>65</sup> Furthermore, evidence suggests that enriched environments increase cell proliferation and neurogenesis (the growth of new cells in the brain) especially in the regions of the brain responsible “for social interaction, memory, and communication.”<sup>66</sup>

Research has also documented brain alterations that occur in individuals who are subjected to social and environmental deprivations, such as those experienced by individuals in solitary confinement. Professor Stuart Grassian reports that as little as a few days of solitary confinement will move the EEG pattern toward “an abnormal pattern characteristic of stupor and delirium,”<sup>67</sup> which results in an inability to focus and an inability to shift one’s attention.<sup>68</sup> Additionally, these brain alterations can lead to a wide array of adverse psychological effects, which may be long lasting or even permanent.<sup>69</sup> Grassian opines that even the prisoners who did not become overtly psychiatrically ill during their confinement, are likely to suffer permanent psychological harm resulting from the confinement.<sup>70</sup> This is manifested by an “intolerance of social interaction” which prevents them from readjusting to the general prison population and to the general community upon release from prison.<sup>71</sup>

Experimental animal research further supports the clinical and other experimental studies that document the effects of solitary confinement on the brain. Studies involving rodents reveal that environmental and social deprivation has negative effects on brain structure and function.<sup>72</sup> These studies have shown that isolated rodents, compared to those housed in enriched environments, exhibit diminished cortical volume, reduced neuronal connections in the cortical areas and the hippocampus,<sup>73</sup> altered action in the both the reward system and amygdala,

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65. *Id.* (citing Riitta Hari et al., *Centrality of Social Interaction in Human Function*, 88 NEURON 181 (2015)).

66. Stephanie Cacioppo et al., *Toward a Neurology of Loneliness*, 140(6) PSYCHOL. BULL. 1464, 1492 (2014).

67. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 330–31 (2006).

68. *Id.* at 331.

69. Coppola, *supra* note 59, at 203, 220. EEG studies have shown that a few days in isolation can provoke “brain injury-like waves alterations,” which have been linked with hypersensitivity to stimuli, “inadequate attention and alertness to the environment” and “a complete breakdown or disintegration of the identity of the isolated individual.” Coppola, *supra* note 59, at 208.

70. Grassian, *supra* note 67, at 332–33.

71. Grassian, *supra* note 67, at 332–33.

72. Amy Orben et al., *The Effects of Social Deprivation on Adolescent Development and Mental Health*, 4 LANCET CHILD ADOLESCENT HEALTH 634, 635–36 (2020). Animal studies employing rodents have been particularly informative because rats and mice progress through stages of development similar to humans. *Id.* The studies focused on the state of development following weaning and into adult maturity. *Id.* Like humans, rodents demonstrate a strong attachment to their peers; they actively seek peer interaction which are considered important social input for healthy social development. *Id.*

73. Kevin Fone & M. Veronica Porkess, *Behavioural and Neurochemical Effects of Post-Weaning Social Isolation in Rodents—Relevance to Developmental Neuropsychiatric Disorders*, 32 NEUROSCIENCE & BIOBEHAVIOR REV. 1087 (2008).

along with lower myelin production.<sup>74</sup> Decreased myelination in the prefrontal cortex has been observed in a number of psychiatric illnesses, including autism, anxiety, depression and schizophrenia.<sup>75</sup> Additionally, these cerebral changes are associated with environmental detachment, hostility, aggression and an increased risk of susceptibility to behaviors that emulate human psychiatric disorders and diseases, including schizophrenia and neurodegenerative disorders.<sup>76</sup> Other researchers have also observed reduced cerebral cortex development along with shorter synapses in areas of the brain involved in spatial information processing, social information, memory and emotion regulation among the rodents housed in isolation.<sup>77</sup>

Similar to the case with adults, the long-term consequences of solitary confinement on juveniles are attributable to the manner in which the juvenile's brain reacts to his/her surroundings.<sup>78</sup> However, unlike adults, the effect of isolation on juveniles is exasperated by the fact that adolescence is a crucial period of development of the human brain.<sup>79</sup>

Modern neuroscience research, utilizing MRI and fMRIs, has significantly advanced our knowledge of how the brain develops and matures during adolescence and into early adulthood.<sup>80</sup> The latest research shows that brain development continues into the early twenties with one author commenting that twenty-one or twenty-two would be the "biological age of maturity."<sup>81</sup>

Developmental neuroscientists studying the adolescent brain have focused their attention in two areas: (1) brain structure, specifically the age-related changes in the structure of the brain and the corresponding circuit-based transformations within the brain; and (2) brain function, or the study of age-related changes in the manner in which the brain functions.<sup>82</sup>

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74. Coppola, *supra* note 59, at 208–09 (citing Jia Lie et al., *Impaired Adult Myelination in the Prefrontal Cortex of Socially Isolated Mice*, 15 NATURE NEUROSCIENCE 1621 (2012)).

75. Coppola, *supra* note 59, at 209–10.

76. Coppola, *supra* note 59, at 209 (citing Kevin Fone & M. Veronica Porkess, *Behavioural and Neurochemical Effects of Post-weaning Social Isolation in Rodents—Relevance to Developmental Neuropsychiatric Disorders*, 32 NEUROSCIENCE & BIOBEHAVIOR REV. 1087 (2008)).

77. Coppola, *supra* note 59, at 209 (citing Jelena Dkordjevic et al., *Effects of Chronic Social Isolation on Wistar Rat Behavior and Brain Plasticity Markers*, 66 NEUROPSYCHOBIOLOGY 112 (2012)).

78. Biswas, *supra* note 57, at 4 (citing Tamar R. Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 47 (2015)). Research shows that brain cells are wired to react to environmental conditions and can die in extreme settings such as long periods of solitary confinement. *Id.* Further, epigenesis, or the process by which the brain cells turn genes on and off in response to environmental changes also contributes to the long-term effects of isolation. *Id.* Because humans are social animals, epigenesis is also caused by deprivation of interaction with the outside world. *Id.* Psychologist Craig Haney has referred to the negative effects of solitary confinement on young adults as the equivalent of placing them in a deep-freeze. Shalev, *supra* note 10, at 30.

79. Shalev, *supra* note 10, at 30.

80. See *Juvenile Justice Policy*, *infra* note 82, at 584.

81. Adam Ortiz, *Cruel and Unusual Punishment: The Juvenile Death Penalty, Adolescence, Brain Development and Legal Culpability*, 2004 A.B.A. SEC. JUV. JUST. CTR. 2 (Jan. 2004).

82. Kathryn Monahan, Laurence Steinberg & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 582 (2015) [hereinafter *Juvenile Justice Policy*].

During adolescence and into early adulthood, four important changes occur in the brain's structure which involve the prefrontal cortex, referred to as the brain's chief executive officer.

First, during preadolescence and early adolescence, a process known as synaptic pruning occurs during which unused links between neurons are eradicated.<sup>83</sup> This process serves to increase the efficiency of the brain that allows for enhanced cognitive abilities and decision making.<sup>84</sup> Second, around the onset of puberty, important changes take place that involve the density and distribution of dopamine receptors in the paths that connect the limbic system to the prefrontal cortex.<sup>85</sup> The limbic system is the area of the brain where emotions are processed and which has significant implications for sensation seeking.<sup>86</sup> The third change in brain structure that occurs during adolescence, and one which continues into the early twenties, is referred to as myelination, the process by which nerve fibers become covered in myelin.<sup>87</sup> Myelin is the substance that enhances the signal transmission effectiveness of the brain's circuits, which within the pre-frontal cortex is necessary to enable higher-order cognitive functions.<sup>88</sup> The fourth important change that occurs is an increase in the strength of the network of connections between the prefrontal cortex and other brain regions.<sup>89</sup> This has an important effect in the regions of the brain responsible for processing emotional information and regulating self-control.<sup>90</sup>

Although there is a strong body of research on the development and maturity of the brain during adolescence, less is known about the effect that the deprivation of social and environmental stimulation during this time period has on the normal development of the brain. However, because research has shown that brain cells are wired to react to environmental conditions and can die in extreme settings such as long periods of solitary confinement,<sup>91</sup> scientists have opined that there is "[g]ood reason to suspect that harsh conditions such as solitary confinement impair brain development during [adolescence]."<sup>92</sup> It is important to note that some of the

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Juvenile Justice Policy*, *supra* note 82, at 582.

89. *Juvenile Justice Policy*, *supra* note 82, at 583.

90. *Juvenile Justice Policy*, *supra* note 82, at 583.

91. Sanjana Biswas, *Solitary Confinement of Juveniles in the Florida Prison System: Analyzing National and State Issues & Strategies for the Protection of America's Children*, 17 WHITTIER J. CHILD & FAM. ADVOC. 1, 4 (2018) (citing Tamar R. Birckhead, *Children in Isolation/ The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 47 (2015)).

92. *Juvenile Justice Policy*, *supra* note 82, at 606. "In light of the neuroscientific evidence on developmental immaturity, it is a distinct possibility that punitive settings disrupt adolescent development in ways that increase the likelihood of subsequent crime. If adolescence is a critical time for the development of capacities that underlie good adult decision-making, it stands to reason that experiences that disrupt that development—such as incarceration—should be minimized." *Juvenile Justice Policy*, *supra* note 82, at 597. Some research suggests that adolescents have a heightened

most significant developmental changes in the brain during adolescence, specifically the strength of neuronal connections in the cortical areas and myelination, are also cerebral changes which have been shown to be the most detrimentally affected by isolation in animal studies, and which have been linked to serious psychiatric illnesses such as autism, and schizophrenia.<sup>93</sup>

While there is limited research on the physiological effect of isolation on human adolescents, there are numerous studies that have examined this effect on the behavioral and brain development of adolescent animals.<sup>94</sup> Neuroscience research on adolescent rodents has shown that they are particularly sensitive to social isolation, which is shown to cause substantial changes in their brains and corresponding behavior.<sup>95</sup> Adolescent rodents, subjected to complete isolation, experienced widespread functional and structural changes, most commonly in neuromodulatory, dopamine and serotonin systems within the cortical and striatal areas of the brain—the areas responsible for motivation and reward processes.<sup>96</sup> Serotonin levels are believed to result in increased anxiety and hyperactivity.<sup>97</sup> The researchers also reported that these changes did not occur in pre- or post-adolescent rodents, but were unique to adolescents.<sup>98</sup>

Changes in behavior were observed to occur alongside the physiological changes. Rodents that were subjected to long periods of isolation demonstrated abnormal behaviors including hyperreactivity to stressful situations and increased aggression.<sup>99</sup> These animals also exhibited diminished performance on tasks that required learning and attention.<sup>100</sup>

Another study, this one involving adolescent primates, showed similar effects to those demonstrated in the rodent studies.<sup>101</sup> One researcher reported that deprivation of social contact in these animals, for as little as one to three weeks, resulted in “anxiety-like behaviors and a reduction in cell proliferation and neurogenesis in the hippocampus”—the region of the brain associated with

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vulnerability compared to adults under conditions of isolation. For example, one study reported that the number of adverse experiences in childhood strongly correlated with later suicide attempts and that adolescents are far more likely to commit suicide than adults in context of the early stressful experiences. Clark, *supra* note 40, at 352 (citing Shanta R. Dube et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings From the Adverse Childhood Experiences Study*, 286 JAMA 3089 (2001)). Another study that involved repatriated prisoners of war from Vietnam, found that the younger an individual was at the time of capture, the less resilience they had to the conditions of prolonged isolation and torture. Clark, *supra* note 40, at 352 (citing Crystal L. Park et al., *Does Wartime Captivity Affect Late-Life Mental Health? A Study of Vietnam-era Repatriated Prisoners of War*, 9 RES. HUM. DEV. 191 (2012)).

93. See *supra* notes 77–81.

94. Amy Orben, Livia Tomova & Sarah-Jayne Blakemore, *The Effects of Social Deprivation on Adolescent Development and Mental Health*, 4 LANCET 634, 635 (2020), [https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642\(20\)30186-3/fulltext](https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(20)30186-3/fulltext).

95. *Id.*

96. *Id.* at 636.

97. *Id.*

98. *Id.*

99. Orben, *supra* note 94, at 636.

100. Orben, *supra* note 94, at 636.

101. Orben, *supra* note 94, at 636.

learning and memory.<sup>102</sup> Professors Orben, Tomova and Blakemoor concluded: “The animal studies reviewed suggest that the consequences of deprivation of social needs during adolescence can have negative effects resembling features of human neuropsychiatric disorders and on social cognitive development more broadly, due to the lack of experiences for social learning.”<sup>103</sup>

### III. EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT JURISPRUDENCE

#### A. The United States Supreme Court Cases

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>104</sup> The punishment clause of the Eighth Amendment consists of two distinct categories of punishment—sentencing and conditions of confinement.<sup>105</sup> With respect to the conditions of confinement, the Court has stated that “courts have responsibility to scrutinize claims of cruel and unusual confinement. . . . [W]hen conditions of confinement amount to cruel and unusual punishment, ‘federal courts will discharge their duty to protect constitutional rights.’”<sup>106</sup> The Supreme Court has interpreted the Eighth Amendment to be “a restraint upon the exercise of legislative power,” which, “imposes some obligation on the judiciary to judge the constitutionality of punishment.”<sup>107</sup> Furthermore, the Court has consistently stated that what constitutes cruel and unusual punishment is a fluid, not static concept.<sup>108</sup>

One of the earlier cases to interpret the punishment clause of the Eighth Amendment, *Weems v. United States*, involved an individual who was found guilty of “falsifying a ‘public and official document,’” and was sentenced to fifteen years of cadena temporal punishment.<sup>109</sup> In holding that the sentence violated the Eighth Amendment, the Court found that punishment is “cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights,

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102. Orben, *supra* note 94, at 636.

103. Orben, *supra* note 94, at 637.

104. U.S. CONST. amend. VIII.

105. See *generally Cruel and Unusual Punishments*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-8/cruel-and-unusual-punishments> (last visited Apr. 8, 2021).

106. *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (quoting *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974)).

107. *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (quoting *Furman v. Georgia*, 408 U.S. 313–14 (1972) (White, J., concurring)).

108. See *e.g.*, *Weems v. United States*, 217 U.S. 349, 378 (1910); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

109. *Weems*, 217 U.S. at 357–58. Cadena temporal punishment is punishment in which the prisoner is kept in chains and made to perform hard labor. *Cadena Temporal*, ISLAWS.COM, <http://court.islaws.com/cadena-temporal#:~:text=Cadena%20Temporal%20-%20What%20is%20Cadena%20temporal%3F%20This,to%20a%20lifetime%20of%20surveillance%20by%20the%20government> (last visited Apr. 5, 2021).

both on account of their degree and kind.”<sup>110</sup> “The terms imply something inhuman and barbarous,—torture and the like.”<sup>111</sup> The Court further noted: “The clause of the Constitution . . . is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>112</sup>

The Court further developed the definition of cruel and unusual punishment in *Trop v. Dulles*.<sup>113</sup> In this case, a soldier who had been found guilty of desertion was declared by a military court to have lost his United States citizenship.<sup>114</sup> In finding that the sentence violated the cruel and unusual punishment clause of the Eighth Amendment, Justice Warren, writing for the Court, cited *Weems v. United States*, and stated: “The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>115</sup> In determining whether the punishment violated this standard, the Court relied on a United Nations survey of international law and noted: “[T]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>116</sup>

In *Estelle v. Gamble*, the Court introduced the concept of deliberate indifference into its Eighth Amendment jurisprudence.<sup>117</sup> This case involved a civil rights action brought in the United States District Court for the Southern District of Texas by a prisoner against the state correctional medical director and two correctional officers.<sup>118</sup> The prisoner claimed that he was subjected to cruel and unusual punishment as the result of inadequate medical treatment.<sup>119</sup>

The Court noted that the Eighth Amendment, “proscribes more than physically barbarous punishments,” noting, “[t]he Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”<sup>120</sup> It also stated that the Eighth Amendment prohibits punishments which are, “incompatible with the ‘evolving standards of decency that mark the progress of a maturing society.’”<sup>121</sup> The Court found that the, “unnecessary and wanton infliction of pain,” can be caused by the deliberate indifference of prison officials to the serious medical needs of a prisoner.<sup>122</sup> However, it held that “in order to state a cognizable claim, a prisoner must allege **acts or omission sufficiently harmful** to evidence deliberate indifference to serious medical needs. It is only such

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110. *Weems*, 217 U.S. at 377.

111. *Id.* at 368.

112. *Id.* at 378.

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

114. *Id.* at 87–88.

115. *Id.* at 100–01.

116. *Id.* at 102. J. Warren cited a United Nations’ survey of the nationality laws of 84 countries which revealed only two countries, the Philippines and Turkey that impose denationalization as a penalty for desertion. *Id.* at 103.

117. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

118. *Id.* at 98.

119. *Id.* at 101–02.

120. *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

121. *Id.* (quoting *Trop*, 356 U.S. at 101).

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

indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.”<sup>123</sup>

*Wilson v. Seiter*<sup>124</sup> marked a significant departure from the Court’s previous decisions on conditions of confinement cases.<sup>125</sup> Rather than focus its attention on the actual conditions of confinement and the effect these had on the imprisoned, Justice Scalia, writing for the majority, placed the focus on the intent of the prison officials and, in doing so, added a second required element to these causes of action.<sup>126</sup> In order to be successful on a cruel and unusual punishment, conditions of confinement action, plaintiffs need to prove subjective intent on the part of prison officials; in other words, a plaintiff must prove that the individual officials acted with deliberate indifference to the harmful effect on the prisoners involved.<sup>127</sup>

This case was brought by prisoners housed at the Hocking Correctional Facility in Ohio.<sup>128</sup> They complained that the conditions within the facility which included overcrowding, excessive noise, inadequate heating and cooling, unclean restrooms, improper ventilation, unsanitary food preparation and dining facilities, and being required to be housed with mentally ill inmates amounted to cruel and unusual punishment.<sup>129</sup> Justice Scalia, writing for the majority, focused on the plain meaning of the Eighth Amendment, concluding that it only applied to cruel and unusual “punishment.”<sup>130</sup> He reasoned that 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.”<sup>131</sup>

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123. *Estelle*, 429 U.S. at 104 (emphasis added). In other words, the Court appears to be indicating that it is the acts or omissions of the prison officials themselves that must be sufficiently harmful, not the subjective intentions of the officials.

124. 501 U.S. 294 (1991).

125. Two cases decided in the intervening period between the Courts rulings in *Estelle* and *Seiter*—*Hutto v. Finney*, 437 U.S. 678 (1978) and *Rhodes v. Chapman*, 452 U.S. 337 (1981)—demonstrate the Court’s continued focus on the actual conditions within the prisons. In *Hutto*, the Court found that confinement in an isolation cell is a form of punishment subject to Eighth Amendment scrutiny. *Hutto*, 437 U.S. at 686. It stated: “[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of ‘gruel’ might be tolerable for a few days and intolerably cruel for weeks or months.” *Id.* at 686–87. The Court rejected the State’s argument that deference to the decisions of prison administrators was critical to maintaining secure conditions in prisons, finding instead that a thirty day limit imposed by the district court “presents little danger of interference with prison administration.” *Id.* at 688. In *Rhodes*, the Court again focused on the physical conditions within the prison, but this time finding that the practice of double ceiling prisoners did not violate the Eighth Amendment stating: “[T]he Constitution does not mandate comfortable prisons, and prisons . . . which house persons convicted of serious crimes, cannot be free of discomfort. Thus, these considerations properly are weighed by the legislature and prison administration rather than a court.” *Rhodes*, 452 U.S. at 349.

126. *Wilson*, 501 U.S. at 300.

127. *Id.*

128. *Id.* at 296.

129. *Id.*

130. *Id.* at 300.

131. *Id.*

Justice White concurring (joined by Justices Marshall, Blackmun and Stevens), found the deliberate indifference requirement to be inconsistent with the Court's previous decisions because it conflicts with prior decisions where the Court, "made it clear that the conditions are themselves *part of the punishment*, even though not specifically 'meted out' by a statute or judge."<sup>132</sup> He predicted that the majority's intent requirement will prove to be unworkable in future cases, stating:

Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system. . . . I fear. . . that 'serious deprivations of basic human needs . . . will go unredressed due to an unnecessary and meaningless search for 'deliberate indifference.'<sup>133</sup>

The Court continued to refine the elements of a conditions of confinement claim in two subsequent cases. In *Helling v. McKinney*, a prisoner brought a civil rights action against prison officials alleging that his exposure to environmental tobacco smoke (ETS) subjected him to an unreasonable risk of harm which constituted cruel and unusual punishment under the Eighth Amendment.<sup>134</sup> The prison officials argued that there was no cognizable action absent proof that the prisoner was currently suffering from serious medical problems caused by the exposure to ETS.<sup>135</sup> The Court rejected this argument, holding that Eighth Amendment protections extend to future harm.<sup>136</sup> It held that the plaintiff had stated a cause of action by alleging that petitioners, "with deliberate indifference," exposed him to an unreasonable risk of serious harm to his health.<sup>137</sup>

The Court explained that the plaintiff, on remand, will need to prove both the objective and subjective elements.<sup>138</sup> Regarding the objective requirements, the lower court will need to conduct a scientific and statistical inquiry into the seriousness of the potential injury and also make a determination that "society considers the risk . . . to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate."<sup>139</sup>

In *Farmer v. Brennan*, a transsexual prisoner brought suit against prison officials claiming that the officials showed "deliberate indifference" to his safety by

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132. *Wilson*, 501 U.S. at 306.

133. *Id.* at 310–11.

134. *Helling v. McKinney*, 509 U.S. 25, 25 (1991).

135. *Id.* at 32.

136. *Id.* at 33.

137. *Id.* at 35.

138. *Id.* at 36.

139. *Id.*

placing him in the general prison population which resulted in his being sexually and physically attacked by other inmates.<sup>140</sup> The Court adopted the criminal law “subjective recklessness” standard as the test for deliberate indifference in Eighth Amendment cruel and unusual / conditions of confinement claims.<sup>141</sup> The Court noted that a claimant is not required to show that the official actually believed that harm would occur, rather the test is whether the official failed to act despite knowledge that there was a “substantial risk of serious harm” to the inmate.<sup>142</sup> The Court also opined that “knowledge” can be inferred from the fact that a risk was obvious.<sup>143</sup> It concluded: “We . . . hold that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”<sup>144</sup>

Justice Blackmun, concurring, echoed the arguments set out in Justice White’s concurring opinion in *Wilson*. He argued that *Wilson’s* holding, that prison conditions are beyond the reach of the Eighth Amendment absent a finding of subjective culpability on the part of prison officials, is “inconsistent with our precedents interpreting the Cruel and Unusual Punishments Clause.”<sup>145</sup> He further argued that *Wilson v. Seiter* should be overruled stating:

“Punishment” does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers “severe, rough, or disastrous treatment” . . .<sup>146</sup>

The Cruel and Unusual Punishments Clause was not adopted to protect prison officials with arguably benign intentions from lawsuits. The Eighth Amendment guarantees each prisoner that reasonable measure will be taken to ensure his safety. Where a prisoner can prove that no such reasonable steps were taken and, as a result, he experienced severe pain or suffering without any penological justification, the Eighth Amendment is violated regardless of whether there is an easily identifiable wrongdoer with poor intentions.<sup>147</sup>

Recently, three Supreme Court justices have called for the Court to take up the issue of solitary confinement. Justice Kennedy, concurring in *Davis v. Ayala*,<sup>148</sup> quoted Dostoyevsky stating: “The degree of civilization in a society can be judged

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140. 511 U.S. 825, 828–31 (1994).

141. *Id.* at 839–40.

142. *Id.* at 842.

143. *Id.*

144. *Id.* at 847.

145. *Id.* at 851.

146. *Farmer*, 511 U.S. at 854.

147. *Id.* at 857.

148. *Davis v. Ayala*, 576 U.S. 257 (2015).

by entering its prisons.”<sup>149</sup> He noted that the discussion in the legal academy and among policymakers focuses on the adjudication of innocence or guilt and ignores the questions of what follows.<sup>150</sup> As such, “[p]risoners are shut away—out of sight, out of mind.”<sup>151</sup> He called for consideration of the issues presented by solitary confinement, stating: “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.”<sup>152</sup>

In *Ruiz v. Texas*, Justice Breyer dissented from the majority’s denial of an application for a stay of execution.<sup>153</sup> The petitioner, a death row inmate who had spent twenty-two years in solitary confinement, argued that his execution violated the Eighth Amendment’s prohibition of cruel and unusual punishment because it followed “permanent solitary confinement.”<sup>154</sup> Justice Breyer argued that this case properly presented the issue whether “extended solitary confinement [violates] . . . the Eighth Amendment.”<sup>155</sup> Most recently, Justice Sotomayor dissented from the majority’s denial of a writ of certiorari in *Apodaca v. Raemisch*, another case involving solitary confinement.<sup>156</sup>

#### B. Lower Federal Court Opinions

The Supreme Court’s Eighth Amendment, conditions-of-confinement jurisprudence is surrounded by scholarly criticism. Some of the criticism has centered on the vagueness regarding the types of harm that prisoners must suffer in order to have a viable cause of action. Some authors have observed that many courts understand “serious” harm as limited to “physical” harm and require that the physical harm be the direct result of a deprivation of a specific basic human need such as “food, water, medical care, shelter or sanitation.”<sup>157</sup>

Another scholar has criticized the Supreme Court and lower federal courts for perpetuating a “narrow application of the conditions of confinement standard” because by limiting harm to only “physical” harm, they fail to recognize psychological harm and the severe mental anguish experienced by inmates who have been subjected to solitary confinement.<sup>158</sup>

Additionally, the Supreme Court’s deliberate indifference test has been criticized for its subjective element, which is oftentimes an insurmountable obstacle in actions challenging objectively harmful conditions of confinement.<sup>159</sup> The difficulty in proving the subjective element is clearly demonstrated in the cases

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149. *Id.* at 290.

150. *Id.* at 288.

151. *Id.* at 288.

152. *Id.* at 289–90.

153. *Ruiz v. Texas*, 137 S.Ct. 1246 (2017) (Mem.) (Breyer, J., dissenting).

154. *Id.*

155. *Id.* at 1247.

156. *Apodaca v. Raemisch*, 139 S.Ct. 5 (2018) (Mem.).

157. Coppola, *supra* note 59, at 190–91.

158. Coppola, *supra* note 59, at 186.

159. Coppola, *supra* note 59, at 193.

involving prisoners who suffer from mental illness. In this line of cases, prison officials, who are not trained in mental health, have been found to not be deliberately indifferent by claiming they did not have actual knowledge of a particular need.<sup>160</sup>

The confusion surrounding the definition of harm, alongside the problematic deliberate indifference standard, has led to a clear split of authority among the federal circuit and federal district courts. This conflict is clearly evidenced in the decisions decided by the Seventh and the Fourth Circuit Court of Appeals. In two recent cases, *Isby v. Brown* and *Giles v. Godinez*, the Seventh Circuit Court of Appeals refused to find solitary confinement to be cruel and unusual punishment.<sup>161</sup> In *Isby v. Brown*, the plaintiff was held in administrative segregation (SHU) for a period in excess of ten years.<sup>162</sup> He was confined to an eighty square foot cell, twenty-three hours per day.<sup>163</sup> He was limited to one hour per day of exercise in a yard, which was frequently covered in bird feces with dead birds and where he was required to wear a “nylon dog leash.”<sup>164</sup> He also complained that the lights remained on twenty-four hours a day, he had limited communication with other prisoners or staff, the water in showers was either scalding hot or freezing cold, and temperatures in his cell caused him to freeze in the winter and burn up in the summer.<sup>165</sup> Although the court expressed some concern regarding the length of the confinement in the SHU, it found that the conditions did not “rise to the level of extreme deprivation of basic human needs required to satisfy Eighth Amendment standards[.]”<sup>166</sup> which the court defined as an “identifiable human need such as food, warmth, or exercise.”<sup>167</sup>

In *Giles*, a prisoner had been diagnosed with schizoaffective disorder whose symptoms included depression, suicidal thoughts, anxiety, and auditory hallucinations.<sup>168</sup> He had attempted suicide three times.<sup>169</sup> He alleged that being subjected to solitary confinement was cruel and unusual punishment due to the combined effect that segregation and the conditions within segregation had on his mental illness.<sup>170</sup> The court refused to find that the conditions created an “objectively serious condition [that created] an excessive risk to his health and safety.”<sup>171</sup> It also refused to consider psychological harm as a cognizable harm.<sup>172</sup>

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160. Coppola, *supra* note 59, at 189. See e.g., *Giles v. Godinez*, 914 F.3d 1040, 1049 (7th Cir. 2019).

161. *Isby v. Brown*, 856 F.3d 508, 522 (7th Cir. 2017); *Giles*, 914 F.3d at 1049.

162. *Isby*, 856 F.3d at 512.

163. *Id.* at 513.

164. *Id.*

165. *Id.* at 514–15.

166. *Id.* at 522.

167. *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

168. *Giles v. Godinez*, 914 F.3d 1040, 1044 (7th Cir. 2019).

169. *Id.*

170. *Id.* at 1051.

171. *Id.* at 1051–52.

172. *Id.* at 1052.

The Seventh Circuit Court's decisions stand in stark contrast with that of the Fourth Circuit Court of Appeals. In its 2019 decision in *Porter v. Clarke*, a case with strikingly similar facts to the Seventh Circuit's *Isby* case, the Fourth Circuit held that long term detention in solitary confinement created a substantial risk of psychological and emotional harm and that defendant prison officials were deliberately indifferent to the risk.<sup>173</sup>

This case was bought by several death row inmates housed in the Sussex I State Prison in Virginia alleging that their conditions of confinement amounted to cruel and unusual punishment.<sup>174</sup> The inmates were confined to cells that were seventy-one square feet for approximately twenty-three hours per day and which were lit twenty-four hours a day.<sup>175</sup> During the outdoor time, (one hour five times a week) they were confined to a steel and wire mesh enclosed space that measured 7.9 by 20 feet long ("approximately the size of a parking space").<sup>176</sup> The inmates could keep a television and had access to publications and library materials.<sup>177</sup> They were also allowed noncontact visitation on weekends and holidays.<sup>178</sup>

The court held that cognizable harm could encompass psychological harm stating: "To be 'sufficiently serious,' the deprivation must be 'extreme' – meaning that it poses a 'serious or significant physical or emotional injury resulting from the challenged conditions,' or 'a substantial risk of serious harm resulting from . . . exposure to the challenged conditions.'"<sup>179</sup> It discussed numerous studies that demonstrate the psychological injury resulting from solitary confinement.<sup>180</sup> More importantly, it distinguished its previous decisions which held to the contrary.<sup>181</sup> In doing so, it noted that its 1975 decision predated all of the Supreme Court's conditions of confinement cases,<sup>182</sup> while another case predated much of the research that demonstrates the harmful effects of solitary confinement.<sup>183</sup> Finally with respect to the deliberate indifference element, the court found that the "extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement that has emerged in recent years provides circumstantial evidence that the risk of such harm 'was so obvious that it had to have been known.'"<sup>184</sup>

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173. *Porter v. Clarke*, 923 F.3d 348, 361 (4th Cir. 2019).

174. *Id.* at 353.

175. *Id.* at 353–54.

176. *Id.* at 353.

177. *Id.* at 354.

178. *Id.*

179. *Porter*, 923 F.3d at 358 (quoting *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016)).

180. *Id.* at 356.

181. *Id.* at 358–59.

182. *Id.* at 358.

183. *Id.* at 358–59.

184. *Id.* at 361 (quoting *Makdessi v. Fields*, 789 F.3d 126, 136 (4th Cir. 2015)). Some recent decisions from federal district courts have also recognized cognizable harm resulting from solitary confinement. See *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 778 (M.D. Penn. 2016) (finding that inmate's placement in solitary confinement for 36 years resulted in psychological deterioration and unreasonably jeopardized his mental health, which is a "proper subject of constitutional scrutiny"). See also *People v. Annucci*, 180 F. Supp. 3d 294, 297, 308 (S.D.N.Y. 2016) (upholding a class action settlement) (The court

## C. Federal Cases Involving Juveniles

Civil rights litigation has had some impact on the use of solitary confinement. Cases in New York, Mississippi, Ohio, and Illinois have resulted in settlements or judgments limiting the use of this practice on juveniles.<sup>185</sup> However, constitutional challenges have had less success.<sup>186</sup> Although the Supreme Court has recently found violations of the Eighth Amendment with respect to juvenile sentencing,<sup>187</sup> it has not decided an Eighth Amendment conditions of confinement case involving juveniles. Furthermore, the split evidenced among the federal circuit courts regarding the adult cases is also demonstrated in federal district court decisions involving juveniles.

Two federal district courts in New York recently granted preliminary injunctions against prison officials in cases brought by juveniles who were subjected to solitary confinement. In *V.W. v. Conway*,<sup>188</sup> the court noted “a broad consensus among the scientific and professional community that juveniles are psychologically more vulnerable than adults.”<sup>189</sup> It also noted the Supreme Court “has continued to stress that these fundamental differences are consequential in the Eighth Amendment context.”<sup>190</sup> With respect to the subjective deliberate indifference element, the court found the defendants were aware of the risks associated with this type of confinement.<sup>191</sup> Finally, the court noted that extensive evidence exists which demonstrates that the use of isolation on juveniles is not reasonably related to prison safety.<sup>192</sup>

The Federal District Court for the Northern District of New York reached a similar decision in *A.T. v. Harder*,<sup>193</sup> a case brought by groups of sixteen and seventeen-year-old inmates alleging Eighth Amendment violations based upon the

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noted that the settlement “should end the use and conditions of solitary confinement in New York as they have existed for decades.” It further remarked: “This litigation, and the way it has been handled by all of the attorneys, is the best example of the power of impact litigation to redress conditions that affect the most vulnerable members of our society.”)

185. Amy Fettig, *The Movement to Stop Youth Solitary Confinement: Drivers of Success & Remaining Challenges*, 62 S.D. L. REV. 776, 787–89 (2017). See also Abigail Q. Cooper, *Beyond the Reach of the Constitution: A New Approach to Juvenile Solitary Confinement Reform*, 50 COLUM. J.L. & SOC. PROBS. 343, 355–57 (2017).

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

187. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding it unconstitutional to impose the death penalty for crimes committed while under the age of eighteen); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that juveniles may not be sentenced to life imprisonment without parole for non-homicide offenses); *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life sentences without parole are unconstitutional for juvenile offenders).

188. *V.W. v. Conway*, 236 F. Supp.3d 554 (N.D.N.Y. 2017).

189. *Id.* at 583.

190. *Id.* (citing *Miller v. Alabama*, 567 U.S. 460, 489 (2012); *Roper*, 543 U.S. at 578; *Graham*, 560 U.S. at 82).

191. *Id.* at 584.

192. *Id.*

193. *A.T. v. Harder*, 298 F. Supp. 3d 391 (N.D.N.Y. 2018).

routine practice of placing juveniles in solitary confinement.<sup>194</sup> However, the Federal District Court for the Middle District of Florida in *Hughes v. Judd*<sup>195</sup> rejected the juvenile plaintiffs' claim that subjecting them to isolation was an Eighth Amendment violation.<sup>196</sup> It rejected their arguments that the constitutional standard governing juveniles should be more demanding than that pertaining to adults.<sup>197</sup> In doing so, the court rejected plaintiffs' reliance on *Roper*, *Graham*, and *Miller* on the grounds that these cases involved sentencing, not conditions of confinement.<sup>198</sup> The court also rejected plaintiffs' argument that psychological injury is cognizable under the Eighth Amendment, opining that injury requires deprivation of a single human need such as food, warmth, or exercise.<sup>199</sup>

#### IV. THE ARGUMENTS

The Supreme Court's current test for Eighth Amendment Cruel and Unusual Conditions of Confinement challenges consists of two prongs: (1) an objective prong which involves an analysis of the conditions and the risk of harm to the individual and (2) a subjective prong which requires a finding that the prison officials' actions (or inaction) were undertaken with deliberate indifference to the risk of harm to the prisoner.<sup>200</sup>

##### A. The Objective Element

The substantial body of research which has been conducted in recent years clearly establishes that subjecting individuals, particularly juveniles, to solitary confinement undoubtedly exposes them to a "substantial risk of serious harm."<sup>201</sup> Studies also demonstrate that solitary confinement is a physically barbarous form of punishment because prisoners subjected to it experience marked changes in both their brain structure and function—changes which have been associated with chronic conditions of psychosis.<sup>202</sup> Further, solitary confinement causes "unnecessary and wonton infliction of pain,"<sup>203</sup> in that inmates subjected to these conditions experience extreme emotional and psychological distress.<sup>204</sup> The degree of severity is made clear by the staggering numbers of suicide attempts within this particular population.<sup>205</sup>

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194. *Id.* at 400.

195. *Hughes v. Judd*, 108 F. Supp. 3d 1167 (M.D. Fla. 2015).

196. *Id.* at 1258.

197. *Id.* at 1174.

198. *Id.* at 1181–82.

199. *Id.* at 1242.

200. *See supra* notes 134–44.

201. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). *See also* *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (a conditions of confinement case in which the Court held that exposing inmates to environmental tobacco smoke could constitute cruel and unusual punishment because it presents an "unreasonable risk of serious harm").

202. *See* discussion *supra* notes 72–77.

203. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

204. *See* discussion *supra* notes 43–58.

205. *See supra* note 40.

The Seventh Circuit Court of Appeals, and the lower federal courts that have aligned with it are wrong in refusing to recognize prisoners' Eighth Amendment claims in the absence of proof of deprivations of "basic human needs"<sup>206</sup> in the form of "food, water, medical care, shelter or sanitation."<sup>207</sup> Their reasoning ignores the vast body of contemporary research that has shown that socialization and environmental stimulation are basic human needs.<sup>208</sup> Furthermore, this substantial body of research also demonstrates that the serious effects isolation produces are not only psychological but physical, in that it often results in permanent neurobiological changes in those subjected to it.<sup>209</sup>

#### B. Evolving Standards of Decency

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."<sup>210</sup> When addressing conditions of confinement claims under the Eighth Amendment, the Court has stated that "prisoners retain the essence of human dignity inherent in all persons."<sup>211</sup> Furthermore, the Court has held that conditions of confinement will amount to cruel and unusual punishment when the conditions fail to comport with "evolving standards of decency that mark the progress of a maturing society."<sup>212</sup>

Advocates for abolishing solitary confinement argue that evolving standards of decency, as evidenced by international law, federal administrative law, federal agency opinions, and the opinions of professional organizations, along with the current trends in case law and state legislation, support the conclusion that this practice violates these standards of decency.<sup>213</sup> As Justice Kennedy has recently remarked: "The human toll wrought by extended terms of isolation long has been understood, and questioned . . . . There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular. . . . [C]onsideration of these issues is needed."<sup>214</sup>

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206. *Isby v. Brown*, 856 F.3d 508, 522 (7th Cir. 2017).

207. See *Coppola*, *supra* note 59, at 190–91.

208. See discussion *supra* notes 59–64.

209. See discussion *supra* notes 59–103.

210. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

211. *Brown v. Plata*, 563 U.S. 493, 510 (2011).

212. *Estelle*, 429 U.S. at 102.

213. See, e.g., *Kysel*, *supra* note 37; Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927 (2018); Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 S.M.U. L. REV. 373 (1995).

214. *Davis v. Ayala*, 576 U.S. 257, 287–89 (2015) (Kennedy, J., concurring).

## i. International Law

The United States Supreme Court has long relied on foreign law,<sup>215</sup> although the doctrinal areas in which the Court has cited foreign law has shifted over time.<sup>216</sup> While the Court's early focus was on economic liberties, since 1972, the cases in which it has cited to foreign law have focused on freedom of speech, the right to privacy, and the Cruel and Unusual Punishments Clause.<sup>217</sup>

The Court has most frequently cited international law when resolving questions involving the Eighth Amendment,<sup>218</sup> because since the beginning of the modern Cruel and Unusual Punishment Doctrine, the Court has recognized that international opinion, regarding the acceptability of particular forms of punishment, has been an important part of the analysis.<sup>219</sup> An early example of this is the Eighth Amendment case, *Trop v. Dulles*, where the Court noted that "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."<sup>220</sup> The *Trop* Court further noted that it has "recognized the relevance of the views of the international community" in determining if a particular punishment comports with contemporary understandings of the Eighth Amendment.<sup>221</sup>

Three decisions issued in the early 2000s, *Atkins v. Virginia*,<sup>222</sup> *Lawrence v. Texas*,<sup>223</sup> and *Roper v. Simmons*,<sup>224</sup> raised the issue of reliance on foreign law to a new level of prominence. In each of these cases, the Court relied on foreign law as support for overturning prior precedents and, in reaching a decision that conflicted with the challenged legislation, cited changes in societal morals and values.<sup>225</sup> The Court continued this practice in its 2012 decision in *Miller v. Alabama*, in which it

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215. Steven A. Simon, *The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study*, 1 J.L. & CTS. 279, 286–90 (2013). The first citation appeared in 1843, in an opinion authored by Chief Justice Taney. *Id.* at 287.

216. *Id.*

217. *Id.* One author characterized the role of foreign law in the Court's opinions as falling into categories, the largest being consensus confirmation and consensus identification. *Id.* at 288–90. Consensus confirmation occurs in cases where the Court has used foreign law to "confirm or buttress the existence of consensus on a rule on which consensus already was clear in the United States and that was not at odds with the governmental acts challenged in the case." *Id.* at 288. Consensus identification, on the other hand, involves cases where the "Court has referenced foreign law to support the application of a rule for which there was not already an American consensus on the rule." Simon, *supra* note 215, at 290.

218. Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 237 (2011).

219. *Id.*

220. Simon, *supra* note 215, at 290 (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

221. *Thompson v. Oklahoma* 487 U.S. 815, 830 (1988) (citing *Trop*, 356 U.S. at 102); Glensy, *supra* note 218.

222. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding the execution of mentally retarded individuals violated the Eighth Amendment).

223. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional criminal laws prohibiting sexual acts between same sex persons).

224. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the execution of persons under the age of eighteen violated the Eighth Amendment).

225. Simon, *supra* note 215 at 293–94.

held that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits sentencing juveniles to life imprisonment without parole for non-homicide crimes.<sup>226</sup>

International law relating to the treatment of prisoners began to be developed at the end of World War II, beginning with the Charter of the United Nations which went into force in 1945.<sup>227</sup> Article 55 of the Charter endorses "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>228</sup> The Universal Declaration of Human Rights, adopted in 1948, notes in Article 5 "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>229</sup> Scholars have argued that the Declaration has become binding as a matter of customary international law.<sup>230</sup>

In December 2015, the United Nations General Assembly adopted the United Nations Standard Minimum Rules for the Treatment of Prisoners, also known as the Nelson Mandela Rules.<sup>231</sup> These rules define solitary confinement as "confinement of prisoners for 22 hours or more a day without meaningful human contact."<sup>232</sup> They expressly prohibit indefinite solitary confinement and prolonged solitary confinement, defined as "confinement for a time period in excess of 15 consecutive days."<sup>233</sup> The Rules further state that "The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice . . . continues to apply."<sup>234</sup>

With respect to juveniles, the U.N.'s Convention on the Rights of the Child, which has been ratified by every country member of the United Nations except for the United States, compels a state to incarcerate a child "only as a measure of last resort and for the shortest appropriate period of time."<sup>235</sup> Additionally, the U.N. Committee on the Rights of the Child, the group with responsibility for interpreting the Convention, has opined that punitive solitary confinement of juveniles is cruel,

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226. *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

227. *UN Charter*, UNITED NATIONS, <https://www.un.org/en/charter-united-nations/index.html> (last visited Apr. 9, 2021).

228. U.N. Charter art. 55, ¶ 4. For a discussion of International Law regarding solitary confinement, see Nan. D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. WEST. INT'L. L. J. 139 (1995). See also GROWING UP LOCKED DOWN, *supra* note 38, at 70–76.

229. G.A. Res. 217 (III) A, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948).

230. See, e.g., Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L. J. 759, 769 (1994).

231. U.N. Office on Drugs & Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (Dec. 17, 2015), [https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf).

232. *Id.* at 14.

233. *Id.*

234. *Id.*

235. G.A. Res. 44/25, art. 37(b), Convention on Rights of the Child (Nov. 20, 1989).

inhuman or degrading treatment.<sup>236</sup> Furthermore, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) pronounces solitary confinement of adolescents as cruel, inhuman, or degrading treatment.<sup>237</sup> This position was reasserted by the special rapporteur on torture in his report to General Assembly in 2011: “The Special Rapporteur holds the view that the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violated article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture.”<sup>238</sup>

## ii. The Maturing Consensus in National and State Law and Policy

In January 2016, President Obama issued an Executive Order banning the use of punitive solitary confinement on juveniles in federal prisons.<sup>239</sup> In doing so, he followed the Department of Justice’s recommendations set out in its *Report and Recommendations Concerning the Use of Restrictive Housing* (“the Report”).<sup>240</sup> The *Report* recommended that juveniles should not be subjected to isolation except as “a temporary measure in response to an act of serious violence.”<sup>241</sup> The *Report*

236. G.A. Res. 45/113, ¶ 4(L), United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Dec. 14, 1990), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx>. GROWING UP LOCKED DOWN, *supra* note 38, at 74.

237. GROWING UP LOCKED DOWN, *supra* note 38, at 74.

238. Interim Rep. of the Special Rapporteur of the Human Rights Council, 21 (Aug. 5, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement>. The special rapporteur called for an absolute ban on solitary confinement of juveniles and an absolute ban on solitary confinement of individuals with mental disabilities. *Id.* Another important source of international law, the European Convention on Human Rights and its enforcement arm, the European Court of Human Rights also support the conclusion that the current practice of solitary confinement is incompatible with “evolving standards of decency” of civilized societies. European Convention on Human Rights, art. 3, Sept. 21, 1970. Article 3 of the European Convention on Human Rights prohibits torture and “inhuman or degrading treatment or punishment.” *Id.* Although the Court has not decided a case involving the solitary confinement of juveniles, it has reached decisions in two cases involving adults. In *Soering v. United Kingdom*, the Court found a violation of Article 3’s prohibition against “inhuman or degrading treatment” based on what it termed the “death row phenomenon” – the “ever-present and mounting anguish of awaiting execution” alongside the “increasing tension and psychological trauma” caused by solitary confinement conditions. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). The Court also found an Article 3 violation in *Ilascu and Others v. Moldova and Russia* where a prisoner was detained in strict isolation for eight years during which time, he was kept in an unheated cell, deprived food as a form of punishment, and allowed to shower only rarely. Additionally, he was not allowed any contact with other prisoners, forbidden to contact his attorney, denied regular visits from his family, and unable to send or receive mail. *Ilascu and Others v. Moldova and Russia*, 48787/99, Eur. Ct. H.R. (July 8, 2004).

239. Press Release, The White House, FACT SHEET: Department of Justice Review of Solitary Confinement, <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>.

240. DEP’T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING, [hereinafter “Report”] <https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing>.

241. *Id.* at 114.

further recommended that isolation should only be used with the consent of a mental health professional.<sup>242</sup>

Many states have recently passed laws that limit the use of solitary confinement of juveniles. Twenty-nine states currently prohibit punitive solitary confinement, while fifteen states limit the time an adolescent may spend in punitive confinement.<sup>243</sup> Other states have passed more comprehensive restrictions on this practice including Colorado, California, and New Jersey.<sup>244</sup> Additionally, numerous professional groups have also called for an end to this practice, particularly with respect to juveniles. The American Academy of Child and Adolescent Psychiatry issued a 2012 policy statement opposing the solitary confinement of juveniles.<sup>245</sup> In 2017, the American Bar Association's Criminal Justice Section called on legislative bodies and governmental agencies to end solitary confinement of adolescents except in cases of immediate harm.<sup>246</sup> In 2018, the Association of State Correctional Administrators called for the reduced use and reform of the system of administrative segregation.<sup>247</sup>

All of the above demonstrates that the practice of subjecting juveniles to prolonged periods of solitary confinement meets the objective element of a Cruel and Unusual Punishment – Conditions of Confinement claim because the practice poses a substantial risk of harm to them and the practice fails to comport with evolving standards of decency.

#### B. The Deliberate Indifference Element

The subjective element of an Eighth Amendment cruel and unusual punishment—conditions of confinement claim requires a showing that prison officials acted with deliberate indifference to the harmful effects of the conditions on the prisoners involved. This requirement has been criticized as being inconsistent with the Court's Eighth Amendment jurisprudence by two justices: Justice White, concurring in *Wilson v. Seiter*,<sup>248</sup> and more recently Justice Blackmun,

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242. *Id.* In 2018, the Association of State Correctional Administrators called for the reduced use and reform of the system of administrative segregation. Resnik et. al, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, YALE L. SCH. (Oct. 18, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3264350](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264350).

243. Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, 45 J. AM. ACAD. PSYCHIATRY L. 350, 351 (2017).

244. Amy Fetting, *The Movement to Stop Youth Solitary Confinement: Drivers of Success & Remaining Challenges*, 62 S.D. L. REV. 776, 786–87 (2017); Brenda Flanagan, *NJ Law Limits Use of Solitary Confinement for Juveniles*, NJ SPOTLIGHT NEWS (Jan. 29, 2016), [https://www.njtvonline.org/news/video/nj-law-limits-use-of-solitary-confinement-for-juveniles\\_](https://www.njtvonline.org/news/video/nj-law-limits-use-of-solitary-confinement-for-juveniles_)

245. Clark, *supra* note 243, at 350–51.

246. ABA *against the use of solitary confinement of juveniles*, AM. BAR ASS'N (Aug. 15, 2017), [https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba\\_against\\_the\\_use0/](https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba_against_the_use0/).

247. Judith Resnik et al., *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, SSRN: YALE L. SCH., PUB. L. RES. PAPER NO. 656 at 1, 82 (Oct. 18, 2018), [hereinafter *Reforming Restrictive Housing*], [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3264350#references-widget](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264350#references-widget).

248. *Wilson v. Seiter*, 501 U.S. 294, 306 (1991) (White, J., concurring).

concurring in *Farmer v. Brennan*<sup>249</sup> in which he opined: “The Cruel and Unusual Punishments Clause was not adopted to protect prison officials with arguably benign intentions from lawsuits.”<sup>250</sup>

Justices White and Blackmun are correct. While requiring a showing that prison officials acted intentionally in causing harm may be a rational requirement in 42 U.S.C. § 1983 actions where the officials can be held personally liable for their actions, it is not rational in cases where institutional collective decision-making results in dangerous and unsafe conditions that affect the health and safety of prisoners and where prisoners are seeking only injunctive relief. Furthermore, to require proof of an official’s subjective intent, while at the same time affording deference to the same prison official’s decisions, creates a double layer of protection for the offending officials, at the expense of vulnerable, incarcerated prisoners, particularly youths.

There appears to be some recent indication that the Court is relaxing the deliberate indifference requirement as originally set out by Justice Scalia in *Seiter*.<sup>251</sup> There also appears to be some indication that the Court may be moving away from it entirely. One indication that the Court may be loosening the intent requirement is seen in the *Farmer* opinion, where the Court opined that knowledge of the potential risk of harm to prisoners on the part of prison officials can be inferred from the fact that the risk was obvious, rather than requiring evidence of the offending officer’s subjective knowledge of the risk of harm.<sup>252</sup> Further evidence of a movement away from a strict application of this test is also seen in *Brown v. Plata*.<sup>253</sup> In this case, the Court upheld the lower court’s decision, which found that serious overcrowding resulted in violations of prisoners’ Eighth Amendment’s rights to safe conditions and which ordered that certain numbers of prisoners be released to alleviate the overcrowding.<sup>254</sup> In affirming the lower court’s ruling, the Court did not address the deliberate indifference requirement.<sup>255</sup> The Court’s unwillingness to discuss this element has led some scholars to believe that the Court has opened the door to overlooking this requirement in a wider array of situations.<sup>256</sup>

Even though it appears that the Court may be moving away from the deliberate indifference element as originally set out by Justice Scalia, there should be little doubt that this element is met in cases where prison officials have subjected prisoners, particularly juveniles, to prolonged solitary confinement. The substantial risk of harm from this treatment is obvious and is demonstrated in the substantial body of scholarly literature which has recently been published on this subject.<sup>257</sup> Furthermore, this body of literature has clearly informed not only the

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249. *Farmer v. Brennan*, 511 U.S. 825, 851–52 (1994) (Blackmun, J., concurring).

250. *Id.* at 857.

251. *Seiter*, 501 U.S. at 297. See *supra* notes 120–126 and accompanying text.

252. *Farmer*, 511 U.S. at 837.

253. *Brown v. Plata*, 563 U.S. 493, 924–26 (2011).

254. *Id.* at 502.

255. See generally *id.*

256. Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 PA. L.: LEGAL SCHOLARSHIP REPOSITORY 286, 310 (2012).

257. See *supra* notes 76–106.

general public, but should also be known to prison officials. As the Fourth Circuit Court of Appeals pronounced in a recent 2019 decision, these studies provide evidence that the risk of harm is ‘so obvious that it had to have been known’ to the officials.<sup>258</sup> Finally, the fact that the substantial risk of harm to prisoners resulting from this treatment is well known to prison administrators is also evidenced by the 2018 statement of the Association of State Correctional Administrators which called for the reduced use and reform of the system of administrative segregation.<sup>259</sup>

Even though the above arguments establish that the deliberate indifference element can be met in cases involving juveniles, a different standard of culpability is required in these cases. The Supreme Court’s relatively recent recognition in *Roper*, *Graham*, and *Miller* that juveniles are different from adults, which has informed its decisions regarding the constitutional rights of juveniles in its Eighth Amendment sentencing cases, should also inform juvenile conditions of confinement cases.<sup>260</sup>

The foundational legal principles that have traditionally applied to children, which are premised on the assumption that children lack the capacity to care for themselves, should apply to imprisoned adolescents.<sup>261</sup> As a result, the States’ *parens patriae* power, which is premised on these assumptions, applies to imprisoned juveniles who are under state control. In fact, the Supreme Court has recognized that the “State has a *parens patriae* interest in preserving and promoting the welfare of the child” when they were detained in a juvenile justice system.<sup>262</sup> Nothing less should apply to juveniles in adult prisons. Accordingly, prison officials are required to consider the best interests of the child in these situations. Thus, this heightened burden, standing alone, prohibits the imposition of solitary confinement of adolescents in all but the most extreme situations and for the shortest period of time.<sup>263</sup>

Moreover, different standards of culpability should apply in cases involving juvenile prisoners based on the Supreme Court’s recent jurisprudence in which it recognized that juveniles are categorically different from adults. Its recognition that juveniles are categorically less mature in their decision-making capacity and highly vulnerable to outside pressures, supports a conclusion that adult correctional standards should not be applied to juvenile inmates. One scholar has opined that the Court’s acknowledgement in *Roper* and *Graham* that the Constitution should afford protections to youths which are not required for adults seems to suggest a

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258. *Porter*, 923 F.3d at 361.

259. See generally *Reforming Restrictive Housing*, *supra* note 247.

260. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010). Additionally, in *J.D.B. v. North Carolina*, the Court acknowledged that children “characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” *J.D.B. v. North Carolina*, 564 U.S. 261, 267–272 (2011).

261. See Kim Brooks Tandy, *Do No Harm: The Enhanced Application of Legal and Professional Standards in Protecting Youth from the Harm of Isolation in Youth Correctional Facilities*, 34 CHILD. LEGAL RTS. J. 143, 161 (2014).

262. *Schall v. Martin*, 467 U.S. 253, 263 (1984).

263. *Id.*

movement towards a jurisprudence that relies on a developmental approach to issues involving juvenile law.<sup>264</sup>

Other scholars have opined that developmental considerations should be taken into account in these cases, which will yield a more demanding constitutional standard governing juveniles as compared to adults.<sup>265</sup> One author commented that the Court's recent jurisprudence recognizing the developmental differences between children and adults should mean that the Eighth Amendment "imposes an obligation on prison officials to preserve and promote the welfare of child prisoners - as a requirement rooted in their basic humanity and dignity."<sup>266</sup> Others have also advocated for a similar approach:

The standard for conditions cases applied to juveniles should be appropriately tailored to their developmental status, and not simply a reiteration of adult standards. To incorporate developmental status into the existing structure for conditions claim, a juvenile deliberate indifference standard would require courts to consider: (1) the seriousness of the harm in light of juvenile vulnerability; and (2) the intent of the correctional official in light of the heightened duty to protect juveniles.<sup>267</sup>

#### V. CONCLUSION

The United States Supreme Court has stated that the goals of the penal system are: "to punish justly, to deter future crime, and to return imprisoned persons to society with an improved change of being useful, law-abiding citizens."<sup>268</sup> None of these penological goals are met by subjecting incarcerated juveniles to the brutal conditions of solitary confinement. It is time that the Supreme Court takes up the issue of solitary confinement, examines it in light of the Eighth Amendment's prohibition of cruel and unusual punishment as Justice Kennedy, Justice Breyer, and Justice Sotomayor have called upon the Court to do, and find that the practice is unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment.

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264. Tandy, *supra* note 261, at 286.

265. Kysel, *supra* note 37, at 700.

266. Kysel, *supra* note 37, at 700.

267. Levick et al., *supra* note 256, at 312.

268. Rhodes v. Chapman, 452 U.S. 337, 352 (1981).