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## Protecting America's Children: Why an Executive Order Banning Juvenile Solitary Confinement Is Not Enough

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# **Protecting America's Children: Why an Executive Order Banning Juvenile Solitary Confinement Is Not Enough**

## *Abstract*

*This Comment posits that solitary confinement of juveniles within United States correctional facilities violates the Eighth Amendment's Cruel and Unusual Punishment Clause, and, as such, President Obama's recent Executive Order banning juvenile solitary confinement is simply not a powerful enough solution. Part II discusses how broadly and to what degree solitary confinement is used in juvenile correctional facilities across the United States. Part III addresses President Barack Obama's executive order banning juvenile solitary confinement in federal prisons, the nature of presidential unilateral action, and why his executive order must be paired with Congressional legislation or Supreme Court jurisprudence to have a lasting effect. Part IV then details the Supreme Court's two-part tests which must be satisfied in order to establish an Eighth Amendment violation. Additionally, Part IV relates the current case law and public policy considerations that support Eighth Amendment protection of juveniles from solitary confinement. Next, Part V posits that juvenile isolation is deserving of Eighth Amendment protection under the Constitution because of its devastating psychological, physical, and developmental effects on juveniles. Finally, Part VI explains the positive impact that would result from Eighth Amendment protection against juvenile solitary confinement, including bringing the United States in compliance with the United Nations' Convention on the Rights of the Child and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, both of which the U.S. is currently in violation.*

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## I. INTRODUCTION

“[The] experiment . . . 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>1</sup> This description, given by renowned French politicians Gustave de Beaumont and Alexis de Tocqueville, is from the year 1831, but the “experiment” they observed in New York has become common practice in modern American society, used every day on the most vulnerable sector of the population: America’s children.<sup>2</sup> The experiment is solitary confinement.<sup>3</sup>

This Comment posits that solitary confinement of juveniles within United States correctional facilities violates the Eighth Amendment’s Cruel and Unusual Punishment Clause, and, thus, President Obama’s recent executive order banning juvenile solitary confinement is simply not a powerful enough solution.<sup>4</sup> Part II discusses the scope of the issue at hand; namely, how broadly and to what degree solitary confinement is used in juvenile correctional facilities across the United States.<sup>5</sup> Part III addresses President Barack Obama’s executive order banning juvenile solitary confinement in federal prisons, the nature of presidential unilateral action, and why his executive order must be paired with congressional legislation or Supreme Court jurisprudence to have a lasting effect.<sup>6</sup> Part IV then details the Supreme Court’s two-part tests set out in *Wilson v. Seiter*<sup>7</sup> and *Farmer v. Brennan*,<sup>8</sup> both of which must be satisfied to establish an Eighth Amendment violation.<sup>9</sup> Additionally, Part IV recounts current United States

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1. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 484 (1997) (citing Torsten Eriksson, *The Reformers, An Historical Survey of Pioneer Experiments in the Treatment of Criminals* 49 (1976) (quoting Alexis de Tocqueville and Gustave de Beaumont)). Tocqueville and Beaumont were commissioned by the French government in 1831 to learn about the American prison system. See ALEXIS TOCQUEVILLE, *LETTERS FROM AMERICA* VII, XVIII (Frederick Brown ed. & trans. 2010) (1831). They arrived in America in May 1831 and remained for nine months, studying the early American social, economic, and political systems. *Id.*

2. See *infra* Part II.

3. See Haney & Lynch, *supra* note 1. Tocqueville and Beaumont penned this opinion after witnessing solitary confinement’s introduction into New York prisons. *Id.*

4. See *infra* Parts III–V.

5. See *infra* Part II.

6. See *infra* Part III.

7. 501 U.S. 294 (1991).

8. 511 U.S. 825 (1970).

9. See *infra* Part IV.



case law and public policy considerations that support the Eighth Amendment protection of juveniles from solitary confinement.<sup>10</sup>

Next, Part V posits that juvenile isolation meets the Supreme Court's tests set out in Part IV and thus deserves Eighth Amendment protection under the Constitution.<sup>11</sup> To demonstrate this, Part V describes the devastating psychological, physical, and developmental effects solitary confinement has on juveniles.<sup>12</sup> Finally, Part VI explains the positive impacts that would result from Eighth Amendment protection against juvenile solitary confinement, such as bringing the United States into compliance with the United Nations' (U.N.) Convention on the Rights of the Child (CRC)<sup>13</sup> and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture),<sup>14</sup> both of which the United States is currently violating.<sup>15</sup>

## II. THE SCOPE OF JUVENILE SOLITARY CONFINEMENT

### A. *A Brief History of Solitary Confinement in U.S. Prisons*

The practice of solitary confinement in the United States began in 1829 as an experiment at the Eastern State Penitentiary in Philadelphia.<sup>16</sup> The practice was instituted with good intentions—prison overseers were influenced by the belief that if inmates were confined in a cell with only a Bible to read, they “would use the time to repent, pray and find

10. *See infra* Part IV.

11. *See infra* Part V.

12. *See infra* Part V.

13. United Nations Convention on the Rights of the Child art. 49, Sept. 2, 1990, 1577 U.N.T.S. 44, 44 [hereinafter Convention on the Rights of the Child]. The CRC defines a child as, “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” *Id.* at 46.

14. United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 27, June 26, 1987, 1465 U.N.T.S. 113, 113 [hereinafter Convention Against Torture].

15. *See infra* Part VI.

16. Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NPR (July 26, 2006, 7:52 PM), <http://www.npr.org/templates/story/story.php?storyId=5579901>. The first inmate in Eastern State Penitentiary was Charles Williams, who was “a farmer sentenced to two years for theft” and entered his isolation cell on October 23, 1829. Chai Woodham, *Eastern State Penitentiary: A Prison With a Past*, SMITHSONIAN.COM (Sept. 30, 2008), <http://www.smithsonianmag.com/history/eastern-state-penitentiary-a-prison-with-a-past-14274660/?no-ist>.

introspection.”<sup>17</sup> The experiment did not go as planned; many inmates committed suicide, went insane, or found themselves unable to re-enter society and function normally.<sup>18</sup> In fact, Charles Dickens visited the prison in 1842 and criticized its conditions: “I am persuaded that those who devised this system . . . do not know what it is that they are doing. . . . I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body. . . .”<sup>19</sup> Because of these unfortunate results, solitary confinement in the prison gradually faded away.<sup>20</sup>

Then, in 1934, the U.S. government opened Alcatraz in the San Francisco Bay, dedicating one hallway inside the prison for cells to be used specifically for solitary confinement.<sup>21</sup> This hallway was known as the “D Block,” and inmates sent there sometimes stayed for years.<sup>22</sup> The most significant event on this timeline, however, is the adoption of twenty-three-hour isolation cells at a prison in Marion, Illinois, in 1983.<sup>23</sup> This was the first prison in the United States to allow inmates to be isolated for an extended period of time without allowing them access to work or educational programs or permitting them to eat with the other prisoners in

17. Sullivan, *supra* note 16. The inmates were also allowed to do chores such as shoemaking and weaving. Woodham, *supra* note 16.

18. Sullivan, *supra* note 16.

19. CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 238–39 (Harper & Brothers ed., 2d ed. 1842); *see also* Woodham, *supra* note 16. Charles Dickens was a Victorian author known for his contributions to classic English literature. *Charles Dickens (1812-1870)*, BBC (2014), [http://www.bbc.co.uk/history/historic\\_figures/dickens\\_charles.shtml](http://www.bbc.co.uk/history/historic_figures/dickens_charles.shtml) (last visited Sept. 2, 2016). Some of his famous works include *David Copperfield* (1850), *Great Expectations* (1861), and *Pickwick Papers* (1837). *Id.*

20. Sullivan, *supra* note 16. The Eastern State Penitentiary abandoned its “system of isolation and penitence” in 1913. Woodham, *supra* note 16.

21. Sullivan, *supra* note 16. The prison population at Alcatraz was made up of prisoners who misbehaved at other federal prisons and were transferred to Alcatraz “where the highly structured, monotonous daily routine was designed to teach an inmate to follow rules and regulations.” *Historical Information: The Rock*, FED. BUREAU PRISONS, <https://www.bop.gov/about/history/alcatraz.jsp> (last visited Sept. 2, 2016) [hereinafter FED. BUREAU PRISONS].

22. FED. BUREAU PRISONS, *supra* note 21. The most notorious prisoner to be confined in Alcatraz’s “D block” was Robert Stroud, also known as “Birdman.” *Id.* Stroud was convicted of manslaughter in 1909 and sent to prison, where he murdered a prison guard in 1916 and was sentenced to life imprisonment. *Id.* He was transferred to Alcatraz for smuggling in contraband in birdcages, which he often requested for his scientific study of canaries and their diseases. *Id.* Of the seventeen years he spent at Alcatraz, six of them were in a “D block” solitary confinement cell. *Id.*

23. Sullivan, *supra* note 16.

the cafeteria.<sup>24</sup> The Marion system for isolation quickly became the standard; by the 1990s, “supermax” prisons cropped up in more than thirty-six other states.<sup>25</sup>

### B. Numbers on the Rise

One reason solitary confinement did not become widespread until recent years may be because “[e]arly modern judges had fewer scruples about meting out physical punishments, but they found solitary confinement an unbearable torment.”<sup>26</sup> Regrettably, this is no longer the common perception amongst law enforcement and prison officials; data collected by the Human Rights Watch (HRW) and the American Civil Liberties Union (ACLU) suggests that in 2011 there were more than 95,000 young people imprisoned in correctional facilities and jails.<sup>27</sup> Not only is the sheer volume of children imprisoned surprising, but the living conditions they endure can be shocking.<sup>28</sup> These same two organizations found that “[y]oung people are subjected to solitary confinement in jails and prisons nationwide, and often for weeks and months,”<sup>29</sup> and “[w]hen subjected to solitary confinement,

24. *Id.*

25. Bryan B. Walton, *The Eighth Amendment and Psychological Implications of Solitary Confinement*, 21 LAW & PSYCHOL. REV. 271, 285 (1997). This included the notorious Pelican Bay correctional facility in California. *Id.*

Pelican Bay State Prison . . . is designed to house California’s most serious criminal offenders in a secure, safe, and disciplined institutional setting. Half of the prison houses maximum security inmates in a general population . . . setting. The other half houses inmates in the Security Housing Unit . . . designed for inmates presenting serious management concerns.

*Pelican Bay State Prison (PBSP)*, CAL. DEP’T CORR. & REHAB., [http://www.cdcr.ca.gov/Facilities\\_Locator/PBSP.html](http://www.cdcr.ca.gov/Facilities_Locator/PBSP.html) (last visited Sept. 2, 2016).

26. Haney & Lynch, *supra* note 3, at 482.

27. ACLU & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 2 (2012), <https://www.aclu.org/files/assets/us1012webwcover.pdf> [hereinafter GROWING UP LOCKED DOWN].

28. *See infra* Part V.

29. GROWING UP LOCKED DOWN, *supra* note 27, at 3. There is no nationwide legislation in place prohibiting state facilities from isolating juveniles for twenty-three hours a day. Trey Bundy, *Inside Calif. Juvenile Hall, Rare Glimpse at Solitary Confinement Cells*, CTR. FOR INVESTIGATIVE REPORTING (Apr. 18, 2014), <https://www.revealnews.org/article/inside-calif-juvenile-hall-rare-glimpse-at-solitary-confinement-cells/>. Sara Ryan, the superintendent of the Santa Cruz County Juvenile Hall, demonstrated to the Center for Investigative Reporting (CIR) that she understood this very clearly. *Id.* She told them:

If a youth is in their room for [twenty-three] hours a day and they give them one hour out, then they’re not breaking any law. . . . A kid could be in their room for isolation for an

adolescents are frequently denied access to treatment, services, and programming adequate to meet their medical, psychological, developmental, social, and rehabilitative needs.”<sup>30</sup>

Three states investigated by HRW and the ACLU reported that all—*every single one*—of their juvenile inmates were held in solitary confinement for the duration of their stay in the state correctional facility.<sup>31</sup> New York is not one of those states, but the New York City Department of Corrections “is one of the largest jail systems in the country.”<sup>32</sup> In that system, the average length of stay in isolation for adolescents is still extensive—43.1 days.<sup>33</sup>

Addressing this growing concern, two medical doctors, Dr. James Gilligan and Dr. Bandy Lee, visited New York City correctional facilities and observed the living conditions of the incarcerated juveniles.<sup>34</sup> In their report to the New York City Board of Corrections, the doctors made a troubling conclusion: although the proportion of mentally ill Americans currently residing in a correctional or mental health facility “is almost exactly the same as it was [fifty] years ago,” back then, 25% were in prisons and 75% were in mental hospitals.<sup>35</sup> Today, however, about 95% are held in prisons while 5% are held in mental hospitals.<sup>36</sup>

These statistics demonstrate that jails are receiving more mentally ill

entire year. As long as we [give] them that one hour out [for] large-muscle activity, we're in compliance.

*Id.* Also, neither the federal government nor the state governments require juvenile correctional facilities “to report their use of isolation for minors.” *Id.*

30. GROWING UP LOCKED DOWN, *supra* note 27, at 3; *see infra* note 175 and accompanying text.

31. GROWING UP LOCKED DOWN, *supra* note 27, at 63. Hard evidence on juvenile isolation in correctional facilities, such as the evidence collected by the HRW and the ACLU, is often extremely difficult to obtain; the CIR “spent months requesting access to facilities that hold minors around the country.” Bundy, *supra* note 29. “Rikers Island jail in New York, Cook County jail in Chicago, and five county lockups across Florida would not let in reporters.” *Id.* The CIR attributes this to the “secretive nature of isolating juveniles.” *Id.*

32. GROWING UP LOCKED DOWN, *supra* note 27, at 64.

33. *Id.* at 67–68. Forty-three days is thirteen days longer than the thirty-day limit in the Army Field Manual for the “separation” of detainees, which is considered a “restricted” interrogation technique. *See* Rupert Stone, *Beyond Torture: The New Science of Interrogating Terrorists*, NEWSWEEK (June 6, 2015, 6:05 AM), <http://www.newsweek.com/2015/06/19/beyond-torture-new-science-interrogating-terrorists-340944.html>.

34. JAMES GILLIGAN & BANDY LEE, REPORT TO THE NEW YORK CITY BOARD OF CORRECTION 1–2 (2013), <http://solitarywatch.com/wp-content/uploads/2013/11/Gilligan-Report-Final.pdf>.

35. *Id.* at 2–3.

36. *Id.*

inmates than mental hospitals—including mentally ill juveniles.<sup>37</sup> As a result, correctional facilities are also placing mentally ill juveniles in isolation cells.<sup>38</sup> Evidence suggests that isolation of mentally ill young people does not yield positive results; in fact, it can greatly exacerbate already present symptoms of mental illness, harshly demonstrating the inhumanity of utilizing solitary confinement as a regular practice in juvenile facilities.<sup>39</sup> Fortunately, these striking practices and statistics are not going unnoticed.<sup>40</sup>

### III. PRESIDENT OBAMA'S RESPONSE & THE STRENGTH OF UNILATERAL EXECUTIVE ACTION

#### A. *President Obama's Executive Order Banning Juvenile Solitary Confinement*

On January 25, 2016, President Barack Obama penned an op-ed piece for the Washington Post announcing an executive order banning almost all use of juvenile solitary confinement in federal prisons.<sup>41</sup> The President began his article by relating a story similar to those included in this

37. *See id.* The Treatment Advocacy Center and the National Sheriff's Association estimated in their 2014 joint report that in 2012 around 356,268 severely mentally ill persons were held in U.S. prisons and jails. E. FULLER TORREY ET AL., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6 (2014), <http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf>. The report relates that “[a]s the number of seriously mentally ill prisoners has increased in recent years, an increasing number of them have ended up in solitary confinement.” *Id.* at 16.

38. *See* TORREY ET AL., *supra* note 37, at 33, 73; GILLIGAN & LEE, *supra* note 34, at 3; GROWING UP LOCKED DOWN, *supra* note 27 and accompanying text. Probation officials in Contra Costa County, California were sued in 2014 for allegedly “placing minors in solitary confinement for months on end and denying them educational services in the process.” Bundy, *supra* note 29. The lawsuit claimed that a thirteen-year-old girl who suffered from “diagnosed bipolar disorder and attention deficit hyperactivity disorder” was confined in an isolation cell for over one-hundred days. *Id.*

39. *See infra* Section V.A.

40. *See infra* Section III.A.

41. *See* Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html?tid=a\\_inl](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl). Obama's executive order allows for isolation to be used in situations where it is in the best interest of the juvenile—“when certain prisoners must be isolated for their own protection or in order to protect staff and other inmates.” *Id.* Even then, Obama asserted, “the practice should be limited, applied with constraints and used only as a measure of last resort.” *Id.*

Comment—a story about a young man, Kalief Browder, whose mental health deteriorated rapidly during and following his time in solitary confinement.<sup>42</sup> But Kalief Browder's story is especially poignant: tragically, Browder committed suicide on June 6, 2015, at the age of twenty-two.<sup>43</sup> Obama believed this suicide was due in large part to Browder's nearly two-year isolation on Rikers Island while he awaited his day in court, which never came.<sup>44</sup>

Obama also included statistical research to bolster his action.<sup>45</sup> Notably, he stated that “[a]s many as 25,000 inmates are serving months, even years of their sentences alone in a tiny cell, with almost no human contact.”<sup>46</sup> He credited Colorado and New Mexico with leading the way for the states in solitary confinement reform as both are already showing positive results from reducing the amount of prisoners held in solitary confinement in their respective state prisons.<sup>47</sup> The federal government is making positive

42. *Id.* Browder attempted to commit suicide several times while in solitary confinement, including “[o]nce in February, 2012, [when] he ripped his bedsheet into strips, tied them together to create a noose, and tried to hang himself from the light fixture in his cell.” Jennifer Gonnerman, *Kalief Browder, 1993–2015*, *NEW YORKER* (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

43. Dana Ford, *Man Jailed as Teen Without Conviction Commits Suicide*, *CNN* (June 15, 2015), <http://www.cnn.com/2015/06/07/us/kalief-browder-dead/>. Kalief Browder was from the Bronx and was arrested in 2010 at sixteen-years-old for stealing a backpack. Obama, *supra* note 41. At about 12:15 p.m. on June 6, 2015, Kalief Browder went into a bedroom in his home, “pulled out the air conditioner, and pushed himself out through the hole in the wall, feet first, with a cord wrapped around his neck.” Gonnerman, *supra* note 42; Ford, *supra*.

44. Obama, *supra* note 41. “In 2013, Kalief was released, having never stood trial. He completed a successful semester at Bronx Community College. But life was a constant struggle to recover from the trauma of being locked up alone for 23 hours a day.” *Id.* Browder attempted suicide in November 2013, six months after his release from solitary confinement. Gonnerman, *supra* note 42. By January 2015, Browder had grown so paranoid he threw out his new television “because it was watching [him].” *Id.*

45. Obama, *supra* note 41. According to Obama, last summer he “directed Attorney General Loretta E. Lynch and the Justice Department to review the overuse of solitary confinement across U.S. prisons.” *Id.*

46. *Id.* Obama also noted that “[t]here are as many as 100,000 people held in solitary confinement in U.S. prisons—including juveniles and people with mental illnesses.” *Id.*

47. *Id.* Obama related that the state of Colorado reduced the amount of incarcerated individuals it was holding in isolation, resulting in the lowest number of assaults against its state prison staff since 2006. *Id.* Colorado began these reforms in 2012. Kirk Mitchell, *Colorado Prisons Turn Away from Heavy Use of Solitary Confinement*, *DENV. POST* (June 4, 2012, 1:00 AM), <http://www.denverpost.com/2012/06/03/colorado-prisons-turn-away-from-heavy-use-of-solitary-confinement/>. New Mexico also “implemented reforms,” which led to a decrease in its solitary confinement numbers and an increase in the number of “prisoners engaging in promising rehabilitation programs.” Obama, *supra* note 41. The New Mexico Corrections Department committed to

strides, too; Obama noted that federal prisons “have cut the use of solitary confinement by 25 percent.”<sup>48</sup>

Possibly the most important section of Obama’s op-ed was his appeal to Congress.<sup>49</sup> The President wrote that he hoped Congress “will send [him] legislation as soon as possible that makes our criminal justice system smarter, fairer, less expensive and more effective.”<sup>50</sup> In this one sentence, the President acknowledged what decades of jurisprudence has set in stone as truth: the President’s power is at its weakest when he or she is acting alone.<sup>51</sup> To ensure Obama’s ban extends not only to this generation of incarcerated young people, but to every generation thereafter, Congress and the Supreme Court must recognize juvenile solitary confinement as a violation of the Eighth Amendment’s Cruel and Unusual Punishment Clause.<sup>52</sup> For this reason, it is essential that Obama’s executive order be considered just one step—albeit a very significant one—towards eradicating juvenile solitary confinement in the United States.<sup>53</sup>

### *B. The Separation of Powers & Unilateral Executive Action*

The President’s authority to act unilaterally, which includes implementing executive orders, is derived from Article II of the United States Constitution.<sup>54</sup> Article II outlines the entire scope of the President’s authority, but his ability to issue executive orders is specifically founded in Section 3, which states, “he shall take Care that the Laws be faithfully executed.”<sup>55</sup> Executive orders fall under this duty to faithfully execute the laws and can be defined as “order[s] or regulation[s] issued by the President

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“reducing its reliance on solitary confinement” on February 12, 2014. Eli Hager & Gerald Rich, *Shifting Away from Solitary*, MARSHALL PROJECT (Dec. 23, 2014, 1:12 PM), <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary#.6oMhCnY8S>. Additionally, “after spending two days in solitary confinement himself, state Secretary of Corrections Gregg Marcantel challenge[d] judges who hear disciplinary cases to consider alternatives before isolation.” *Id.*

48. Obama, *supra* note 41. Like in the cases of Colorado and New Mexico, this measure by the federal government “significantly reduced assaults on staff.” *Id.*

49. *See id.*

50. *Id.*

51. *See infra* Section III.B.

52. *See infra* Part IV.

53. *See infra* Part V.

54. *See* U.S. CONST. art. II, § 3.

55. *Id.*

or some administrative authority under his direction for the purpose of interpreting, implementing, or giving administrative effect to a provision of the Constitution or of some law or treaty.”<sup>56</sup>

Additionally, executive orders have the “force and effect of law”<sup>57</sup> and are different from federal legislation and regulations in a significant way: “[T]here are almost no legally enforceable procedural requirements that the president must satisfy before issuing (or repealing) an executive order or other presidential directive,” which makes them easier to implement efficiently.<sup>58</sup> On the other hand, the President does not have the authority to sign an executive order that enforces “policy decisions that are not otherwise authorized by law.”<sup>59</sup> In fact, such an executive order would be “without legal effect unless the order can be justified as an exercise of the President’s exclusive and independent constitutional authority.”<sup>60</sup>

Executive orders have been a fundamental part of the President’s executive power since 1789, when America’s first President, George Washington, unilaterally declared that the United States would not intervene

56. *Executive Order*, BLACK’S LAW DICTIONARY (5th ed. 1979). Black’s Law Dictionary online currently defines “executive order” as: “[d]irective action from a prime minister or president to its executive governmental agencies in an official document.” *What is Executive Order?*, L. DICTIONARY, <http://thelawdictionary.org/executive-order/> (last visited Oct. 2, 2016). Other definitions include: “[A] unilateral action or directive from the president of the United States that allows him, as head of the executive branch and subject to his constitutional statutory authority, to pursue specific actions within the broad confines of executive power.” Matthew R. Leffler, *Order or Memorandum: Either Way, It Still Matters*, 23 No. 5 WIS. EMP. L. LETTER 6 (2014). “An executive order could be a document with specific instructions to agencies in the executive branch, a directive to agents of the executive branch to take or refrain from taking certain actions, or a combination of orders and directions to agencies and executive branch officials.” *Id.* “Executive orders cover a wide range of subjects, including public lands, mineral reserves, civil rights, emergency economic situations, and removal of federal employees.” John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839–40 (1981).

57. Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2030 (2015). Typically, executive orders draw power from “congressional delegations of authority to the President (explicit, implicit, or anticipated), from the President’s independent authority under Article II of the Constitution, or from some vague combination of the two, [and] are generally enforceable by courts.” *Id.* at 2030–31. In achieving a broader scope since the 1930s, executive orders have “become the most important type of ‘Presidential legislation.’” Noyes, *supra* note 56, at 839.

58. Newland, *supra* note 57, at 2032. “Executive orders have allowed Presidents to . . . bypass the legislative process by issuing orders that carry the force of law.” Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 VAL. U. L. REV. 385, 389 (2007).

59. VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 1 (2014).

60. *Id.*



in the war between Great Britain and France.<sup>61</sup> This precedent was reaffirmed only a few years later in 1803, when President Thomas Jefferson exercised his implied unilateral powers to complete the Louisiana Purchase.<sup>62</sup> Then in 1842, President John Tyler used his executive power to create a “commission to investigate corruption in the New York City Customhouse.”<sup>63</sup> Thus, the presidential tradition of using implied constitutional powers to unilaterally issue executive orders was “firmly established” in the very early days of American politics and has been consistently confirmed since then.<sup>64</sup>

For instance, during the Civil War, President Abraham Lincoln issued

61. Wetzel, *supra* note 58, at 389–90. This became known as the “Neutrality Proclamation,” and it has never been overturned. *Id.* at 390–91.

62. *Id.* at 392. President Jefferson made the Louisiana Purchase “unilaterally by Presidential order without direct statutory or Constitutional authority.” *Id.* The Louisiana Purchase was a deal entered into by the United States and France, in which France agreed to sell “827,000 square miles of land west of the Mississippi River for \$15 million.” Gaye Wilson, *Louisiana Purchase*, THOMAS JEFFERSON FOUND. (2003), <https://www.monticello.org/site/jefferson/louisiana-purchase>.

63. Wetzel, *supra* note 58, at 393. The Secretary of the Treasury advised the three private citizens commissioned by President Tyler with this task:

The President considers it his duty, under and by virtue of the provision of the Constitution which requires him to see that the laws be faithfully executed, to inquire into and ascertain the best means within his power of correcting the evils which have been found to exist in this branch of the Executive administration.

Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 61 (1994) (quoting Cong. Globe, 27th Cong., 2d Sess. 475 (1842)). “The New York Custom House was established in 1799 by the United States government to regulate New York port and harbor activities” through regulating imports and exports, raising revenues by placing duties on imports, and preventing smuggling. *New York Custom House Records*, N.Y. PUB. LIBRARY, <http://archives.nypl.org/mss/3092> (last visited Sept. 5, 2016).

64. Wetzel, *supra* note 58, at 393. “By the beginning of the Civil War, the practice of issuing executive orders was firmly established in American politics.” *Id.* This is also true of written instruments such as presidential memoranda and presidential proclamations. CHU & GARVEY, *supra* note 59, at 1. Because the U.S. Constitution “does not contain any provision referring to these terms or the manner in which the President may communicate directives to the executive branch,” these instruments are not easily distinguishable from one another. *Id.* One widely accepted definition of these instruments can be found in a 1957 report issued by the House Government Operations Committee:

Executive orders and proclamations are directives or actions by the President . . . . Executive orders are generally directed to, and govern actions by, Government officials and agencies . . . . Proclamations in most instances affect primarily the activities of private individuals . . . . Since the President has no power or authority over individual citizens . . . except where he is granted such power and authority by a provision in the Constitution or by statute, the President’s proclamations are not legally binding and are at best hortatory unless based on such grants of authority.

*Id.*

possibly the most famous executive order of all time: the Emancipation Proclamation.<sup>65</sup> And later, when America sank into the Great Depression, President Franklin Delano Roosevelt responded by instituting his New Deal primarily by way of executive orders.<sup>66</sup> Soon thereafter, during the turbulent era of the Civil Rights Movement, President Harry Truman issued executive orders to usher in equality and justice for African-Americans.<sup>67</sup> As this illustrates, executive orders have played a major role in shaping the course

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65. *Featured Documents*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., [https://www.archives.gov/exhibits/featured\\_documents/emancipation\\_proclamation/](https://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/) (last visited Sept. 5, 2016); see Wetzel, *supra* note 58, at 394. The Emancipation Proclamation announced liberation for slaves in confederate territory on January 1, 1863. *Featured Documents*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., [https://www.archives.gov/exhibits/featured\\_documents/emancipation\\_proclamation/](https://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/) (last visited Sept. 5, 2016). During the Civil War, President Lincoln passed two other executive orders that drew the Supreme Court's attention: one was upheld and the other was declared unconstitutional. Wetzel, *supra* note 58, at 394. The former was President Lincoln's executive order to "establish a naval blockade," confirmed as being within his constitutional authority by the Supreme Court in the *Prize Cases*. Wetzel, *supra* note 58, at 394; see *The Amy Warwick*, 67 U.S. 635, 635 (1862). The latter was Lincoln's decree suspending the writ of habeas corpus, which the Supreme Court declared unconstitutional in *Ex parte Milligan*. Wetzel, *supra* note 58, at 394; see *Ex parte Milligan*, 71 U.S. 2 (1866). Congress, on the other hand, had no issue with either of Lincoln's executive orders, "due to the unique circumstances of the Civil War." Wetzel, *supra* note 58, at 395.

66. *Administration of Franklin D. Roosevelt (1933–1945)*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/federal-register/executive-orders/roosevelt.html> (last visited Sept. 6, 2016). President Franklin D. Roosevelt issued a total of 3,728 executive orders during his presidency—573 in his first year alone. *Id.* One of his landmark orders was Executive Order 7034, which created the Works Progress Administration. *Records of the Works Project Administration [WPA]*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/research/guide-fed-records/groups/069.html> (last visited Sept. 6, 2016); see Anita Bernstein, *Just Jobs*, 45 U. BAL. L. REV. 209, 217 (2016). President Franklin Roosevelt was also responsible for issuing one of the most infamous executive orders in American history: Executive Order 9066, which "authorized the evacuation of all persons deemed a threat to national security from the West Coast to relocation centers further inland." *Document for February 19th: Executive Order 9066: Resulting in the Relocation of Japanese*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/historical-docs/todays-doc/?dod-date=219> (last visited Sept. 6, 2016). As a result, over 100,000 people of Japanese ancestry were evacuated to and confined in "isolated, fenced, and guarded relocation centers, known as internment camps." *Id.* Both the Supreme Court and Congress supported this order. Wetzel, *supra* note 58, at 402–03. In fact, in *Korematsu v. United States*, the Supreme Court handed down a decision validating the relocation of Japanese Americans on the West Coast. 323 U.S. 214, 223–24 (1944).

67. Wetzel, *supra* note 58, at 405–07. President Truman's Executive Order 9981 issued in 1948 desegregated the U.S. military. *Id.* at 405. In fact, "it was primarily through executive orders that Presidents were able to make early civil rights strides." *Id.* at 404. If it had not been for executive orders like President Truman's, "the struggle for civil rights would have been slowed and segregation would have been even more pervasive in the middle of the twentieth century." *Id.* at 405–06.

of American history.<sup>68</sup>

Although the ability to act without the typical administrative constraints allows presidents to implement executive orders unfettered, it continues to burden them in another way: an executive order remains politically weak until the Supreme Court agrees it is a constitutional exercise of power and deems it enforceable, or until Congress codifies it into new legislation.<sup>69</sup> This also means that executive orders are vulnerable—they can be overturned by a single Supreme Court decision, piece of legislation passed by Congress, or executive order issued by a subsequent president.<sup>70</sup> Indeed, since the Supreme Court handed down its decision in *Little v. Barmette*,<sup>71</sup> “it has been well established that a statute supersedes an executive order.”<sup>72</sup> This vulnerability creates uncertainty for the President’s legacy, and more importantly, places in jeopardy those the executive order is designed to protect; for Obama’s executive order, that means America’s children.<sup>73</sup>

### 1. Executive Orders Overturned by the Supreme Court of the United States

In *Little*, the Supreme Court considered whether President John Adams had the authority to issue his executive order directing the capture of all

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68. See *supra* notes 61–67 and accompanying text. A few other notable and history-shaping executive orders include President Eisenhower’s 1957 Executive Order 10730 directing the National Guard to ensure the peaceful integration of Little Rock Central High School; John F. Kennedy’s Executive Order 10925 establishing Affirmative Action in 1961; President Carter’s Executive Order 12127 creating the Federal Emergency Management Agency in 1979; and George W. Bush’s Executive Order 13228 establishing the Department of Homeland Security in 2001. See *Executive Orders Disposition Tables Index*, U.S. NAT’L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/federal-register/executive-orders/disposition.html> (last visited Sept. 6, 2016).

69. Noyes, *supra* note 56, at 843. “Since the President’s constitutional powers in many cases provide a weaker basis for an executive order than does a statute, courts may stretch to find statutory support.” *Id.* “[Executive orders] rid the president of the need to assemble majorities in both houses of Congress, or to wait through administrative processes, such as notice-and-comment rulemaking, to initiate policy.” Newland, *supra* note 57, at 2032. In addition,

[I]f Congress supports an executive order, and wants to provide the directive with greater stability, Congress may codify the presidential order as it was issued or with certain modifications. Similarly, if the President issues an executive order on questionable legal authority, Congress may subsequently ratify the order either expressly or by implication.

CHU & GARVEY, *supra* note 59, at 10.

70. See *infra* Sections III.B.1–3.

71. 6 U.S. 170 (1804).

72. Wetzell, *supra* note 58, at 420.

73. Obama, *supra* note 41.

ships traveling from French ports.<sup>74</sup> Chief Justice Marshall ultimately ruled that President Adams did not have that authority<sup>75</sup> because Congress had previously enacted legislation specifically limiting the seizure of vessels to only those “bound or sailing to a French port.”<sup>76</sup> President Adams could not supersede this legislation with an executive order directing otherwise.<sup>77</sup> This 1804 decision continues to restrict the power of executive orders today, requiring presidents to adhere to previously enacted congressional legislation.<sup>78</sup>

In that one case, the Supreme Court set a precedent defining its ability to evaluate the legitimacy of unilateral executive actions; indeed, the Supreme Court has exercised this power in determining when an executive order violates the Constitution, how to properly interpret an executive order, and whether regulations within the executive order may be overturned.<sup>79</sup> The Supreme Court demonstrated this authority in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>80</sup> The majority concluded that President Truman did not have the authority to delegate all control of the nation’s steel mills to the Secretary of Commerce, stating: “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>81</sup> The Supreme Court determined that the executive order had the essential characteristics of a statute and thus was unconstitutional for the President to issue.<sup>82</sup> This majority opinion was joined by five

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74. 6 U.S. at 177.

75. *Id.* at 179.

76. *Id.* at 177 (first emphasis added).

77. *Id.* “Firmly establishing the supremacy of statutes over executive orders, the Court held that the statute controlled and that the executive order was thus invalid.” Wetzel, *supra* note 58, at 391–92.

78. See Wetzel, *supra* note 58, at 391–92.

79. Newland, *supra* note 57, at 2034.

Executive orders find their ways into judicial decisions via all sorts of avenues: challenges to the President’s power to promulgate an order, efforts to overturn the regulations pursuant to an order, allegations that an order violates constitutional rights, arguments that an order has been improperly interpreted, or claims that resolution of a question of statutory interpretation ultimately hinges on the interpretation of an antecedent order.

*Id.*

80. 343 U.S. 579 (1952).

81. *Id.* at 587. The majority opinion was penned by Supreme Court Justice Hugo Black. *Id.* at 579.

82. *Id.* at 588.

The preamble of the order itself, like that of many statutes, sets out reasons why the

concurrences; so although the majority appears “to refute the notion that the President possesses implied constitutional powers,” four concurring opinions to the decision “maintained that implied presidential authority adheres in certain contexts.”<sup>83</sup>

Supreme Court Justice Robert H. Jackson’s concurrence is widely considered the most influential of these concurrences.<sup>84</sup> In fact, Justice Jackson’s analysis of the presidential authority to act unilaterally has become “the decisive judicial test for determining the legality of executive orders.”<sup>85</sup> Justice Jackson organized the President’s powers into a tripartite scheme: (1) the President’s “authority is at its maximum” when acting in accordance with “an express or implied authorization of Congress”;<sup>86</sup> (2) the President’s authority falls into a “zone of twilight” when acting “in absence

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President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. . . . [T]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.

*Id.* at 588–89.

83. *CHU & GARVEY*, *supra* note 59, at 4. In addition to Justice Jackson’s concurrence, Justices Felix Frankfurter, Harold Hitz Burton, and Tom C. Clark also offered concurring opinions. *Id.* at 4 n.25; *Youngstown*, 343 U.S. at 593–710. In Justice Frankfurter’s concurrence, he maintained that executive orders are part of

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.

*Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring). Next, Justice Burton contended, “[T]he present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President’s constitutional power to meet such catastrophic situations.” *Id.* at 659 (Burton, J., concurring). Finally, Justice Clark concurred in result only, opining, “[W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures . . . ; but that in the absence of such action by Congress, the President’s independent power to act depends upon the gravity of the situation confronting the nation.” *Id.* at 662 (Clark, J., concurring).

84. *CHU & GARVEY*, *supra* note 59, at 4.

85. *Wetzel*, *supra* note 58, at 407. Justice Jackson did recognize, however, that his three categories represented a “somewhat over-simplified [sic] grouping,” but were intended to assist identification of “practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.” *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

86. *Youngstown*, 343 U.S. at 635. Jackson explains this to mean that if, for instance, the President were to execute a seizure in adherence to congressional legislation, this seizure “would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” *Id.* at 637.

of either a congressional grant or denial of authority”;<sup>87</sup> and (3) the President’s authority is at its weakest when acting in opposition to Congress.<sup>88</sup> This tripartite scheme set a precedent for recognizing that “[p]residential powers do not fall into neat separation of powers categories” and “constitutional authority for a President’s action is weaker than statutory authority.”<sup>89</sup>

While still relevant and often invoked, the tripartite scheme has recently been set aside on a few occasions when courts have analyzed executive orders.<sup>90</sup> For example, in 1995, President Clinton passed Executive Order 12954 prohibiting government agencies “from contracting with companies that hire permanent replacement workers during strikes.”<sup>91</sup> The United States Court of Appeals for the District of Columbia Circuit voided Clinton’s order because it undermined congressional legislation from 1935 that “allow[ed] employers to permanently replace strikers,” but the court did not utilize nor even mention the *Youngstown* decision in reaching that conclusion.<sup>92</sup>

The Supreme Court again did not employ Jackson’s tripartite scheme in 2014 when it revoked President Obama’s executive order in *NLRB v. Noel*

87. *Id.* at 637. This “zone of twilight” as Jackson so artfully put it, illustrates that even though the President is acting without explicit authority from Congress, there is a chance that “he and Congress may have concurrent authority.” *Id.* Jackson also stressed that, in circumstances where a “zone of twilight” is present, congressional acquiescence or silence “is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” *Id.*

88. *Id.* Here, Jackson adds that “[c]ourts can sustain exclusive [p]residential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” *Id.* at 637–38.

89. Noyes, *supra* note 56, at 843. “In 1952, when the Supreme Court overturned an executive order issued by Harry S. Truman, an oft-used precedent was set. It says that presidents have the most authority when their actions are in line with laws already enacted by Congress.” Alicia Parlapiano & Wilson Andrews, *Limits on Presidents Acting Alone*, N.Y. TIMES (Jan. 20, 2015), <http://www.nytimes.com/interactive/2015/01/20/us/politics/presidential-executive-action.html>.

90. *See infra* notes 91–95 and accompanying text.

91. Parlapiano & Andrews, *supra* note 89.

92. *Id.*; *see* Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1339 (1996). The court reasoned,

[W]e think it untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to the Procurement Act . . . . [This] would permit the President to bypass scores of statutory limitations on governmental authority, and we therefore reject it.

*Id.* at 1332.

*Canning*.<sup>93</sup> In that case, the Supreme Court analyzed President Obama's authority to make appointments to the National Labor Relations Board during a recess between pro forma sessions of Congress.<sup>94</sup> The Supreme Court determined that President Obama had violated the Recess Appointments Clause of the Constitution because he made appointments during a three-day Congressional break, which is "too short a time to bring a recess within the scope of the Clause."<sup>95</sup> While the Supreme Court has the power to directly overrule an executive order, Congress's methods to undermine unilateral executive actions can be either direct or indirect.<sup>96</sup>

## 2. Executive Orders Overturned by Congress

In terms of direct methods, Congress can sue the President, directly repeal the executive order, or strip the order of its foundational authority.<sup>97</sup> These methods can be relatively simple for Congress to carry out; for example, to effectively repeal an executive order, "Congress need only enact legislation directing that provisions of the executive order 'shall not have legal effect.'"<sup>98</sup> Congress enacted such legislation as recently as 2005, when it passed its Energy Policy Act to explicitly nullify an executive order issued on December 13, 1992, that was responsible for creating the Naval Petroleum Reserve Numbered 2.<sup>99</sup>

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93. 134 S. Ct. 2550, 2617 (2014). Here, the Supreme Court dedicated most of its opinion to interpreting the Recess Appointments Clause in Article II of the Constitution, which it never had done before. *Id.* at 2554.

94. *Id.*

95. *Id.* at 2557.

96. *See infra* Section III.B.2.

97. Dino P. Christenson & Douglas L. Kriner, *Political Constraints on Unilateral Executive Action*, 65 CASE W. RES. L. REV. 897, 911–12 (2015); Parlapiano & Andrews, *supra* note 89.

Orders issued pursuant to authority provided to the President by Congress, as distinguished from orders that are based on the President's exclusive constitutional authority, may be legislatively modified or nullified. Congress may revoke all or part of such an order by either directly repealing the order, or by removing the underlying authority upon which the action is predicated.

CHU & GARVEY, *supra* note 59, at 9.

98. *Id.* In 1992, Congress revoked President George H. W. Bush's executive order establishing "a human fetal tissue bank for research." *Id.* "The repeal legislation stated that '[t]he provisions of Executive Order 12806 . . . shall not have any legal effect.'" *Id.* at 10.

99. *Id.* at 9; *see also* William J. Olson & Alan Woll, *Executive Orders and National Emergencies How Presidents Have Come to "Run the Country" by Usurping Legislative Power*, 358 POL'Y ANALYSIS 1, app. 3–4 (1999), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa358.pdf> (providing a partial but substantial list of executive orders that have been modified or revoked by

More often, Congress utilizes the methods of indirect action that it has at its disposal.<sup>100</sup> For example, when Congress cannot pass a vote to completely overturn an executive order, it may be able to prevent important components of the order from taking place.<sup>101</sup> Demonstrating this is Congress's response to Obama's 2009 executive order directing the prison in Guantanamo Bay, Cuba, "to close within a year."<sup>102</sup> Obama's objective has yet to be completed, "in part because Congress has prevented the Obama administration from transferring the remaining higher-level detainees to prisons on domestic soil."<sup>103</sup>

Another of these indirect measures is financial: "[D]espite being a rather blunt instrument, Congress retains the power of the purse and therefore, ultimately, the power to support or de-fund most policies that presidents begin unilaterally."<sup>104</sup> Additionally, Congress, and more specifically congressmen and congresswomen, can be highly persuasive in garnering public support or opposition for presidential unilateral actions.<sup>105</sup> This is because when members of Congress "object and criticize presidential actions in the public sphere, they are all but assured of receiving considerable media coverage, and they are well-positioned to influence public opinion against the executive branch."<sup>106</sup>

This type of congressional public persuasion has been present throughout the Obama administration, especially in the latter half of his presidency.<sup>107</sup> The former Speaker of the House, John Boehner, drew major

statute).

100. See *infra* notes 101–10 and accompanying text; see also CHU & GARVEY, *supra* note 59, at 10 (discussing the ways in which Congress may indirectly negate the effectiveness of an executive order).

101. See generally Parlapiano & Andrews, *supra* note 89.

102. See *id.*

103. *Id.*; see also David M. Herszenhorn, *Senate Passes Military Bill that Bans Transfers of Guantánamo Detainees*, N.Y. TIMES (Nov. 10, 2015), [http://www.nytimes.com/2015/11/11/us/politics/senate-passes-military-bill-that-bars-transfers-of-guantanamo-detainees.html?\\_r=0](http://www.nytimes.com/2015/11/11/us/politics/senate-passes-military-bill-that-bars-transfers-of-guantanamo-detainees.html?_r=0).

104. Christenson & Kriner, *supra* note 97, at 908.

105. *Id.* at 911–12.

106. *Id.* at 912.

107. See generally *id.* at 912–31. In 2013, bipartisan congressional efforts were particularly persuasive in garnering disapproval of unilateral presidential military action in Syria as an overwhelming majority of the American public agreed that President Obama should seek congressional approval prior to taking any action in Syria. See Rebecca Shabad, *140 House Members Say Obama Needs Approval from Congress on Syria*, HILL (Aug. 29, 2013, 7:01 PM), <http://thehill.com/blogs/blog-briefing-room/news/319127-55-house-members-say-obama-needs-approval-from-congress-in-syria-strikes>.



media attention in 2014 when he announced his plan to sue President Obama for an alleged “wanton abuse of presidential power” after Obama “delay[ed] the employer mandate provision of the Affordable Care Act.”<sup>108</sup> Boehner’s explanation for the suit is nothing short of an appeal for public support: “The current president believes he has the power to make his own laws— . . . even boasting about it. He has said that if Congress won’t make the laws he wants, he’ll go ahead and make them himself, and . . . that’s exactly what he did.”<sup>109</sup>

Possibly to drive this point home, Speaker Boehner sued President Obama again that same year regarding Obama’s 2014 executive order announcing the creation of “programs that would grant work permits and protection from deportation to more than four million unauthorized immigrants.”<sup>110</sup> For the latter of the two lawsuits, the House of Representatives voted to “undo” Obama’s executive order before it could even make it to court.<sup>111</sup> These instances illustrate the pressing need for juvenile solitary confinement to be banned not only by President Obama in an executive order, but also by the Supreme Court as a violation of the Eighth Amendment’s Cruel and Unusual Punishment Clause.<sup>112</sup>

### 3. Executive Orders Overturned by the Next President

The final major avenue through which an executive order can be overturned is revocation by a subsequent president.<sup>113</sup> Simply put, presidents have the power to issue executive orders and the power to void

108. *Id.* The employer mandate requires “employers with 50 or more full-time equivalents to offer coverage to full-time employees and their dependents or pay taxes if an employee obtains Exchange coverage and a premium tax credit.” *The Affordable Care Act: Summary of Employer Requirements*, WASH. COUNCIL ERNST & YOUNG (Feb. 2013), [http://www.nahu.org/meetings/capitol/2013/attendees/jumpdrive/Employer\\_ACA\\_Reference\\_Deck\\_02\\_14\\_2013.pdf](http://www.nahu.org/meetings/capitol/2013/attendees/jumpdrive/Employer_ACA_Reference_Deck_02_14_2013.pdf).

109. Christenson & Kriner, *supra* note 97, at 898.

110. Parlapiano & Andrews, *supra* note 89. “Any lawsuit from Congress targeting White House immigration policy would not be alone in the courts. More than half of the states, led by Texas, have already sued, challenging in federal court whether Obama’s directives should be allowed to go into effect.” Daniel Newhouse, *Boehner to Sue Obama, Again*, ATLANTIC (Jan. 27, 2015), <http://www.theatlantic.com/politics/archive/2015/01/boehner-to-sue-obama-again/451644/>.

111. Parlapiano & Andrews, *supra* note 89; *see also* Jeremy W. Peters, *House Measure Defies Obama on Immigrants*, N.Y. TIMES (Jan. 14, 2015), <http://www.nytimes.com/2015/01/15/us/politics/house-votes-to-revoke-legal-protections-for-millions-of-immigrants.html>.

112. *See supra* notes 79, 97–111 and accompanying text.

113. Parlapiano & Andrews, *supra* note 89.

them.<sup>114</sup> One example of a recently revoked executive order includes President George H. W. Bush's 1992 order that banned the use of tissue from induced abortions in human fetal tissue banks for federally funded research, which President Clinton rescinded the very next year.<sup>115</sup> In 2008, President George W. Bush's 2006 order opening "the sale of oil and gas drilling leases on more than 100,000 acres in eastern Utah" was rescinded, and the leases were voided only weeks after Obama assumed office.<sup>116</sup> Another order issued by President George W. Bush was revoked by President Obama—Bush's 2001 executive order that "allow[ed] federal funds to be used for human embryonic stem cell research," but restricted the cells to those that had "already been extracted."<sup>117</sup> Shortly after taking office, President Obama issued an executive order loosening those restrictions.<sup>118</sup>

An excellent illustration of the "presidential ping-pong"<sup>119</sup> this type of activity can produce is President Ronald Reagan's executive order that prohibited the United States Agency for International Development from allocating funds to organizations that counseled or provided information to women about getting abortions.<sup>120</sup> President Clinton rescinded the order in 1993, less than ten years after President Reagan signed the order.<sup>121</sup> Then, in 2001, President George W. Bush "reinstated and extended" Reagan's original executive order.<sup>122</sup> President Obama reversed the order again in 2009.<sup>123</sup>

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. See Phillip J. Cooper, *Playing Presidential Ping-Pong with Executive Orders*, WASH. POST (Jan. 31, 2004), [https://www.washingtonpost.com/opinions/playing-presidential-ping-pong-with-executive-orders/2014/01/31/cbb6fe30-89f3-11e3-a5bd-844629433ba3\\_story.html?utm\\_term=.774df27a9454](https://www.washingtonpost.com/opinions/playing-presidential-ping-pong-with-executive-orders/2014/01/31/cbb6fe30-89f3-11e3-a5bd-844629433ba3_story.html?utm_term=.774df27a9454).

120. Parlapiano & Andrews, *supra* note 89. This order is generally referred to as the "Mexico City Policy," but is also known as the "global gag rule." Rob Stein & Michael Shear, *Funding Restored to Groups that Perform Abortions, Other Care*, WASH. POST (Jan. 24, 2009), [http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012302814.html?tid=a\\_inl](http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012302814.html?tid=a_inl).

121. Parlapiano & Andrews, *supra* note 89.

122. *Id.*

123. *Id.* President Obama considered Bush's revival of Reagan's order as "excessively broad" in relation to the funding limitations. Stein & Shear, *supra* note 120. Obama also posited that the order "undermined efforts to promote safe and effective voluntary family programs in foreign

This back-and-forth represents the insecurity executive orders face when they are backed by the President alone.<sup>124</sup> Thus, Obama's executive order banning juvenile solitary confinement is far from a permanent measure.<sup>125</sup> For a more permanent, lasting effect to take place, the Supreme Court or Congress must come alongside President Obama and declare juvenile solitary confinement unconstitutional pursuant to the Eighth Amendment.<sup>126</sup>

#### IV. EIGHTH AMENDMENT CASE LAW

##### A. *The Supreme Court's Two-Pronged Test*

The Eighth Amendment prohibition against cruel and unusual punishment originated in the 1689 English Bill of Rights,<sup>127</sup> which used the phrase "cruel and unusual punishments" in relation to those punishments not authorized by any statute or "disproportionate to the offense involved."<sup>128</sup> Adopting this phrase in the United States Constitution, the early drafters wrote, "[e]xcessive bail shall not be required, nor excessive fines imposed,

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nations." *Id.*

124. *Id.*; see also Cooper, *supra* note 119. It is in the very nature of executive orders to "lack stability, especially in the face of evolving presidential priorities." CHU & GARVEY, *supra* note 59, at 7. President Gerald Ford's Executive Order 11821, "which required agencies to issue inflation impact statements for proposed regulations," was also subject to "presidential ping-pong" when President Jimmy Carter signed his own Executive Order 12044 modifying Ford's. *Id.* Carter's order directed agencies "to consider the potential economic impact of certain rules and identify potential alternatives." *Id.* Then, when President Ronald Reagan took office, he rescinded President Carter's executive order and created Executive Order 12291, "which directed agencies to implement rules only if the 'potential benefits to society for the regulation outweigh the potential costs to society.'" *Id.* at 7–8 (quoting Exec. Order No. 12,291, 3 C.F.R. § 127, 128 (1981)). However, President William J. Clinton decided President Reagan's order was unacceptable and signed Executive Order 12866, "which modified the system established during the Reagan Administration . . . [and] eased cost-benefit analysis requirements." CHU & GARVEY, *supra* note 59, at 8. Thereafter, President George W. Bush amended the Clinton order with Executive Orders 13258 and 13422. *Id.* Finally, "President Barack Obama revoked both of these orders via Executive Order 13497." *Id.* President Obama also issued two executive orders on the topic, one of which reaffirmed President Clinton's order. *Id.* at 8–9.

125. CHU & GARVEY, *supra* note 59, at 7.

126. See *infra* Parts IV–V.

127. Bill of Rights [1688], c. 2 (Eng.), <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2>; see also Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 666 (2004).

128. Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 420 (1995).

nor cruel and unusual punishments inflicted.”<sup>129</sup>

For almost two centuries, the United States Supreme Court interpreted this clause to prohibit only cruel and unusual prison *sentences*, barring it from applying to prison *conditions*.<sup>130</sup> Then, in 1976, the Supreme Court handed down its remarkable decision in *Estelle v. Gamble*,<sup>131</sup> forever altering Eighth Amendment jurisprudence by extending the Cruel and Unusual Punishment Clause to address prison conditions.<sup>132</sup> The Court held in *Estelle* that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”<sup>133</sup>

Since *Estelle*, the Supreme Court has created a two-pronged test for applying the Eighth Amendment to the conditions of U.S. correctional facilities.<sup>134</sup> First, the plaintiff alleging cruel and unusual punishment must demonstrate that prison officials wantonly inflicted pain through deprivation of a “minimal life necessity.”<sup>135</sup> The Supreme Court held in *Wilson* that a

129. U.S. CONST. amend. VIII.

130. Sara L. Rose, “*Cruel and Unusual Punishment*” *Need Not Be Cruel, Unusual, or Punishment*, 24 CAP. U. L. REV. 827, 827–28 (1995) (“[T]he Cruel and Unusual Punishment Clause . . . was interpreted to prohibit cruel and unusual sentences, . . . rather than regulating conditions in prisons since courts only impose sentences, not general conditions of confinement.”).

131. 429 U.S. 97 (1976). J.W. Gamble, an inmate in the Texas Department of Corrections, was injured during a prison work assignment by a bale of cotton that fell on him. *Id.* at 98–99. Subsequently, he was allowed to visit the prison hospital, during which the doctor prescribed him medication. *Id.* at 99. Almost a month later, when Gamble was still suffering from intense back pain, the doctor authorized him to perform “light” prison work. *Id.* at 100. When Gamble told a prison officer he was in too much pain to work, he was sent to “administrative segregation,” where he remained for the next two months until a committee placed him in solitary confinement for his continual “refusal to work.” *Id.* at 100–01. While in isolation, he experienced chest pain as well as pain in his left arm and back, but prison guards refused his request to see a doctor. *Id.* at 101.

132. *Id.* at 103–05. In its decision to include prison conditions under the cruel and unusual punishment umbrella, the Court considered several prior cases that indicated that the Eighth Amendment applies to more than just prison punishments: *Gregg v. Georgia*, 428 U.S. 153, 171 (1976); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958); and *Weems v. United States*, 217 U.S. 349, 373 (1910). *Estelle*, 429 U.S. at 102–03.

133. *Estelle*, 429 U.S. at 104 (citation omitted) (quoting *Gregg*, 428 U.S. at 172–73). The Court reasoned that it is “the government’s obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so . . . such a failure may actually produce physical ‘torture or a lingering death.’” *Id.* at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)). Additionally, the Court considered that “denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose,” and “[t]he infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation.” *Id.*

134. See *Wilson v. Seiter*, 501 U.S. 294, 299 (1991).

135. *Id.* at 304. The complaint in *Wilson* alleged “overcrowding, excessive noise, insufficient

minimal life necessity may include “single, identifiable” deprivations such as withholding food, exercise, or warmth from a prisoner.<sup>136</sup> Second, the plaintiff must show that the prison guards acted with culpable states of mind in exacting the punishment.<sup>137</sup>

When reviewing challenges to prison conditions, the Supreme Court utilizes the “deliberate indifference” standard to analyze whether a culpable state of mind existed.<sup>138</sup> The standard requires the plaintiff to prove that the prison official knew of an “excessive risk to inmate health and safety” but disregarded it.<sup>139</sup> More specifically, “the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>140</sup> For example, in *Farmer v. Brennan*, the petitioner was serving a sentence in federal prison for credit card fraud when he was diagnosed by the Bureau of Prisons medical personnel as a transsexual.<sup>141</sup> He was later relocated to another federal prison and placed into the general population of male inmates, where he was allegedly beaten and raped by another inmate.<sup>142</sup> The petitioner argued that his placement into the male prison was a deliberately indifferent failure to protect his safety, and thus violated his Eighth Amendment rights.<sup>143</sup>

In its final determination of the case, the Supreme Court concluded 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

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locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates.” *Id.* at 296.

136. *Id.* at 304. This definition of minimal life necessity was expanded by the Court in *Helling v. McKinney*, in which the Court deemed the ability to breathe air free of smoke a minimal life necessity for prison inmates. 509 U.S. 25, 35–36 (1993).

137. *Wilson*, 501 U.S. at 297.

138. *Id.* This deliberate indifference standard was applied in *Erickson v. Pardus*, 551 U.S. 89, 89–90 (2007). The Court determined that the prisoner–plaintiff properly alleged that he suffered substantial harm by claiming prison officials acted with deliberate indifference when they denied him access to treatment for hepatitis C. *Id.*

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

140. *Id.*

141. *Id.* at 829.

142. *Id.* at 830.

143. *Id.* at 831.

take reasonable measures to abate it.”<sup>144</sup> All juvenile solitary confinement has the potential to impart serious mental, physical, and developmental harm on child inmates, and thus these tests should be applied in every instance, as discussed further in the following Sections.<sup>145</sup>

### B. Case Law Supporting Protection by the Eighth Amendment

Justice Kennedy proclaimed in *Brown v. Plata* that “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.”<sup>146</sup> This admonition bolstered the 1966 Supreme Court opinion in *Kent v. United States*, which reflected a growing necessity for the protection of juvenile inmates, stating, “[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection[] accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>147</sup>

Since then, case law has continued to support increased attention to the Eighth Amendment rights of incarcerated juveniles—a few specifically addressing solitary confinement.<sup>148</sup> The first of these cases decided post-*Kent* was *Lollis v. New York State Department of Social Services*.<sup>149</sup> In

144. *Id.* at 847.

145. *See infra* Sections IV.B–V.C.

146. 563 U.S. 493, 511 (2011). Although not on a federal level, Senator Leland Yee, a Democrat from San Francisco, did decide, in fact, that intrusion into prison administration was necessary regarding juvenile inmates in California. Bundy, *supra* note 29. He introduced a bill banning solitary confinement “as a form of punishment,” but unfortunately, the bill was undermined by Yee’s indictment for corruption in March of 2014. *Id.* Other politicians who share Yee’s view on isolating juveniles include U.S. Representative Tony Cárdenas from California and U.S. Senator Dick Durbin from Illinois. Gary Gately, *Juvenile Solitary Confinement: Modern-Day ‘Torture’ in the US*, JUVENILE JUSTICE INFO. EXCH. (Mar. 5, 2014), <http://jjie.org/juvenile-solitary-confinement-modern-day-torture-in-the-u-s/>.

Cárdenas explained he is opposed to the practice because “[s]olitary confinement is something that is purely punitive, and it has nothing to do with rehabilitation.” *Id.* Dick Durbin’s reasoning was slightly different, focusing on the psychological concerns associated with solitary confinement: “When it comes to solitary confinement, we know children are particularly vulnerable . . . . The mental health effects of even short periods of isolation, including depression and risk of suicide, are heightened among youths.” *Id.*

147. 383 U.S. 541, 556 (1966) (granting certiorari to a juvenile charged with housebreaking and rape and determining that the juvenile was entitled to a hearing on whether the waiver of jurisdiction over him was valid, because he was not represented by counsel when the waiver was executed).

148. *See infra* notes 149–60 and accompanying text.

149. 322 F. Supp. 473 (S.D.N.Y. 1970).

*Lollis*, the court found that the two-week solitary confinement of a fourteen-year-old girl,<sup>150</sup> coupled with the facility's prevention of her access to recreational or reading materials, violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>151</sup> In making this decision, the court considered the affidavits of psychiatrists and psychologists submitted by the plaintiff because of "the standing of the affiants, the wealth and diversity of their expertise, and the unconditional nature of their opinions."<sup>152</sup> An excerpt from the affidavit of Dr. Robert E. Gould well represents the other affiants' thoughts on *Lollis*'s two-week isolation:

In my opinion it is unconscionably cruel and inhumane treatment to put an adolescent in isolation for a two-week period. . . . Isolation as a "treatment" is punitive, destructive, defeats the purposes of any kind of rehabilitation efforts and harkens back to medieval times. There is no justification for such treatment unless one wants to dehumanize a young person.<sup>153</sup>

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150. *Id.* at 475. *Lollis*'s isolation cell was roughly six feet by nine feet, and she was kept there twenty-four hours a day. *Id.* In response to an inquiry on how she kept herself busy, *Lollis* replied that she slept all day and cried all night. *Id.* at 475–76. She was even prohibited from receiving a visit by a psychiatrist, being told she could not see one until released from isolation. *Id.* at 476.

151. *Id.* at 482. In so holding, the court stated:

Measured by the standards of the Eighth Amendment cases cited . . . [and] the views of experts in the field of adolescent psychology . . . a two-week confinement of a fourteen-year old girl in a stripped room in night clothes with no recreational facilities or even reading matter must be held to violate the Constitution's ban on cruel and unusual punishment.

*Id.*

152. *Id.* at 481.

153. *Id.* Other notable statements found in the affidavits include those by Dr. Ernst Papanek, Joseph D. Noshpitz, M.D., and E. Richard Feinberg, M.D. *Id.* Dr. Papanek asserted:

I do not believe that prolonged isolation of any child can have either educational or treatment value for the child concerned. . . . Isolation is one of the most devastating actions which society can visit upon any of its members. Whether it is done with the intention to help or to punish is irrelevant.

*Id.* Dr. Noshpitz contended:

What is true in this case for adults is of even greater concern with children and adolescents. Youngsters are in general more vulnerable to emotional pressures than mature adults; isolation is a condition of extraordinary severe psychic stress; the resultant impact on the mental health of the individual exposed to such stress will always be serious, and can occasionally be disastrous.

*Id.* Finally, Dr. Feinberg stated that "prolonged isolation never can promote emotional development in the direction of health; more often it may be the vehicle whereby sadistic impulses in the adults caring for children may be discharged, to the great detriment of the mental health of the latter." *Id.*

Two years later, in *Inmates of the Boys' Training School v. Affleck*,<sup>154</sup> five plaintiffs sought a preliminary injunction to end the solitary confinement of juveniles for more than two hours without first securing a psychiatrist's note, as well as to stop the isolation of juveniles for more than twenty-four hours under any circumstance.<sup>155</sup> The plaintiffs also sought to "define certain minimum requirements for conditions of confinement."<sup>156</sup> The environment of the isolation cells was stark—some of the inmates were kept in cells that contained only a mattress on the floor and a toilet, which could only be flushed from outside the cell by the prison personnel.<sup>157</sup> These rooms were referred to by the inmates as "bug-out" rooms.<sup>158</sup>

In its majority opinion, the court summarized the testimony of a staff member: "[H]e discovered that a boy had slit his wrists, which were still bleeding and covered with bloody towels. Notifying other staff of this . . . he was told they already knew of it. No doctor came to attend the boy during the next eight hours, nor was any other care forthcoming."<sup>159</sup> The court held that isolating children under these circumstances constituted cruel and unusual punishment; it determined that these conditions could only lead to the "destruction" of an isolated child.<sup>160</sup>

at 482.

154. 346 F. Supp. 1354 (D.R.I. 1972).

155. *Id.* at 1357.

156. *Id.* To come to its conclusion, the court accepted as true an inmate's testimony describing the living conditions of an isolation cell. *Id.* at 1360. The court summarized: "[H]e was confined to the solitary confinement cell for a week, wearing only his underwear. The room was dark and cold. He was not given toilet paper, soap, sheets, blanket, or change of clothes. He was not allowed to leave the room." *Id.*

157. *Id.* at 1359.

158. *Id.* Inmates often give solitary confinement cells slang names "because they are often colder, bleaker, darker, and more sparsely furnished than the average sleeping cell." Laura Anne Gallagher, Note, *More Than a Time Out: Juvenile Solitary Confinement*, 18 U.C. DAVIS J. JUV. L. & POL'Y 224, 256 (2014). The term "bug-out" can also refer to a behavioral reaction, such as, "[s]omebody threw some soapy water in my eyes, and I bugged out because the supervisor wouldn't let me go and wash it out of my eyes." *Boys' Training School*, 346 F. Supp. at 1362.

159. *Boys' Training School*, 346 F. Supp. at 1361–62. Another staff member testified:

[W]hile on duty . . . he observed a boy attempting to hang himself. . . . Requesting instructions and assistance from his superiors, the staff member was told to put the boy in the "bug-out" room. He did. Once in the room the boy started banging his head into the wall. The staff member removed the hysterical boy from the room. . . . No trained psychiatric help was given.

*Id.* at 1360.

160. *Id.* at 1366–67. The court concluded its opinion by quoting the First Circuit to support holding prison personnel accountable for their actions: "Nor can it be any excuse for continuous, as distinguished from temporary accidental, inhumane treatment . . . that the representatives of the state



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“To be kept in solitude is to be kept in pain, and put on the road to madness.”<sup>161</sup> Beginning nearly a century ago, sentiments like this could be found in published materials, indicating that the American government, prison officials, and educated citizens have been aware of the negative effects of solitary confinement for just as long.<sup>162</sup> For most Americans living far outside the walls of a prison, however, pondering the conditions of juvenile imprisonment is not likely a daily occurrence.<sup>163</sup> Indeed, Supreme Court Justice Anthony Kennedy has stated, “When the door is locked against the prisoner, we do not think about what is behind it. . . . Were we to enter the hidden world of punishment, we should be startled by what we see.”<sup>164</sup> But for prison officials who spend long hours each and every day monitoring the inmates in juvenile correctional facilities, it is hard to imagine that they could be completely unaware of the detriment solitary confinement has on the minds and bodies of the young people they serve.<sup>165</sup>

This last assertion is important in the context of the Supreme Court’s test for categorizing prison conditions as cruel and unusual punishment.<sup>166</sup> At this point in time, the Supreme Court requires that an inmate-plaintiff alleging an Eighth Amendment violation prove that a prison official acted with deliberate indifference in depriving him or her of a minimal life

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were doing the best they could.” *Id.* at 1374 (quoting *Rozechi v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972)).

161. Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 741 (2015) (quoting Edward O. Wilson, *Evolution and Our Inner Conflict*, N.Y. TIMES (June 24, 2012, 5:00 PM), [http://opinionator.blogs.nytimes.com/2012/06/24/evolution-and-our-inner-conflict/?\\_r=1](http://opinionator.blogs.nytimes.com/2012/06/24/evolution-and-our-inner-conflict/?_r=1)).

162. See Haney & Lynch, *supra* note 3, at 484.

163. See *infra* note 164 and accompanying text.

164. See Bennion, *supra* note 161, at 742 (citing Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting 3 (Aug. 9, 2003), <http://apps.americanbar.org/irr/annual2003/kennedyspeech.pdf>).

165. See Bundy, *supra* note 29. Fernando Giraldo, a probation officer at Santa Cruz County Juvenile Hall in California, is but one example of a prison official knowledgeable of the effects of isolation on juveniles. *Id.* He told the CIR,

We know that’s what happens when you isolate people . . . . The effect could really be psychosis and really damaging somebody. And we do know that that person, at some point—whether it is the next day or year—will return back to our community and be living with us, and we should care about that person.

*Id.*

166. See *supra* Section IV.A.

necessity.<sup>167</sup> The main problem with this test, however, is that it is unnecessary.<sup>168</sup> Every single juvenile placed in solitary confinement is stripped of two minimal life necessities critical to proper adolescent development: human touch and social interaction.<sup>169</sup> Moreover, the test focuses on the wrong culpable party; it should not be measuring the deliberate indifference of specific prison officials, but instead, the deliberate indifference of state governments towards their own young citizens.<sup>170</sup> This is because state governments are fully aware of the consequences and detrimental effects of isolation on adolescents' psychological, physical, and developmental health.<sup>171</sup>

Illustrating this government-wide awareness, U.S. Attorney General Eric H. Holder, Jr. commissioned the National Task Force on Children Exposed to Violence (NTFCEV), which issued its final report in December 2012 and concluded, "Nowhere is the damaging impact of incarceration on vulnerable children more obvious than when it involves solitary confinement."<sup>172</sup> To summarize, the NTFCEV recommended that the solitary confinement of children be forbidden in U.S. correctional facilities.<sup>173</sup> In a letter written to the ACLU by Robert L. Listenbee, Jr.,<sup>174</sup> Administrator of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) for the U.S. Department of Justice (DOJ), Mr. Listenbee stated, "[I]solation of children is dangerous and inconsistent with best practices and . . . excessive isolation can constitute cruel and unusual punishment. OJJDP is cognizant that young people have needs that differ in nature and degree from adults because they are still developing physically and psychologically."<sup>175</sup>

167. See *supra* notes 135, 138 and accompanying text.

168. See *infra* notes 169–74 and accompanying text.

169. See *infra* note 184 and accompanying text.

170. See *infra* notes 171–75 and accompanying text.

171. See *infra* Sections V.A–C.

172. Gately, *supra* note 146.

173. *Id.*

174. Listenbee was a co-chair on the NTFCEV. *Id.*

175. Letter from Robert L. Listenbee, Adm'r of the Office of the Juvenile Justice & Delinquency Prevention, to Jesselyn McCurdy, Senior Legislative Counsel, ACLU (July 5, 2013), [https://www.aclu.org/sites/default/files/assets/doj\\_ojjdp\\_response\\_on\\_jj\\_solitary.pdf](https://www.aclu.org/sites/default/files/assets/doj_ojjdp_response_on_jj_solitary.pdf). Mr. Listenbee attached to the July 5, 2013, letter a document outlining DOJ policies regarding juvenile isolation, which related, "Isolation is known to be dangerous to mental health, especially among youth. . . . Confined youth have a constitutional right of freedom from unreasonable bodily restraints . . . [and therefore t]he routine improper use of an isolation unit in a state facility can constitute cruel and

Based on this, as well as the evidence presented throughout the rest of this Part, it is nearly impossible to argue that state government and prison officials are unaware of the deprivation of minimal life necessities caused by solitary confinement, or are anything but deliberately indifferent when they send children into isolation.<sup>176</sup>

### A. Psychological Effects of Isolation

After the Vietnam War came to an end, the U.S. military conducted a study on isolation with naval aviators imprisoned during the war.<sup>177</sup> The soldiers overwhelmingly identified the social isolation brought on by imprisonment “as torturous and agonizing as any physical abuse they suffered.”<sup>178</sup> A similar study was completed in 1992, involving soldiers who were imprisoned in detention camps for roughly six months in the former Yugoslavia.<sup>179</sup> Researchers found that the prisoners of war had brain abnormalities even months after they returned home.<sup>180</sup> The most serious abnormalities were found in two distinct groups: the soldiers who suffered a head injury serious enough to knock them unconscious, and the soldiers subjected to solitary confinement.<sup>181</sup> Like Vietnam and Yugoslavia, the

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unusual punishment.” *Id.*

176. *See infra* Part V.A–C.

177. Atul Gawande, *Hellhole*, NEW YORKER (Mar. 30, 2009), <http://www.newyorker.com/magazine/2009/03/30/hellhole>.

178. *Id.*

179. *Id.* The fall of the Berlin Wall and the collapse of the Soviet Union in 1990 “sparked nationalism in Yugoslavia’s republics.” *Balkans 1940s to 1999*, WASH. POST ONLINE (2000), <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/timeline.htm>. Fighting soon broke out in Croatia, which eventually “spilled into neighboring Bosnia,” and the “ensuing war pulled in Bosnian Serbs, Muslims, and Croats and became one of the bloodiest conflicts in European history since WWII.” *Id.*

180. Gawande, *supra* note 177.

181. *Id.* When used as torture, solitary confinement results in anxiety, emotional instability, disorientation, anger, depression, hallucinations, and post-traumatic stress disorder (PTSD). Haney & Lynch, *supra* note 3, at 509. PTSD is “an extreme psychological reaction that can occur in the wake of a traumatic event” and

entails a subsequent, overwhelming emotional reaction that may be followed by some form of denial, including symptoms of amnesia, and avoidance of anything related to the trauma, as well as detachment and estrangement from others, limited affect, and a poor outlook on the future. Intrusive thoughts about the event, including pseudo-hallucinations and disturbing thoughts and emotions that “flood” the victim are also characteristic of PTSD.

*Id.* at 509–10. Generally, the emotions that flood victims include “guilt, fear, shame and rage over one’s vulnerability as a victim, rage at the source of the trauma, and fear of the loss of control of

United States also uses solitary confinement as a weapon—wielding it not only against its enemies, but also against its own children.<sup>182</sup> Juveniles placed in solitary confinement exhibit a wide variety of psychological effects triggered by the isolation, and many medical and psychological experts deem these effects seriously detrimental to a young person's mental health.<sup>183</sup> Within the previously mentioned report to the New York City Board of Corrections, Dr. James Gilligan and Dr. Bandy Lee asserted that “[t]he use of prolonged solitary confinement can only be seen by both inmates and staff as one of the most severe forms of punishment that can be inflicted on human beings short of killing them.”<sup>184</sup>

Their conclusion is echoed by studies reporting that while enduring solitary confinement, many inmates in isolation experience anxiety, rage, extreme depression, hopelessness, hallucinations, loss of appetite, insomnia, paranoia, hypersensitivity, panic, self-mutilation, attempts to commit suicide, and suicidal ideation.<sup>185</sup> Other studies relayed that when people are isolated for twenty-three hours in one day, they will usually become despondent and out of touch with reality.<sup>186</sup> In fact, studies revealed that

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aggressive impulses.” *Id.* at 510.

182. See Gawande, *supra* note 177. Currently, the United States Army Field Manual contains a special appendix, listing separation as a “restricted interrogation technique.” Rupert Stone, *Beyond Torture: The New Science of Interrogating Terrorists*, NEWSWEEK (June 9, 2015, 6:05 AM), <http://www.newsweek.com/2015/06/19/beyond-torture-new-science-interrogating-terrorists-340944.html>. Separation entails isolating a detainee for thirty days or more but is limited to use on “unlawful enemy combatants,” because they are not protected by the Geneva Conventions. *Id.* See also *Field Manual 2-22.3: Human Intelligence Collector Operations*, DEP'T ARMY app. M at M-1 (Sept. 6, 2006), <http://fas.org/irp/doddir/army/fm2-22-3.pdf>. There are roughly 2.2 million American citizens in U.S. prisons, nearly 100,000 of which are serving their time in solitary confinement. S.M., *Solitary Confinement Is Cruel—but Soon It Will at Least Be More Unusual*, ECONOMIST (Dec. 21, 2015, 6:23 PM), <http://www.economist.com/blogs/democracyinamerica/2015/12/american-prisons>.

183. See *infra* notes 184–90 and accompanying text.

184. GILLIGAN & LEE, *supra* note 34, at 6.

185. GROWING UP LOCKED DOWN, *supra* note 27, at 24; Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124, 130–32 (2003). In a study conducted by Dr. Stuart Grassian, a psychiatrist and former Harvard Medical School faculty member, he observed that prisoners generally became hypersensitive to noises and smells. Walton, *supra* note 25, at 279–80. For example, the “mere sound of a toilet or faucet running would put them in agony. It was difficult for them to eat because the smell of their food became too strong.” *Id.* at 280.

186. Marsha Levick, Jessica Feierman, Sharon Messenheimer Kelley, Naomi E. S. Goldstein, & Kacey Mordecai, *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 307 (2012) [hereinafter *Evolves*]. During Dr. Stuart Grassian's study, he interviewed hundreds of inmates in

“the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims, including post-traumatic stress disorder . . . and the kind of psychiatric sequelae that plague victims of what are called ‘deprivation and constraint’ torture techniques.”<sup>187</sup>

All the symptoms stemming from this form of legal torture exacerbate any pre-existing mental health issues juveniles suffer from.<sup>188</sup> Consequently, regardless of whether or not the young person had a mental condition prior to entering solitary confinement, “[e]ven a short period of isolation can have

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solitary confinement and found that “roughly a third of solitary inmates were ‘actively psychotic and/or acutely suicidal.’” Jason M. Breslow, *What Does Solitary Confinement Do To Your Mind?*, FRONTLINE (Apr. 22, 2014), <http://www.pbs.org/wgbh/frontline/article/what-does-solitary-confinement-do-to-your-mind/>. Grassian’s conclusions regarding isolated inmates’ psychotic characteristics include those already listed, but added panic attacks, diminished impulse control, difficulty thinking and concentrating, inability to remain alert, and development of “crippling obsessions.” *Id.* One crippling obsession Grassian observed was an inmate who had “developed some obsession with his inability to feel like his bladder was fully empty . . . . Literally, that man spent hours, hours, 24 hours a day it was on his mind, hours standing in front of the toilet trying to pee . . . He couldn’t do anything else except focus on that feeling.” *Id.*

187. Haney, *supra* note 185, at 131–32. Solitary confinement can also produce long-term effects after release, such as Reduced Environmental Stimulation Syndrome (RES), which causes amnesia and a decreased ability to communicate with others. Walton, *supra* note 25, at 279. For one juvenile inmate who was isolated during his time in a correctional facility seven years ago, the psychological scars from his experience in solitary are still very present. Gately, *supra* note 146. He told the Juvenile Justice Information Exchange that “he still tends to isolate himself in his home.” *Id.* He also stated,

I might go in the bathroom or be sitting in the living room and I [will] be in there for hours, man, just looking in the mirror or just in a room, just like I don’t know why I won’t be active. I just find myself always isolating myself for some reason, man.

*Id.* He also uses the metaphor of a grasshopper stuck in a cup to explain this phenomenon:

It’s like if you put a grasshopper in a cup and then you place a top on it and it keeps on jumping and it keeps on jumping and it keep[s] on hitting the top, keep[s] on hitting the top, so when you take the top off, the grasshopper [is] not going to jump out the top of the cup because it’s going to be so used to hitting the top of the cup, and it’s like that’s how it is. Sometimes it feels like I’m in jail when I’m not in jail.

*Id.*

188. Gately, *supra* note 146. According to the Human Rights Watch, mentally disabled prisoners are “disproportionately at risk of being confined in solitary,” because they are “more likely to break the rules and more likely to develop reputations of being unable to function in the general prison population.” *Callous and Cruel: Use of Force Against Inmates with Mental Disabilities in US Jails and Prisons*, HUMAN RIGHTS WATCH (May 12, 2015), <https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and>. In Indiana, 33% of all mentally ill inmates are held in isolation. *Id.* at n.82. In 2003, roughly one-quarter of New York prisons’ isolated population was mentally ill, and in 2013, in Colorado prisons, “prisoners with moderate to severe mental illness [made] up the majority of those in solitary.” TORREY ET AL., *supra* note 37, at 16.

a devastating impact on a juvenile's mental health."<sup>189</sup> Indeed, "there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days . . . failed to result in negative psychological effects."<sup>190</sup>

One example out of many is the experience of T.D., a juvenile placed in solitary confinement in the New Jersey Juvenile Justice Commission (Juvenile Justice Commission) facility.<sup>191</sup> Knowing that T.D. had a preexisting history of suicide attempts and mental health issues, the Juvenile Justice Commission thought it appropriate to respond to those needs by confining T.D. to a small, windowless cell with a concrete bed for almost seven months.<sup>192</sup> During those seven months, the Juvenile Justice Commission refused T.D. access to his personal belongings, interaction with the other inmates, and any type of recreation—including exercise and books.<sup>193</sup> Perhaps not surprisingly, after 180 days spent in isolation, T.D.'s arms were covered with scars from self-mutilation.<sup>194</sup>

Exacerbating the sense of despair experienced by inmates like T.D., some facilities will go to great lengths to ensure that isolated inmates receive the least amount of human interaction possible.<sup>195</sup> In some correctional

189. Gallagher, *supra* note 158, at 250.

190. Haney, *supra* note 185, at 132.

191. *T.D. and O.S. v. Mickens et al.*, JUVENILE LAW CTR. (Dec. 2, 2010), <http://www.jlc.org/legal-docket/td-and-os-v-mickens-et-al>.

192. *Id.*

193. *Id.*

194. Sandra Simkins, Marty Beyer, & Lisa M. Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y 241, 242 (2012). Sadly, T.D.'s experience is far from unique, as illustrated by a state survey recounting several similar incidents involving mentally ill inmates. TORREY ET AL., *supra* note 37, at 15–16. Although the following do not involve inmates specifically held in solitary confinement, they demonstrate the harmful effects of confinement *in general* on persons facing mental health difficulties. *Id.* In Georgia in 2002, "[a] schizophrenic man who was jailed . . . gouged out his own eyes in his cell." *Id.* at 15. In North Carolina in 2007, "Mario Phillips, diagnosed with schizophrenia, 'cut his genitals with a razor while he was locked up waiting to go to trial.'" *Id.* at 16 (citation omitted). In Florida in 2007,

Mark Kuzara . . . cut open his abdomen in the Polk County Jail. After the wound had been stapled, "Kuzara removed the staples at the hospital with his mouth and ate them. . . . Inmates gave Kuzara pen caps, bolts and paper that he would shove into the open wound. Kuzara also made himself vomit up meals, throwing up into the open wound."

*Id.* And in Texas in 2009, "Andre Thomas . . . 'plucked out his right eye . . . [w]hilst in the Grayson County Jail five days after his arrest.' Four years later, in a Texas state prison, Thomas 'removed his [other] eye and ate it in a bizarre outburst.'" *Id.*

195. Haney, *supra* note 185, at 126.

facilities, communication with inmates in solitary confinement is done solely through intercoms to reduce in-person interaction.<sup>196</sup> Even when family members travel to the facility to see their young loved one, some facilities conduct the visit using videoconferencing.<sup>197</sup> Along with restricting in-person interactions comes restricting human touch, which can significantly contribute to the psychological depression many isolated inmates suffer from.<sup>198</sup> Several “touch studies” evidence that receiving little to no human touch leads to the development of eating disorders, aggressive behavior, depression, and self-harm.<sup>199</sup>

In fact, by refusing to allow isolated inmates human touch, prison officials may be doing themselves a disservice; research suggests that showing adolescents more physical affection “can actually decrease violent tendencies.”<sup>200</sup> Overall, researchers agree that “positive touch elicits positive . . . emotions and vice versa.”<sup>201</sup> Thus, when juveniles in solitary confinement are forced to endure long periods of time without receiving any physical affection, it is highly likely they will sink deeper and deeper into depression.<sup>202</sup>

Although courts have not been consistent in recognizing the

196. *Id.*

197. *Id.*

198. Narissra M. Punyanunt-Carter & Jason S. Wrench, *Development and Validity Testing of a Measure of Touch Deprivation*, 12 HUM. COMM. 67, 69–70 (2009).

199. *Id.* Often, a lack of human interaction and human touch results in dehumanizing isolated children. Gately, *supra* note 146. Michael Kemp, a seventeen-year-old boy held in a jail in Washington, D.C., recalls his experience: “You[’re] just like, ‘Man, I feel like an animal in here. I don’t even feel real . . . [like] I’m not even a human being.’” *Id.*

200. Punyanunt-Carter & Wrench, *supra* note 198, at 69. Moreover, research suggests that the psychological effects of solitary confinement make inmates more violent, posing a greater threat of danger to the prison guards. Walton, *supra* note 25, at 280–81. In one study, an inmate suffered from hallucinations and paranoia, leaving him “convinced he could hear the guards outside talking about cutting off his leg.” *Id.* at 280. Many prisoners tend to fantasize about revenge, “including torture and mutilation of the prison guards.” *Id.* Additionally, most isolated inmates are “prone to lose their temper easily and commit random acts of violence against themselves and others. One inmate slashed his wrists while in solitary confinement and could not remember doing it.” *Id.* (footnote omitted). Researchers Thomas Benjamin and Kenneth Lux observed that isolated prisoners tended to “lose touch with reality” and reacted aggressively to “minor incidents.” *Id.* at 281. For example, “[e]ven hearing their cell door bang shut would produce intense stress which the prisoners would often relieve by banging their heads against the wall.” *Id.*

201. Punyanunt-Carter & Wrench, *supra* note 198, at 69.

202. *See id.* at 73 (finding a positive correlation between touch deprivation and depression). This type of confinement also negatively impacts juveniles’ rehabilitation, increasing the likelihood that they will “return to isolation after an initial period in seclusion.” Walton, *supra* note 25, at 281.

psychological effects of long-term solitary confinement,<sup>203</sup> the concurring and dissenting opinion given by Judge Feinberg in *Sostre v. McGinnis*<sup>204</sup> illuminates that some judicial minds, even though they may be in the minority, do find that solitary confinement violates the Eighth Amendment, largely due to the psychological harms it inflicts.<sup>205</sup> Judge Feinberg asserted that the criteria used to establish “cruel and unusual punishment” are “imprecise” and, to a certain degree, “subjective.”<sup>206</sup> Further, he argued that,

What might once have been acceptable does not necessarily determine what is ‘cruel and unusual’ today. . . . [W]e have learned to our sorrow in the last few decades that true inhumanity seeks to destroy the psyche rather than merely the body. . . . The point is that the means used to exact submission must be constitutionally acceptable, and the threat of virtually endless isolation that endangers sanity is not.<sup>207</sup>

Just as Judge Feinberg poignantly stated, solitary confinement and the psychological havoc it wreaks on inmates needs to join “whipping by strap” in the category of outdated and inhumane prison practices of yesteryear.<sup>208</sup>

### *B. Physical Effects of Isolation*

Unfortunately, solitary confinement can also have negative consequences on juveniles’ physical well-being.<sup>209</sup> For children still experiencing puberty and developing secondary sex characteristics, isolation in small spaces combined with limited physical activity can “stunt normal

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203. Compare *Jackson v. Meachum*, 699 F.2d 578, 583 (1st Cir. 1983) (finding that even in conditions that threaten “psychological deterioration” like solitary confinement, inmates do not have the right to preventive therapy), with *Sostre v. McGinnis*, 442 F.2d 178, 190 (2d Cir. 1971) (conveying “respect” for the expert psychiatric opinion of Dr. Seymour Halleck who “feared that the isolation from human contact in punitive segregation might cause prisoners to hallucinate and to distort reality” and suggested that “[l]ong-term isolation might have so serious an impact . . . as to ‘destroy’ a person’s ‘mentality’”).

204. 442 F.2d at 207–09.

205. *Id.* at 209.

206. *Id.* at 208.

207. *Id.*

208. *See id.*

209. *See infra* notes 210–29 and accompanying text.



physical development.”<sup>210</sup> Although it is illegal for prisons to prohibit juveniles from exercising for at least one hour per day, most young inmates in solitary confinement never exercise at all, nor do they leave their cells for that matter.<sup>211</sup> This is because the process to “sign up” for outside recreation is arduous for young people in isolation; they first must wake up before dawn, stand at the doors of their cells, and then wait for a long period of time for a prison official to come shake them down and shackle them.<sup>212</sup> Worse yet, this is all done just so that when they finally reach the outdoors, they can be confined in a chain-link exercise cage for one hour.<sup>213</sup> Thus, it cannot be too surprising that many young inmates are too depressed or unmotivated to sign up for exercise every day.<sup>214</sup>

Many child inmates, however, never even receive the opportunity to sign up for outdoor exercise.<sup>215</sup> Exemplifying this is *Thomas v. Ponder*,<sup>216</sup> a recent Ninth Circuit case in which Otis Thomas, the plaintiff and juvenile in custody, was refused outdoor exercise for thirteen months and twenty-five days while he was housed in an isolation unit.<sup>217</sup> Thomas brought a lawsuit against prison officials for violating his Eighth Amendment rights.<sup>218</sup>

The court determined the prison officials’ refusal to allow Thomas to exercise outside his cell for thirteen months and twenty-five days was “sufficiently serious” to qualify as a violation of Thomas’s Eighth Amendment rights, satisfying the first part of the cruel and unusual punishment test.<sup>219</sup> The first part of the *Farmer* inquiry was met because established law reflects that “exercise is one of the most basic human necessities protected by the Eighth Amendment.”<sup>220</sup>

The court reasoned this was enough for it to be sufficiently obvious to

210. Gallagher, *supra* note 158, at 254.

211. Trey Bundy, *Sixteen, Alone, 23 Hours a Day, in a Six-by-Eight-Foot Box*, CTR. FOR INVESTIGATIVE REPORTING (Mar. 5, 2014), <https://medium.com/solitary-lives/sixteen-alone-23-hours-a-day-in-a-six-by-eight-foot-box-26ab1e09632d> [hereinafter *Sixteen, Alone*].

212. *Id.*

213. *Id.*

214. *Id.*

215. *See infra* notes 216–20 and accompanying text.

216. 611 F.3d 1144 (9th Cir. 2010).

217. *Id.* at 1151.

218. *Id.* at 1149.

219. *Id.* at 1151; *see supra* Section IV.A.

220. *Thomas*, 611 F.3d at 1151–52 (citing *Thomas v. Evans*, No. C 06-3581 MMC (PR), 2009 WL 481265, at \*12 (N.D. Cal. Feb. 24, 2009)); *see also* *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993); *Spain v. Proconier*, 600 F.2d 189, 199 (9th Cir. 1979).

the prison officials that denying Thomas exercise for almost fourteen months “posed a ‘substantial risk of serious harm’ to Thomas’s mental and physical health.”<sup>221</sup> Finally, the court determined that the second element of the *Farmer* test was also satisfied because the prison officials had no legitimate reason to fear that Thomas posed a threat of danger to the officials or other inmates, nor did the emergency situation—which initially caused the denial of outdoor exercise—last for the almost fourteen months Thomas’s exercise right was refused.<sup>222</sup> As this case strongly expresses, the opportunity to exercise once a day must be considered by American courts to be as fundamental a right as receiving food.<sup>223</sup> Because daily exercise is nearly impossible to satisfy in solitary confinement, isolation violates the Eighth Amendment.<sup>224</sup>

Denial of exercise is not the only physically harmful effect solitary confinement has on juvenile inmates.<sup>225</sup> Sadly, many teenagers attempt to kill themselves before or during isolation.<sup>226</sup> As one former juvenile inmate remembers from his time inside, young inmates took shocking measures to avoid isolation, including inserting AA batteries into their anal cavities so as to set off the metal detector on the way into isolation cells.<sup>227</sup> He explains that by doing this, teenagers were resorting to suicide in order to avoid solitary confinement:

When they take you to the infirmary and they see you have a battery in there, they say that’s kind of a suicide attempt because . . . the battery can explode in you, [and] you [can] die. But if you try to commit suicide, you can’t be in the box by yourself, so they take you out the box.<sup>228</sup>

Clearly, solitary confinement is capable of causing the most serious physical

221. *Thomas*, 611 F.3d at 1152.

222. *Id.* at 1153–54.

223. *Id.* at 1151–52.

224. *See id.* (quoting *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir.1996)) (reasoning that, “[l]ike food, [exercise] is a ‘basic human need protected by the Eighth Amendment’”).

225. *See infra* notes 226–29 and accompanying text.

226. *See supra* notes 42–44 and accompanying text; *see also Sixteen, Alone, supra* note 211.

227. *Sixteen, Alone, supra* note 211.

228. *Id.* Other colloquial terms for isolation include “the pound,” “the hole,” “the block,” “the cooler,” “the bing,” “lockdown,” “separation,” “high security,” and “23/7.” Bennion, *supra* note 161, at 746.

harm of all: death.<sup>229</sup>

### C. Developmental Considerations

Intensifying the previously mentioned detrimental effects of isolation is the fact that juveniles are still in the midst of their developmental processes both physically and psychologically.<sup>230</sup> As a result, young inmates' bodies and minds react differently to solitary confinement than would an adult subjected to the same treatment.<sup>231</sup> These differences indicate that determining whether solitary confinement of juveniles violates the Eighth Amendment should remain a separate consideration from determining whether the same is true for adults, especially because several authorities regard young people as less culpable than adults for their crimes, due to their incomplete psychological development.<sup>232</sup>

Physically, males and females undergo a complete bodily transformation between the ages of ten and nineteen.<sup>233</sup> During this timeframe, girls' bodies will increase in body fat, grow larger breast tissue, begin the menstrual cycle, and widen at the hips.<sup>234</sup> Boys generally experience their voices deepening and their genitals growing.<sup>235</sup> Both males and females have growth spurts, weight gain, increase in appetite, hair growth, changes in

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229. See Bennion, *supra* note 161, at 776. In research conducted in California's prison system between 1999 and 2004, researchers documented that prisoners held in isolation "accounted for nearly half of all suicides." Breslow, *supra* note 186. In response to this statistic, one prisoner explained,

The Hole and Segregation cells are depressing enough to drive many men to take their lives in order to escape. For some it would appear to be the only way out. After years of living in the cramped confines of a segregation cell with no hope of getting out, it is easy to see why a man would prefer death.

*Id.*

230. *Solitary Confinement of Juvenile Offenders*, JUVENILE JUSTICE REFORM COMM. (Apr. 2012), [https://www.aacap.org/aacap/policy\\_statements/2012/solitary\\_confinement\\_of\\_juvenile\\_offenders.a\\_spx](https://www.aacap.org/aacap/policy_statements/2012/solitary_confinement_of_juvenile_offenders.a_spx).

231. See *infra* notes 239–44 and accompanying text.

232. See *infra* notes 245–49 and accompanying text; *Evolves*, *supra* note 186, at 294; Elizabeth S. Scott, "Children Are Different": *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013); Jennifer D. Tinkler, Note, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child*, 12 B.C. THIRD WORLD L.J. 469, 476 (1992).

233. See CLEA MCNEELY & JAYNE BLANCHARD, *THE TEEN YEARS EXPLAINED: A GUIDE TO HEALTHY ADOLESCENT DEVELOPMENT* 14 (2009).

234. *Id.*

235. *Id.*

hormone levels, and brain development.<sup>236</sup> Often, teens in completely normal environments are not equipped cognitively or socially to handle the stress associated with this rapid maturation of their bodies, let alone those enduring solitary confinement.<sup>237</sup> Teens often express the stress and self-consciousness surrounding these changes through fear, withdrawal, depression, bullying, eating disorders, and “obsessive concern about appearance.”<sup>238</sup>

In terms of incomplete psychological development, adolescents’ prefrontal cortexes are not yet fully developed, leaving them more impulsive and vulnerable than adults, which also mitigates their decision-making ability.<sup>239</sup> Research reveals that the brain “goes through a [remodeling] process during adolescence,” leading teenagers to recreate their identities and the way they interact socially.<sup>240</sup> This process may not end until the age of twenty-five.<sup>241</sup> In fact, recent studies using MRIs show “changes in the frontal and parietal regions [of the brain] are especially pronounced and prolonged” during the adolescent years.<sup>242</sup> Additionally, research

236. *Id.*

237. *Id.* at 8–9.

238. *Id.* at 10. The “limbic midbrain system and the orbital frontal areas of the frontal lobe” make up humans’ social–emotional systems. Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, 34 CHILD L. PRAC. 124, 124 (Aug. 2015). Because this social–emotional system undergoes rapid development during the adolescent years, teens tend to have “increased need for a sense of rewards, increased sensation seeking, more reactive emotional responses to both positive and negative emotions, [and] increased attentiveness to social cues.” *Id.*

239. *Evolves*, *supra* note 186, at 293. The prefrontal cortex in the brain controls a person’s ability to contemplate risks and consequences, take all options into account, interact well socially, and “delay and reflect.” Tyler, *supra* note 238, at 124. Additionally, the cognitive control system of the brain, which involves the dorsolateral area of the frontal lobe, takes longer to develop during adolescence. *Id.* This system allows for, “increased impulse control, better emotional regulation, more foresight and detection of options, better planning and anticipation of outcomes, [and] greater resistance to stress and peer pressure.” *Id.* Thus, the juvenile brain is imbalanced during development; while the social–emotional system is almost fully developed and active, the cognitive control system is insufficiently mature to regulate the effects of the social-emotional system. *Id.* As a result, impulsivity, sensation-seeking, and susceptibility to peer pressure all decline with age, while time dedicated to problem-solving and gratification delays increase with age. *Id.*

240. Suparna Choudhury, Sara-Jayne Blakemore, & Tony Charman, *Social Cognitive Development During Adolescence*, 1 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 165, 165 (2006), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.531.5603&rep=rep1&type=pdf>. “The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

241. MCNEELY & BLANCHARD, *supra* note 233, at 2.

242. Choudhury & Charman, *supra* note 240, at 165.

demonstrates that the brain's centers for "emotion processing" and "cognitive appraisal" are in their developmental stages during adolescence.<sup>243</sup> Possibly most relevant to the idea of young peoples' diminished culpability is the finding that teenagers tend to—more often than adults—underestimate how risky certain activities are, while remaining "unequivocally optimistic about avoiding harm and misfortune."<sup>244</sup>

In *Roper v. Simmons*,<sup>245</sup> the Supreme Court considered research demonstrating the developmental differences between youth and adults and concluded that children under the age of eighteen are "generally less blameworthy than adults who commit similar crimes."<sup>246</sup> To summarize, the Court determined three characteristics essential to the differentiation: (1) lack of maturity and responsibility; (2) vulnerability and susceptibility to peer pressure; and (3) unformed character.<sup>247</sup>

Later, the Supreme Court reiterated its belief that children must be treated differently than adults in *J.B.D. v. North Carolina*.<sup>248</sup> There, the majority noted that "the legal disqualifications placed on children as a class—e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal."<sup>249</sup>

243. *Id.* at 167. Evidence reflected that "neural maturation in the development of social cognition" plays a role in the development of the adolescent brain. *Id.* at 171.

244. Lawrence D. Cohn, Susan Macfarlane, Walter K. Imai, & Claudia Yanez, *Risk-Perception: Differences Between Adolescents and Adults*, 14 HEALTH PSYCHOL. 217, 221 (1995), <https://academics.utep.edu/portals/321/faculty%20pages/cohn/risk%20perception%20%20differences%20between%20adolescents%20and%20adults.pdf>. Data indicates that when asked whether "admitting to a crime when questioned by the police was the right response," 60% of eleven to thirteen-year-olds responded in the affirmative, while only 20% of eighteen to twenty-four-year-olds answered in the affirmative. Tyler, *supra* note 238, at 124–25. This poll demonstrates what a major impact just seven years of adolescent development has on teenagers' legal responses. *Id.*

245. 543 U.S. at 591.

246. *Id.*

247. *Id.* at 569–70 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). *Eddings* found that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." 455 U.S. at 115. The Court in *Roper* also cited *Johnson v. Texas*: "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 569–70; *Johnson v. Texas*, 509 U.S. 350, 368 (1993).

248. 564 U.S. 261, 265 (2011) (holding that a child's age properly informs the *Miranda* custody analysis).

249. *Id.* at 273.

The research indicating the developmental immaturity of adolescents as compared to adults, coupled with the Supreme Court's acknowledgement of these differences, demonstrates the need to treat adolescents differently under the Eighth Amendment.<sup>250</sup> Thus, the fact that solitary confinement of adults has not been held to violate the Eighth Amendment should have no bearing on whether or not isolation of juvenile inmates violates the Cruel and Unusual Punishment Clause.<sup>251</sup>

## VI. BENEFITS OF EIGHTH AMENDMENT PROTECTION

### A. Properly Rehabilitating Juveniles Creates a Safer Society

If the solitary confinement of juveniles is deemed cruel and unusual punishment, correctional facilities will be more effective at achieving their goal: rehabilitating juveniles so they can re-enter society as law-abiding citizens and productive members of society.<sup>252</sup> This “rehabilitative ideal”<sup>253</sup> was forcefully promoted recently by the Supreme Court in *Graham v. Florida*.<sup>254</sup> Although the decision concerned sentencing a juvenile to life without parole for a non-homicide conviction, much of the Court's discussion regarding rehabilitative considerations is highly relevant to the solitary confinement of juveniles.<sup>255</sup> This is because, like most prisoners sentenced to life without possibility of parole, inmates in solitary confinement are generally precluded from participating in rehabilitative programs.<sup>256</sup> And even if a juvenile does have, or previously had, the

250. *Evolves*, *supra* note 186, at 293.

251. *See id.*

252. *See Inmates of the Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1364 (D.R.I. 1972). “Rehabilitation . . . is the interest . . . defined as being the purpose of confinement of juveniles. . . . [T]he goal of the juvenile justice system, rehabilitation, differs from the goals of the criminal system, which include punishment, deterrence, and retribution.” *Id.*

253. *Graham v. Florida*, 560 U.S. 48, 74 (2010).

254. *Id.* at 79. Terrance Jamar Graham “began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13,” possibly because both his parents were crack cocaine addicts. *Id.* at 53. Graham was convicted of armed burglary and attempted armed robbery and sentenced to life imprisonment without possibility of parole, which he appealed. *Id.* at 57–58.

255. *Id.* at 52–53. When instituted properly, rehabilitation causes moral reform—reached when an inmate reflects, feels remorseful, repents, and has hope for the future. Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 401 (2015). “At a minimum, prison should not be a place where you [come] out brutalized and degraded.” *Id.*

256. Bennion, *supra* note 161, at 743. The Supreme Court noted in *Graham* that “it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are

opportunity to participate in such programs, a mere few hours in solitary confinement does much to counteract any rehabilitative forces present, and ultimately produces individuals who are more likely to contribute to the violence occurring in prisons and in the outside world.<sup>257</sup>

Thus, when juveniles experience isolation, the chance to rehabilitate them into morally reformed, productive members of society is lost—just as it is when juveniles are sentenced to life without possibility of parole.<sup>258</sup> Indeed, the Court asserted, “The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential,” reiterating that it is not constitutionally sound for the penal system to offer juvenile offenders “no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.”<sup>259</sup>

More than a century ago, the Supreme Court recognized solitary confinement as psychologically damaging in its *In re Medley*<sup>260</sup> decision, noting,

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 most cases did not recover sufficient mental activity to be of any subsequent service to the

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ineligible for parole consideration.” 560 U.S. at 79.

257. See *infra* notes 258–67 and accompanying text. “After a few hours in solitary confinement, the effect becomes detrimental rather than rehabilitative.” Walton, *supra* note 25, at 282. “As one moral reform theorist put it, a punishment cannot *aim* at ‘degrading or brutalizing a person’ because this is ‘not conducive to moral awakening but only to bitterness and resentment.’” Flanders, *supra* note 255, at 427 (quoting Herbert Morris, *A Paternalistic Theory of Punishment*, in *WHY PUNISH? HOW MUCH?* 147, 158 (Michael Tonry ed., 2011)).

258. *Graham*, 560 U.S. at 79. Sentencing a juvenile to life without parole sends the message to the juvenile that they are unable to be rehabilitated and beyond redemption as human beings. Flanders, *supra* note 255, at 426. Prison conditions such as solitary confinement can also send that message “by removing *any* possibility that prison is a place where he can be reformed, and where the judgment of incorrigibility is ‘reinforced by the prison term.’” *Id.* at 426–27 (quoting *Graham*, 560 U.S. at 79).

259. *Graham*, 560 U.S. at 79. The Court continued: “Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual.” *Id.* “It is *cruel* to say to a juvenile offender that he is ‘irredeemable’ and that he will never mature enough or be rehabilitated enough to earn release.” Flanders, *supra* note 255, at 414 (emphasis added) (footnote omitted).

260. 134 U.S. 160 (1890).

community.<sup>261</sup>

The Supreme Court's observations clearly indicate that isolation was not beneficial to the rehabilitation of prisoners in 1890, and unfortunately, not much has changed.<sup>262</sup> Modern research exposes that solitary confinement is built on a series of paradoxes: first, as prisoners become increasingly starved for companionship while isolated, they become more "unfit for social interaction" after their release, which is what solitary confinement is intended to reform and improve.<sup>263</sup> This contributes to the second paradoxical reality of solitary confinement: to re-enter outside society or the general prison population—both highly social worlds—prisoners must be able to withstand the psychological consequences of social isolation, but the effects of solitary confinement make it less likely they will ever fully readjust socially when reintroduced to society.<sup>264</sup>

Even more serious is the paradox that isolation is typically instituted to deter violence, but in fact, "*more than a century of research on the psychology of punishment has made it clear that punishment . . . is the most powerful tool we have yet created for stimulating violence.*"<sup>265</sup> Child development studies consistently support this argument, as they show that "the more severely children are punished, the more violent they become, both as children and as adults."<sup>266</sup> Moreover, several prison studies evidence that the conditions of solitary confinement "make it highly likely that

261. *Id.* at 168.

262. See Maria Godoy, *Solitary Confinement & Human Rights*, NPR (July 27, 2006, 1:29 PM), <http://www.npr.org/templates/story/story.php?storyId=5586937>.

263. Gawande, *supra* note 177. In President Obama's op-ed, discussed *supra* in Section III.A, he asserts that

The United States is a nation of second chances, but the experience of solitary confinement too often undercuts that second chance. Those who do make it out often have trouble holding down jobs, reuniting with family and becoming productive members of society. Imagine having served your time and then being unable to hand change over to a customer or look your wife in the eye or hug your children.

Obama, *supra* note 41.

264. Gawande, *supra* note 177. "Perversely, then, the prisoners who can't handle profound isolation are the ones who are forced to remain in it. 'And those who have adapted . . . are prime candidates for release to a social world to which they may be incapable of ever fully readjusting.'" *Id.* (quoting Craig Haney, Psychology Professor at the University of California at Santa Cruz). In fact, once inmates are subject to isolation, it becomes *more* likely that they will return to solitary confinement after being released. Walton, *supra* note 25, at 281.

265. GILLIGAN & LEE, *supra* note 34, at 5 (emphasis added). "[S]olitary confinement makes prisoners more violent and undisciplined." Walton, *supra* note 25, at 281.

266. GILLIGAN & LEE, *supra* note 34, at 5.



[prisoners] will commit more crimes when they are released.”<sup>267</sup>

Therefore, not only is it in the juvenile's best interest to be protected by the Eighth Amendment from solitary confinement, it is also in the best interest of a safe American society; however, American society must demand it.<sup>268</sup> Just last year, the Supreme Court wrote in its majority opinion for *Davis v. Ayala*<sup>269</sup> that solitary confinement, which “will bring you to the edge of madness, perhaps to madness itself,” should “not be the result of society's simple unawareness or indifference.”<sup>270</sup> More than 150 years ago, renowned philosopher Fyodor Dostoyevsky wrote something strikingly similar: “The degree of civilization in society can be judged by entering its prisons.”<sup>271</sup> Justice Kennedy included this quote in his concurring opinion in *Davis*, concluding that “[t]here is truth to this in our own time.”<sup>272</sup>

#### *B. The United States Would Be in Compliance with International Standards*

In *Trop v. Dulles*,<sup>273</sup> the Supreme Court determined that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>274</sup> American society, while claiming to be one of the most developed societies in the world, does not meet the international standards set forth by the United Nations<sup>275</sup> in its

267. Gawande, *supra* note 177.

268. See Tinkler, *supra* note 232, at 473. “As noted by Lung-chu Chen, Professor of Law at New York Law School, ‘The quality and future of society and the degree to which human dignity values are fulfilled may be measured by the protection and treatment accorded to the young members of the population.’” *Id.*

269. 135 S. Ct. 2187 (2015).

270. *Id.* at 2209 (Kennedy, J., concurring).

271. *Id.* at 2210.

272. *Id.*

273. 356 U.S. 86 (1958).

274. *Id.* at 101. Often, this has involved “look[ing] beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual.” *Graham v. Florida*, 560 U.S. 48, 80 (2010). *Graham* then cited examples: *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005), *Atkins v. Virginia*, 536 U.S. 304, 317–18 (2002), *Thompson v. Oklahoma*, 478 U.S. 815, 830 (1988) (plurality opinion), *Enmund v. Florida*, 458 U.S. 782, 796–97 (1982), *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion), and *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion). 560 U.S. at 80.

275. Other applicable international law includes the Basic Principles for the Treatment of Prisoners, which was adopted by the U.N. General Assembly, of which the U.S. is a member. G.A. Res. 45/111 (Dec. 14, 1990). That resolution states, “Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.” *Id.* at ¶ 7.

Convention on the Rights of the Child,<sup>276</sup> or its Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>277</sup> The United States remains the only Western democracy to inflict prolonged periods of solitary confinement on so many of its citizens.<sup>278</sup> Article 37 of the CRC states:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. . . . The arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time; [e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.<sup>279</sup>

“Torture,” as used in the CRC, is helpfully defined in the first article of the Convention Against Torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”<sup>280</sup> While the United States is a State Party of the Convention Against Torture, it is the *only* member out of the 197 members of the U.N. General Assembly that has yet to ratify and become a State Party to the CRC.<sup>281</sup>

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276. See Convention on the Rights of the Child, *supra* note 13.

277. See Convention Against Torture, *supra* note 14.

278. See Godoy, *supra* note 262. “No other Western democracy imposes such conditions of confinement for prolonged periods on so many people.” *Id.*

279. See Convention on the Rights of the Child, *supra* note 13, at art. 37. Article 37 goes on to state,

In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) [e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

*Id.*

280. See Convention Against Torture, *supra* note 14, at art. 1. The Convention Against Torture narrows the scope of its definition by providing that it must be for purposes such as “punishing him for an act he or a third person has committed or is suspected of having committed . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Id.*

281. Currently, the United States is a signatory to the CRC. See *Status of Ratification Interactive Dashboard: Convention on the Rights of the Child*, U.N. HUMAN RTS. OFF. HIGH COMM’R,

Recently, the Supreme Court did take strides towards compliance with the CRC, modifying its Eighth Amendment jurisprudence in relation to juveniles.<sup>282</sup> Specifically, in its 2005 *Roper*<sup>283</sup> decision, the majority concluded that courts cannot impose the death penalty upon juveniles.<sup>284</sup> Coming to this conclusion, the Court reasoned that “[t]he differences between juveniles and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”<sup>285</sup> Then, five years later in *Graham*,<sup>286</sup> the Supreme Court considered the “limited culpability” and the age of the juvenile offender in drawing the “clear line” that the Eighth Amendment “forbids the sentence of life without parole” for juveniles committing non-homicide offenses.<sup>287</sup>

Like the death sentence and life in prison without possibility of parole, the Supreme Court should also hold that juveniles are insufficiently culpable to be placed in solitary confinement.<sup>288</sup> This is supported by juvenile inmates’ personal accounts of the suffering caused by degrading treatment at the hands of prison officials while isolated in American correctional facilities, as well as by the copious research demonstrating the detrimental physical, psychological, and developmental effects of solitary confinement on adolescents.<sup>289</sup> These personal accounts and research studies make it

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<http://indicators.ohchr.org> (last visited Oct. 4, 2016).

282. See *infra* notes 283–87 and accompanying text.

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

284. *Id.* at 575.

285. *Id.* at 572–73. The Court also noted that

An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant’s youth may even be counted against him.

*Id.* at 573.

286. *Graham v. Florida*, 560 U.S. 48, 80 (2010).

287. *Id.* at 74. “An offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Id.* at 76.

288. See *infra* Part V.

289. See Tinkler, *supra* note 232, at 481. “Many states’ statutes do not comply with the treaty, even if they seem to on their face.” *Id.* “For example, although California’s statutory language embodies ‘the best interests of the child’ standard . . . [a] study of juvenile sentencing conducted in California shows that juvenile . . . sentencing practices are not administered according to juvenile sentencing statutes, but are similar to adult sentencing procedures.” Tinkler, *supra* note 232, at 481–82.

indisputable that the United States is not in compliance with the CRC or the Convention Against Torture.<sup>290</sup>

## VII. CONCLUSION

“The prohibition on cruel and unusual punishment is not a static concept, ‘but may acquire meaning as public opinion becomes enlightened by a humane justice.’”<sup>291</sup> Thankfully, due in part to President Obama’s recent executive order, the American public’s opinion of juvenile solitary confinement as “humane” treatment has begun to shift.<sup>292</sup> It is time that this growing enlightenment is echoed by a Supreme Court decision proclaiming that cruel and unusual punishment as defined by the Eighth Amendment encompasses the disturbing reality that America’s children face while locked in isolation cells:

Imagine that you’re locked in a small room like a bathroom 23 hours a day. . . . Your food is thrown under the door . . . yelling, screaming, banging . . . at ALL HOURS; it smells worse than the monkey house. . . . In seg[regation] you either implode or explode; you lose touch with reality, hear voices, hallucinate, and think for hours about killing yourself, others, or both. The anger and hurt gets so intense that you suspect everyone and trust no one and when someone does something nice for you, you don’t understand it.<sup>293</sup>

Indeed, U.S. common law established almost a century ago that “[i]t is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.”<sup>294</sup> To care for

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290. See *supra* notes 275–89 and accompanying text.

291. See *Inmates of the Boys’ Training School v. Affleck*, 346 F. Supp. 1354, 1366 (D.R.I. 1972) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

292. See Nicole Scialabba, *Making the Case to End Solitary Confinement for Juveniles*, A.B.A. (June 27, 2016), <http://www.americanbar.org/publications/childrens-rights/making-the-case.html> (noting that “the bans recently instated by the president” and other entities are helping to contribute to the public awareness and public opinion, which in turn, are helping to eliminate juvenile solitary confinement).

293. GROWING UP LOCKED DOWN, *supra* note 27, at 58. This is the personal testimony of a young man describing his experience in solitary confinement while incarcerated. *Id.* In a letter to the Human Rights Watch, Kyle, a teenager from California, wrote: “Being in isolation to me felt like I was on an island all alone dying a slow death from the inside out.” *Id.* at 1.

294. *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926).

America's young prisoners requires protecting them from cruel and unusual punishment and believing in their ability to rehabilitate, or as President Obama phrased it:

In America, we believe in redemption. We believe . . . that “every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes.” We believe that when people make mistakes, they deserve the opportunity to remake their lives. And if we can give them the hope of a better future, and a way to get back on their feet, then we will leave our children with a country that is safer, stronger and worthy of our highest ideals.<sup>295</sup>

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295. Obama, *supra* note 41 (quoting Pope Francis).

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