

NOTES

CRUEL, UNUSUAL, AND UNCONSTITUTIONAL: AN ORIGINALIST ARGUMENT FOR ENDING LONG-TERM SOLITARY CONFINEMENT

Merin Cherian*

*“[Though] prisoners may be deprived of rights that are fundamental to liberty . . . [they] retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”*¹

*“I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.”*²

INTRODUCTION

On May 15, 2010, a sixteen-year-old African-American boy named Kalief Browder was arrested for allegedly stealing a backpack.³ He was sent to Rikers Island in New York City, where he spent three years awaiting trial, two of which he spent in solitary confinement.⁴ While he was there, he endured physical abuse from jail officers and other inmates and attempted to commit suicide several times.⁵ He was released after prosecutors decided not to pursue his conviction.⁶ Browder went on to earn a high school equivalency diploma and enter community college.⁷ He was a young man full of promise. However, his time spent in solitary wrought lasting psychological damage on him. On June 6, 2015, two years after

* Georgetown University Law Center, J.D. 2019; St. John’s University, B.S. 2016. I would like to thank John Mikhail, William Treanor, John Stinneford, and Shon Hopwood for their very helpful comments, critiques, and research assistance. I would also like to express my gratitude to all the editors and staff of the *American Criminal Law Review*, Volume 56 who worked hard to make this Note ready for publication. My hope is that this Note will meaningfully contribute to the important conversation surrounding solitary confinement. © 2019, Merin Cherian.

1. *Brown v. Plata*, 562 U.S. 493, 510 (2011).

2. CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* 146–47 (John S. Whitley & Arnold Goldman eds., Penguin Books 1972) (1842) (describing the conditions of solitary confinement after visiting the Cherry Hill prison in Philadelphia).

3. Jennifer Gonnerman, *Before the Law*, *NEW YORKER* (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

4. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, *N.Y. TIMES* (June 8, 2015), <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?mtrref=www.google.com>.

5. *Id.*

6. *Id.*

7. Matt Pearce, *Kalief Browder, Jailed for 3 Years in N.Y. Without a Trial, Commits Suicide*, *L.A. TIMES* (June 7, 2015), <http://www.latimes.com/nation/la-na-new-york-kalief-browder-20150607-story.html>.

his release from jail, Browder hanged himself at his parents' home in the Bronx when he was just twenty-two years old.⁸

Kalief Browder's story is indicative of the stories of the 80,000 to 100,000 people currently held in solitary confinement in the United States.⁹ Held in cells typically no bigger than a parking space, devoid of nearly all human interaction and conversation, and left alone with their thoughts for days, months, weeks, years, or decades, prisoners relegated to long-term solitary confinement¹⁰ slowly become insane.¹¹ They suffer from a wide range of mental health issues that often prove to be irreversible even after release and leave deep and lasting wounds on the psyche.¹²

On the surface, it may appear that long-term solitary confinement is far less harsh than more archaic punishments, such as public execution, whipping, or the pillory.¹³ However, these more dramatic punishments have been replaced by others, like solitary confinement, that are subtler but still depraved.¹⁴ Practices like this make it possible for prison officials to cause prisoners to suffer a great deal of pain, both physically and psychologically, "without provoking public outcry."¹⁵

The Supreme Court has yet to decide whether long-term solitary confinement *per se* violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.¹⁶ This Note argues that a proper original understanding of the Clause would eradicate the use of long-term solitary confinement in the United States. In Part I, this Note discusses the Supreme Court's convoluted and inconsistent body of Eighth Amendment jurisprudence that has been birthed out of its "evolving standards" approach. Part II of this Note argues in favor of the original understanding of the Cruel and Unusual Punishments Clause put forth by John Stinneford¹⁷

8. Schwirtz & Winerip, *supra* note 4.

9. See SARAH BAUMGARTEL ET AL., THE LIMAN PROGRAM & ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 3 (2015), https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_seggregation_report_sep_2_2015.pdf.

10. This paper defines "long-term solitary confinement" as confinement that lasts longer than fifteen days and is imposed for any reason, whether administrative or disciplinary. See Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 12 (2012) (stating that solitary confinement should only be used as a last resort and never last longer than fifteen days); CHARLIE EASTAUGH, UNCONSTITUTIONAL SOLITUDE: SOLITARY CONFINEMENT AND THE US CONSTITUTION'S EVOLVING STANDARDS OF DECENCY 118 (2017) ("[E]ven ten days in solitary confinement has been shown to have lasting, deleterious, and damaging effects on a person . . .").

11. See Hafemeister & George, *supra* note 10, at 11; EASTAUGH, *supra* note 10.

12. Hafemeister & George, *supra* note 10, at 35–36.

13. John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441, 443 (2017).

14. *Id.* at 443.

15. *Id.* at 444.

16. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

17. John F. Stinneford is a law professor and assistant director of the Criminal Justice Center at the University of Florida Levin College of Law. He is a prominent Eighth Amendment scholar who has been published in multiple journals, including the Georgetown Law Journal and the Virginia Law Review. His works provide

and accepted by other scholars, namely that *a punishment is cruel and unusual if it is overly harsh in light of longstanding practice*.¹⁸ Because much of the Supreme Court's misapplication of the Eighth Amendment rests on its misunderstanding of the term "unusual," this Note will concentrate more attention on that word in the Clause. Part III then applies this original understanding to the practice of long-term solitary confinement in the United States to argue that it contravenes the Cruel and Unusual Punishments Clause. Part IV provides a brief conclusion.

I. THE SUPREME COURT'S CURRENT UNDERSTANDING OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

The Supreme Court currently has two overarching alternatives for interpreting the Cruel and Unusual Punishments Clause: the "evolving standards" living constitutionalist approach and Scalia's "originalist" approach. Neither approach correctly analyzes the Clause. In fact, both woefully misapply it.

A. *Evolving Standards Approach*

Vagueness and uncertainty have plagued the Supreme Court's Eighth Amendment jurisprudence from its beginning. It has culminated in the "evolving standards" approach the Court uses today. *Wilkerson v. Utah*, decided in 1878, marked the first time the Court interpreted the meaning of "cruel and unusual."¹⁹ Justice Nathan Clifford stated, "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth] [A]mendment to the Constitution."²⁰ In *Wilkerson*, the Court held that execution by firing squad did not violate the Eighth Amendment.²¹ It failed to offer any clear guidelines for applying the Clause, though it did remark that death by shooting was not unusual because it was a common form of execution for military crimes.²²

About a decade later, the Court held in *In re Kemmler* that death by electric chair, used for the first time in any state, did not violate the Cruel and Unusual Punishments Clause and was actually the most humane form of execution.²³ The Court stated, "[p]unishments are cruel when they involve torture or a lingering death."²⁴ Here the Court implied that cruel meant something "inhuman and barbarous, something more than the mere extinguishment of life."²⁵ The latter part of this definition looks to the intent of the punisher to determine whether something is

persuasive, well-supported historical analyses of the original meaning of the Cruel and Unusual Punishments Clause. See, e.g., Stinneford, *supra* note 13.

18. Stinneford, *supra* note 13, at 464.

19. *Wilkerson v. Utah*, 99 U.S. 130 (1878).

20. *Id.* at 136.

21. *Id.* at 134–35.

22. *Id.* at 134.

23. *In re Kemmler*, 136 U.S. 436, 443 (1890).

24. *Id.* at 447.

25. *Id.*

cruel, which is an improper understanding of the word based on historical evidence, as will be discussed later in this Note.²⁶ Furthermore, the Court failed to deal with the “unusual” criterion in any meaningful way, despite the fact that this was the very first time any state had employed execution by electric chair.²⁷

The evolving standards approach that the Court uses today was first hinted at in *Weems v. United States*,²⁸ which was decided twenty years after *Kemmler*. It was then fully articulated in *Trop v. Dulles*.²⁹ The evolving standards approach fully disregards the presence of the word “unusual” in the Cruel and Unusual Punishments Clause.³⁰ *Weems* dealt with a man convicted of fraud and falsification of public documents who was sentenced to fifteen years in shackles, hard labor, and other conditions.³¹ The Court held that this punishment was cruel and unusual, and therefore violated the Eighth Amendment.³² Public opinion served as the basis for the Court’s decision. Writing for the majority, Justice McKenna suggested that the Cruel and Unusual Punishments Clause is “progressive” and can “acquire meaning as public opinion becomes enlightened by a humane justice.”³³ In *Trop*, the Court had to decide whether denationalization was a cruel and unusual punishment for a person convicted of desertion.³⁴ Chief Justice Earl Warren wrote for a plurality that held that it was, stating that the Clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³⁵ He wrote that the Cruel and Unusual Punishments Clause prohibits inhumane treatment “without regard to any subtleties of meaning that might be latent in the word ‘unusual,’” and that if “unusual” were to have any meaning independent of “cruel,” “the meaning should be the ordinary one, signifying something different from that which is generally done.”³⁶ The Court, in articulating the evolving standards approach that it still uses today, disregarded the word “unusual” and refused to even pretend to search for its original meaning.

In *Gregg v. Georgia*,³⁷ the Court officially codified capital punishment as constitutional after a four-year de facto moratorium on the death penalty.³⁸ Both the majority and dissent applied the evolving standards test, marking a solid shift in the

26. See *infra* Part II.A.

27. *125 Years Ago, First Execution Using Electric Chair Was Botched*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6216> (last visited Feb. 8, 2019).

28. 217 U.S. 349 (1910).

29. 356 U.S. 86 (1985).

30. *Id.* at 100 n.32.

31. See *Weems*, 217 U.S. at 357–58, 366.

32. *Id.* at 362, 382.

33. *Id.* at 378.

34. See *Trop*, 356 U.S. at 87.

35. *Id.* at 101.

36. *Id.* at 100–01 n.32.

37. See 428 U.S. 153 (1976).

38. See *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court consolidated three death penalty cases that produced a 5-4 decision with every single justice writing an opinion. The Court struck down all death penalty statutes in the country, requiring states that wanted to reinstate the death penalty to make their statutes

Court's Eighth Amendment jurisprudence.³⁹ From that point forward, the Court has been employing the evolving standards test in Eighth Amendment cases, allegedly drawing upon modern sensibilities to determine whether a punishment is "cruel and unusual."⁴⁰

There are several problems with the Court's current standard. For one, the Court fails to undertake any serious analysis of what "unusual" means, treating it as a mere afterthought while improperly gleaned the entire meaning of the Clause from the word "cruel."⁴¹ This means that the Court interprets the Clause as a command simply not to be cruel, without regard for the meaning of "unusual."⁴² Furthermore, the "evolving standards of decency" approach makes the meaning of the Clause contingent on modern public opinion.⁴³ This would fail to eliminate new forms of cruelty that enjoy widespread public support.⁴⁴ But the rights of criminal defendants, including the nature and extent of the punishments they suffer, should not be dependent on public opinion. In fact, individual constitutional rights ought to be, and are intended to be, protected precisely *against* the sway of public opinion.⁴⁵ Lastly, the "evolving standards of decency" approach does not provide a stable and administrable baseline against which the Court can rule on the constitutionality of various punishments.⁴⁶ Instead, the Court must either intuit the public's current opinion of the punishment, or, what is likelier, the justices rule based their personal moral inclinations.⁴⁷

The Court itself has demonstrated how flimsy its current standard is. In 1988, it held in *Thompson v. Oklahoma* that the execution of criminals under the age of sixteen was unconstitutional.⁴⁸ One year later in *Stanford v. Kentucky*, the Court, in an opinion written by Justice Scalia, said it was not cruel and unusual to execute

more consistent to prevent arbitrary and discriminatory effects. *Id.* at 299. The Court lifted its de facto moratorium on the death penalty in *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976).

39. See *Gregg*, 428 U.S. at 171, 227.

40. See *Miller v. Alabama*, 567 U.S. 460, 494 (2012) (applying the evolving standards approach to strike down mandatory life sentences without possibility of parole for juvenile homicide offenders); *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005) (applying the evolving standards approach to render the juvenile death penalty unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 311–12, 321 (2002) (applying the evolving standards approach to find that using the death penalty on mentally disabled criminals is unconstitutional); *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (applying the evolving standards approach to find that imposing the death penalty on sixteen- or seventeen-year-old criminals did not violate the Cruel and Unusual Punishments Clause), *overruled by Roper v. Simmons*, 543 U.S. 551, 574 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 821, 838 (1988) (applying the evolving standards approach to find that the execution of a fifteen-year-old convicted of murder would be unconstitutional).

41. See John F. Stinneford, *The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1750 (2008).

42. *Id.*

43. *Id.* at 1753–54.

44. *Id.* at 1755.

45. *Id.* at 1754.

46. *Id.* at 1755.

47. *Id.* at 1751–53.

48. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

offenders sixteen years of age or above because there was “neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at age 16 or 17 years of age.”⁴⁹ In 2005, the Court reversed in *Roper v. Simmons* and found that it is cruel and unusual to subject offenders below the age of eighteen to the death penalty, thereby reaffirming and expanding *Thompson’s* holding.⁵⁰ In the majority opinion, Justice Kennedy cited scientific research that minors lack the maturity and responsibility of adults and thus should not be subjected to capital punishment.⁵¹ Though twenty states had codified the use of the death penalty on minors, only six states since 1989 had actually executed prisoners for crimes they had committed as minors.⁵² Kennedy stated that there was thus a “national consensus” that the practice should be outlawed.⁵³ This judicial whiplash over the span of just seventeen years demonstrates how the evolving standards test produces inconsistent results over a brief period of time. Applying the correct understanding of the Cruel and Unusual Punishments Clause would remedy this problem.

B. Scalia’s “Originalist” Approach

On the other hand, Justice Scalia’s ostensibly originalist approach to interpreting the Clause anchors its meaning to the standards for punishment at the end of the eighteenth century when the Eighth Amendment was passed and ratified.⁵⁴ Scalia believed that the Clause was meant to prohibit those punishments that were considered unacceptable when the Eighth Amendment was ratified.⁵⁵ Therefore, while living constitutionalists look to current public opinion to apply the “evolving standards of decency,” originalists like Scalia look to public opinion from 1790.⁵⁶ However, at that time, it was legally permissible to publicly flog, pillory, or even mutilate criminal offenders,⁵⁷ and the First Congress allowed the use of the death penalty for offenses as minor as counterfeiting.⁵⁸ Scalia himself admitted that he could not stomach using the Eighth Amendment to uphold such practices, even if they were widely accepted at the time of ratification.⁵⁹ Thus, Scalia was aware of

49. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

50. *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005).

51. *Id.* at 569.

52. *Id.* at 564–65.

53. *Id.* at 567.

54. See Bryan A. Stevenson & John F. Stinneford, *Common Interpretation: The Eighth Amendment*, NAT’L CONSTITUTION CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-viii> (last visited Feb. 27, 2019).

55. Stinneford, *supra* note 41, at 1742.

56. *Id.* at 1743.

57. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 40 (1993).

58. See An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 14, 1 Stat. 112 (repealed 1825).

59. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.”).

the shortcomings of his own methodology. His instinct told him that surely the Eighth Amendment could not allow modern-day flogging, but he knew that a faithful application of his own improper and intransigent understanding would necessitate such a result. As this Note will explain, an accurate original understanding of the Cruel and Unusual Punishments Clause would assuage these concerns.

II. THE ORIGINAL MEANING OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

A correct reading of the Cruel and Unusual Punishments Clause gives both “cruel” and “unusual” their proper due. John Stinneford provides a persuasive, well-supported historical analysis of the original meaning of the Cruel and Unusual Punishments Clause.⁶⁰ Because the Supreme Court tends to focus on the cruelty portion of the analysis and neglects to give “unusual” its proper meaning, this Note will focus more attention on the original understanding of “unusual.” It will break up the cruel and unusual analysis into two discrete steps to faithfully apply the meaning of the Clause, though there is some scholarship advocating for a combined reading of “cruel and unusual.”⁶¹

A. *The Original Meaning of “Unusual”: Contrary to Long Usage*

Much hinges on the meaning of the word “unusual” when applying the original meaning of the Eighth Amendment to the practice of solitary confinement. The Supreme Court incorrectly defines “unusual” in its colloquial sense, as “something different from that which is generally done.”⁶² Stinneford argues, based on historical evidence, that “unusual” is instead a term of art that means “contrary to ‘long usage.’”⁶³ Hence, a government practice would be considered just if it was “continuously employed through the jurisdiction for a very long time”⁶⁴ The term connotes the idea that longstanding punishments enjoy a presumption of reasonableness and constitutionality.⁶⁵ “[T]he best way to prevent cruel governmental innovation is to compare new punishment practices to traditional practices that

60. See Stinneford, *supra* note 41.

61. See Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 690 (2016). Samuel Bray, a law professor at UCLA School of Law, has also put forward an interesting reading of the phrase “cruel and unusual,” interpreting it not as two distinct requirements, i.e. that a punishment must be both cruel *and* unusual in order to violate the Eighth Amendment, but instead as a single, complex expression. Bray asserts that “cruel and unusual” should be read as a hendiadys, *id.*, or “a figure of speech in which a single complex idea is expressed by two words connected by a conjunction.” *Hendiadys*, 7 THE OXFORD ENGLISH DICTIONARY 142 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1991). According to Bray’s reading, the word “unusual” modifies the word “cruel,” meaning that the Clause prohibits punishments that are “innovatively cruel.” Bray, *supra*, at 690. While Bray’s argument is interesting, he does not present enough historical evidence to make a compelling argument that this was indeed the original meaning of the Cruel and Unusual Punishments Clause.

62. *Trop v. Dulles*, 356 U.S. 86, 100–1 n.32 (1985) (citations omitted).

63. Stinneford, *supra* note 41, at 1745.

64. *Id.*

65. *Id.*

enjoy long usage.”⁶⁶ This interpretation of “unusual” relies on a customary understanding of our common law system. The common law referred to longstanding practices that were both the primary source of positive law in England and the basis for fundamental individual rights.⁶⁷ Though many lawyers and academics today view the common law as an irresolute body of law that judges make up as they decide cases, this is not how the common law was originally understood.⁶⁸ At the time the Constitution was ratified, the common law was seen not as the product of judges’ whims, but as customary law—laws that had obtained their force after having been used for a long time throughout a jurisdiction.⁶⁹ These elements of long usage and universality were thought to justify a legal practice’s enforcement because they were believed to guarantee reasonableness and legitimacy.⁷⁰ The idea was that if the practice was not good it would have fallen out of usage.⁷¹ Long usage meant that the laws were reasonable and enjoyed the consent of the people.⁷² In the seventeenth and eighteenth centuries, Edward Coke stated that “long usage” was the standard by which one could determine whether a certain government practice was consistent with reason and justice and thus could properly be considered a law.⁷³ He compared the common law to the refinement of gold in a fire, stating that the common law is “finer and refined” until it reaches a level of perfection that no lawmaker or legislature would be able to attain alone.⁷⁴ Coke referred to government actions that departed from traditional long usage as “unusual” actions or “innovations,” condemning them as dangerous and presumptively unjust.⁷⁵

66. *Id.*

67. *Id.* at 1772.

68. *Id.* at 1768–69.

69. *Id.*

70. *Id.* at 1775.

71. Stinneford, *supra* note 13, at 469–70.

72. John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 561 (2014); see also David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel to be Unconstitutional?*, 16 PUB. AFF. Q., U. OF ILL. 77, 89 (2002). David Hershenov, a philosophy professor at the University of Buffalo, posits an interesting theory that will not be explored in depth in this paper but warrants a brief note. While Hershenov is largely in agreement with Stinneford’s reading of “unusual,” he stated that its meaning could, at least sometimes, be based on the public’s subjective understanding of what is unusual rather than the statistical reality of what is unusual. Therefore, even if a punishment is factually a common practice, it is possible for the public to consider it unusual if the public lacks knowledge of the practice. Hershenov argues that if the people are unaware of a certain practice, that means that the practice, no matter how long it has been in use, does not enjoy the consent of the people. This is especially salient in the case of long-term solitary confinement, where one can argue that the public may not be adequately aware of the practice or its effects.

73. 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1608), reprinted in 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE § 170, at 701 (Steve Sheppard ed., 2003).

74. *Id.*

75. *Id.* at 740 (comparing “innovations” unfavorably in the context of long usage of the common law). In similar fashion, William Blackstone, a prominent common law scholar in the eighteenth and nineteenth centuries, concurred with Coke that the common law consisted of customs that had “binding power” and enjoyed “long and immemorial usage” and “universal reception throughout the kingdom.” Blackstone’s arguments had particular influence during the founding era. His treatise, *Commentaries on the Laws of England*, has been regarded as the “handbook of the American revolutionary” and “the bible of American jurisprudence in the 19th century.” Stinneford, *supra* note 41, at 1787.

By the end of the eighteenth century, the American colonists accepted the English common law as part of their own body of law.⁷⁶ Before and during the American Revolution, the colonists condemned Parliament's actions, such as taxing the colonists without representation and denying them common law protections in criminal trials.⁷⁷ They referred to these actions as "innovations" and "usurpations" that were "unusual," "unconstitutional," and "void."⁷⁸ In the Declaration of Independence, the Founders stated that the English monarch had disrupted the legislative process by "[c]all[ing] together legislative bodies at places *unusual*, uncomfortable, and distant."⁷⁹ They used "unusual" to refer to calling legislative bodies in places not designated by long usage, indicating that the Continental Congress saw long usage as a standard for judging the integrity of governmental actions.⁸⁰

Statements from state ratification conventions further support this reading of "unusual." In 1788, anti-Federalist Patrick Henry remarked that the dearth of common law constraints in the Constitution would result in a federal government that was simply a series of "new and unusual experiments."⁸¹ He argued that certain powers granted to the federal government would empower it to engage in unusual, and therefore tyrannical, activities.⁸² He stated that the Constitution gave the federal government powers that were not cognizable under the common law and thus dangerously allowed for experimentation.⁸³ Specifically, he believed that the power to make treaties, call forth the militia, and punish crime would allow a federal government unbound by the common law to enter into treaties calling for "unusual punishments,"⁸⁴ discipline the militia using "unusual and severe methods,"⁸⁵ or impose cruel and unusual punishments on criminal defendants.⁸⁶ Therefore, Henry believed that custom and long usage of the common law was the best way to protect individual liberty and prevent the government from engaging in experimentation, innovation, and unusual practices.⁸⁷ Similarly, after the Eighth Amendment was ratified, a number of state courts applying their state analogs of the Eighth Amendment recognized that a practice that enjoyed long usage could not be deemed "unusual."⁸⁸

76. PAUL SAMUEL REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 52 (Lawbook Exch., Ltd. 2004) (1898).

77. Stinneford, *supra* note 41, at 1795–96.

78. *Id.*

79. THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776) (emphasis added).

80. Stinneford, *supra* note 41, at 1798.

81. Patrick Henry, Speech to the Virginia Ratifying Convention for the United States Constitution (June 9, 1788), *in* DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 172 (Jonathan Elliot ed., 1891).

82. *Id.*

83. *Id.*

84. *Id.* at 503–04.

85. *Id.* at 412.

86. *Id.* at 447–48.

87. Stinneford, *supra* note 41, at 1807.

88. See *Barker v. People*, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823) (upholding a statute that disenfranchised people convicted of dueling because disenfranchisement was not an unusual punishment at common law). The

Another concept integral to a proper understanding of “unusual” is desuetude. Desuetude is the concept that “if a law is left unenforced for a long time despite numerous enforcement opportunities, it may lose all legal force because a negative custom has grown up against it.”⁸⁹ The nature of the non-usage is also important. If it was a conscious, voluntary decision (usually by a legislature or an executive body) not to use the practice for a period of fifty to one hundred years, this supports the argument that the law is desuete.⁹⁰ Thus, a traditional common law punishment loses its presumption of constitutionality if it falls out of usage for a considerable period of time.⁹¹

The concept of desuetude was illustrated in *James v. Commonwealth*.⁹² In that case, the Pennsylvania Supreme Court had to decide whether subjecting a woman to the ducking stool⁹³ for being a common scold⁹⁴ was a permissible form of punishment under the Eighth Amendment and the Pennsylvania Constitution’s ban on cruel punishments. Though the ducking stool had previously been a traditional common law punishment for this kind of crime, the court found that the ducking stool was no longer permissible under the common law.⁹⁵ “As a starting point, the court recognized that the common law was constituted by usage, and that therefore, if a traditional punishment ceases to be used, it also ceases to be part of the common law.”⁹⁶ In England, no one had been subject to the ducking stool since about two centuries prior to the time of the case, and the practice had never become part of Pennsylvania’s common law.⁹⁷ The court stated that “[t]he long disuetude [*sic*] of any law amounts to its repeal.”⁹⁸ According to the court, “[t]he common law doctrine of desuetude is a particularly important constraint on criminal punishment...because it allows the law to accommodate societal advancement in

court clarified in a later opinion that the plaintiff’s claim was without merit because the Eighth Amendment did not apply to the states. *Barker v. People*, 3 Cow. 686, 686 (N.Y. Sup. Ct. 1824). *See also Commonwealth v. Wyatt*, 27 Va. (6 Rand.) 694, 701 (1828) (upholding a statute that enabled the court to order those convicted of setting up illegal gambling operations to be whipped because, though whipping was “certainly odious,” it could not be deemed unusual because the court’s discretion to order whipping had “always [been] exercised by [c]ommon [l]aw courts.”).

89. Stinneford, *supra* note 72, at 565.

90. *Id.* at 570–71.

91. *Id.*

92. *James v. Commonwealth*, 12 Serg. & Rawle 220 (Pa. 1825).

93. A “ducking stool” referred to a “castigatory,” which is “[a] device for punishing scolds by repeatedly plunging them underwater.” *Castigatory*, BLACK’S LAW DICTIONARY 231 (8th ed. 2004).

94. A scold was “[a] person who regularly br[oke] the peace by scolding people, increasing discord, and generally being a public nuisance to the neighborhood.” *Id.* at 1374 (entry for “scold”).

95. *James*, 12 Serg. & Rawle at 231.

96. Stinneford, *supra* note 41, at 1814.

97. *James*, 12 Serg. & Rawle at 227, 233 (“[T]he common-law punishment of ducking was not received nor embodied by usage so as to become a part of the common law of Pennsylvania. It was rejected, as not accommodated to the circumstances of the country, and against all the notions of punishments entertained by this primitive and humane community.”).

98. *James*, 12 Serg. & Rawle at 228.

‘manners’ and ‘education’ through the ‘silent and gradual disuse of barbarous criminal punishment.’”⁹⁹

In *Wilkerson v. Utah*, an 1878 case, the Supreme Court contrasted customary punishments still in practice with those that had fallen out of usage,¹⁰⁰ implicitly applying the concept of desuetude. The Court stated that punishments such as drawing and quartering, disembowelment, beheading, public dissection, and being burned alive,¹⁰¹ though permissible at common law, were clearly unconstitutional under the Cruel and Unusual Punishments Clause.¹⁰² These practices had fallen out of usage for so long (for at least a century) that the Court could not fathom authorizing them under the Clause.¹⁰³ Though the Court did not explicitly reference the concept of “desuetude,” this was the underlying basis for its decision.

This definition of “unusual”—contrary to longstanding tradition—resolves much of the ambiguity that plagues the Supreme Court’s Eighth Amendment jurisprudence. It clarifies the Eighth Amendment, provides it with its full meaning, and makes it both more administrable and less prone to manipulation. The original meaning of “unusual” directs the Court to look at new punishments and determine whether they are consistent with longstanding tradition, just as the court in *James v. Commonwealth* did. This definition, based on historical evidence, provides an effective baseline by which to determine whether a punishment is “unusual.” It breathes life back into a crucial word in the Constitution that the Supreme Court has virtually rendered dead and can remedy both the instability and guesswork of the evolving standards approach, as well as the intransigence and unease associated with Scalia’s approach.¹⁰⁴ Neither camp fully appreciates or applies the meaning of “unusual.” They either read the word entirely out of the Clause or else figure that it means “out of the ordinary” or “different from what is generally done,”¹⁰⁵ using either today or the time the amendment was ratified as a benchmark. If the Court employed the proper meaning of “unusual,” it would be able to apply the Cruel and Unusual Punishments Clause in a more historically faithful and administrable manner.

For example, imagine that five years ago the practice of beheading became a legal form of execution in the United States, with all fifty states adopting and practicing it. If a person on death row were to bring a claim that beheading is cruel and unusual, the Court, using its evolving standards approach, could not say in good faith that beheading is unusual, given that it is currently being practiced in all fifty states. Such a practice could not be deemed “odd” or “different from what is generally done.” However, it may be deemed unusual under the proper original

99. Stinneford, *supra* note 72, at 578 (quoting *James*, 12 Serg. & Rawle at 228).

100. *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

101. *Id.*

102. *Id.* at 136.

103. Stinneford, *supra* note 72, at 584.

104. See Stinneford, *supra* note 41, at 1817–18.

105. *Trop v. Dulles*, 356 U.S. 86, 100–01 n.32 (1985) (citations omitted).

understanding of the term because it has only been implemented for five years, which is not a long enough time to establish it as a “usual” form of punishment that can overcome Eighth Amendment scrutiny.

Rather than looking at the existence, frequency, and general acceptance of a punishment at one fixed point in time—whether the present, for the evolving standards camp, or 1790, for Scalia—the proper original understanding looks at whether a punishment is reasonable according to the long usage of the common law. The emphasis should be on the longevity of the practice. Punishments that do not withstand the test of time and/or fall out of use are considered unusual. This brings a greater range of punishments within the scope of the Eighth Amendment since modern imprisonment in its many forms is an innovative practice. “Reforms” like long mandatory minimum sentences, chemical castration for sex offenders, and—especially salient to the analysis here—long-term solitary confinement can thus be subject to meaningful judicial review.

B. The Original Meaning of “Cruel”: Effect, Not Intent

The Supreme Court ought to also align its understanding of “cruel” with its correct original meaning. “Cruel” can be understood in one of two ways: it may refer to the intent of the punisher—her “delight in, or conscious indifference to, the pain of others”¹⁰⁶—or it may refer to the nature and effects of the punishment itself, irrespective of the punisher’s intent.¹⁰⁷ Stinneford refers to the former as the “cruel-intent” reading and the latter as the “cruel-effect” reading.¹⁰⁸ A proper original understanding of the Clause counsels in favor of the latter—that “cruel” means “unjustly harsh” rather than “motivated by cruel intent.”¹⁰⁹ Further, to analyze whether a punishment is cruel in the context of the Cruel and Unusual Punishments Clause, the inquiry is whether a certain punishment is significantly harsher than the longstanding punishment it replaces, not whether it is harsh *per se*.¹¹⁰ This framework provides judges with a basis for comparison and deters them from imposing their own moral predispositions.¹¹¹

A “cruel-effect” reading is based on the meaning of “cruel” in the two leading dictionaries at the time the Eighth Amendment was passed,¹¹² the use of “cruel” in

106. Stinneford, *supra* note 13, at 444.

107. *Id.*

108. *Id.* at 445–46.

109. *Id.* at 464, 493.

110. See Stinneford, *supra* note 41, at 1745.

111. Stinneford, *supra* note 41, at 1751–53.

112. See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE dxix (6th ed. 1785); 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828). Both of the leading dictionaries provided two definitions of cruel, one aligned with the intent portion of “cruel” to describe a person and the other aligned with the effect reading of “cruel” to describe a thing. Notably, Justice Thomas’s concurrence in *Baze v. Rees*, 553 U.S. 35, 41, 102 (2008), a case in which the Court upheld the constitutionality of a certain form of lethal injection, conveniently fails to note both definitions, instead referencing only the cruel-intent definition. In fact, both dictionaries state that “cruel” can also be understood as, among other things,

17th and 18th century discussions of the “cruell and unusuall punishments” clause in the English Bill of Rights, debates in the state ratifying conventions and in the First Congress, early cases that interpreted the clause or a state law equivalent of it, and early legal treatises that discussed cruel and unusual punishments.¹¹³ According to the research, there is no instance in the 1800s or early 1900s when any authoritative figure or text claimed that the punisher’s intent was a factor in the “cruel” analysis.¹¹⁴

Applying an intent reading of “cruel” also leaves open the question of what to do when punishments unintentionally cause severe pain. Could such punishments ever be deemed cruel and unusual? Based on Supreme Court jurisprudence, it appears that the answer is no.

“We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”¹¹⁵

In order for an inmate to show that a punishment or condition he suffered in prison was cruel and unusual, he must show, at a minimum, that a prison official acted with deliberate indifference.¹¹⁶ This standard requires the prisoner to delve into the prison official’s subjective intent to demonstrate an Eighth Amendment violation.¹¹⁷ It fails to apply a proper understanding of “cruel”—that the cruelty of a punishment should turn on the *effect* of the *punishment*, rather than the *intent* of the *punisher*.¹¹⁸ The former analysis would also be easier for the Supreme Court to undertake. Rather than attempting to scrutinize the subjective intent of a prison official, the Court could instead scrutinize the cruelty of the punishment itself in light of longstanding practice.¹¹⁹

“mischievous; destructive; causing pain” (Johnson’s dictionary) and “inhuman; barbarous; savage; causing pain, grief or distress; exerted in tormenting, vexing or afflicting.” (Webster’s dictionary). Furthermore, though the dictionaries contain both definitions, the fact that the Cruel and Unusual Punishments Clause references punishment, a thing, rather than punisher, a person, counsels in favor of applying the effect definition of “cruel.” Stinneford, *supra* note 13, at 468.

113. Stinneford, *supra* note 13, at 466–67. See Stinneford, *supra*, for a full historical analysis of the original meaning of “cruel.”

114. *Id.* at 464.

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

116. This standard was first established in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), and then extended to all claims that prison conditions are cruel and unusual in *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

117. *Farmer*, 511 U.S. at 839.

118. Stinneford, *supra* note 13, at 445.

119. *Id.* at 464.

III. LONG-TERM SOLITARY CONFINEMENT

While some federal courts have recognized the adverse effects of solitary confinement,¹²⁰ and some have even found a violation of the Eighth Amendment in some cases,¹²¹ there is no established federal precedent that long-term solitary confinement *per se* violates the Eighth Amendment.¹²² This Part will proceed to discuss the history and nature of solitary confinement and prove why it is both cruel and unusual under the proper original analysis.

Today, solitary confinement,¹²³ the practice of isolating prisoners in closed cells with virtually no human interaction, exists in some fashion in most federal, state, and local jails and prisons.¹²⁴ Though solitary confinement varies from prison to prison, it has certain characteristics across all prisons. Prisoners kept in solitary confinement typically spend twenty-two to twenty-three hours a day in sixty to eighty square foot cells separated from other people.¹²⁵ They are prohibited from having any normal conversation, social interaction, or visitation with another human being, are constantly surveilled and monitored, and are denied access to educational, vocational, and recreational programs.¹²⁶ Because modern technology makes surveillance easier, solitary confinement is more complete and dehumanizing than ever before.¹²⁷ Solitary confinement can last for days, weeks, months, years, or decades, and prisoners placed in solitary often do not know when or if

120. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1229 (N.D. Cal. 1995) (describing Chief Judge Henderson's tour of the prison and his observation that "some inmates spend the time simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing in a zoo."); *Davenport v. DeRobertis*, 844 F.2d 1310, 1313–16 (7th Cir. 1988), cert. denied, 488 U.S. 908 (1988) ("[T]here is plenty of medical and psychological literature concerning the ill effects of solitary confinement . . . [T]he record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year and even month after month can cause substantial psychological damage, even if the isolation is not total.").

121. See *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 779–80 (M.D. Pa. 2016) (finding that prison officials acted with deliberate indifference when they kept a prisoner in solitary confinement for thirty-six years); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 677–82 (M.D. La. 2007) (finding that prisoners who spent twenty-eight to thirty-five years in solitary provided evidence sufficient to show that prison officials acted with deliberate indifference in violation of the Eighth Amendment); *Morris v. Travisono*, 549 F. Supp. 291, 295 (D.R.I. 1982) (holding that prisoner's eight-and-a-half year period in solitary confinement resulted in "unnecessary and wanton infliction of pain in violation of the eighth amendment") (internal quotations omitted).

122. In fact, in *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), the court, while recognizing that inmates were at risk of serious psychological injury, held that the risk was not of "sufficiently serious magnitude" to find a "*per se*" violation of the Eighth Amendment for all prisoners held in long-term solitary confinement. *Id.* at 1265-66. The court went on to state that it would be a violation of the Eighth Amendment to place prisoners who already have a mental illness in solitary confinement, but that for others, they simply experience "generalized psychological pain" that does not contravene the Eighth Amendment. *Id.*

123. Jean Casella & Sal Rodriguez, *What Is Solitary Confinement?*, THE GUARDIAN (Apr. 27, 2016), <https://www.theguardian.com/world/2016/apr/27/what-is-solitary-confinement>.

124. *Id.*

125. Sal Rodriguez, *Solitary Confinement in the United States: FAQ*, SOLITARY WATCH (2015), <http://solitarywatch.com/wp-content/uploads/2017/09/Solitary-Confinement-FAQ-2015.pdf>.

126. *Id.*

127. *Id.*

they will ever get out.¹²⁸ Together, all of these factors make this form of isolation uniquely devastating.¹²⁹

The American Correctional Association's 1959 Manual of Correctional Standards states that solitary confinement should only be used as a last resort, should not last longer than fifteen days, and that even during short periods, prisoners must be provided with individual or group therapy to ensure the stability of their mental health.¹³⁰ According to a joint study done by the Association of State Correctional Administrators and Yale Law School that involved 54,382 prisoners kept in solitary confinement in 41 jurisdictions, 99% of prisoners were kept in solitary for 15 days or more, with 76% of them kept in solitary for a range of 15 days to 1 year, and 23% of them kept in solitary for a range of one year to over six years.¹³¹ Consequently, this Note defines "long-term solitary confinement" as confinement that lasts for fifteen days or longer and is imposed for any reason, whether administrative or disciplinary.

A. *Origins of Long-Term Solitary Confinement*

While solitary confinement was a method previously espoused in English prison literature, the practice first appeared in the U.S. in 1790 in Philadelphia's Walnut Street prison.¹³² In 1790, the Pennsylvania legislature authorized construction of a block of solitary confinement cells within the Walnut Street prison.¹³³ While some prisoners were subject to hard labor, the more incorrigible inmates were sentenced to serve part or all of their term in solitary confinement.¹³⁴ The Walnut Street prison was replaced by both the Western State Penitentiary in Pittsburgh, which opened in 1826 and was designed to enforce idle solitude, and the Eastern State Penitentiary, which opened in 1829, and was designed to enforce individual labor within solitary cells.¹³⁵ The Eastern State Penitentiary, also known as Cherry Hill,

128. *Id.*

129. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 125 (2003); see also DEREK S. JEFFREYS, SPIRITUALITY IN DARK PLACES: THE ETHICS OF SOLITARY CONFINEMENT 49–50 (2013); MICHAEL SANTOS, INSIDE: LIFE BEHIND BARS IN AMERICA 75 (2006) (describing conditions in solitary confinement as "the most squalid of conditions" with some prisoners "locked in the hole for months or years at a time").

130. See Hafemeister & George, *supra* note 10, at 12.

131. *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms*, ASSOC. OF STATE CORR. ADM'RS & THE LIMAN PROGRAM, YALE LAW SCHOOL 7 (Nov. 2016), <https://law.yale.edu/system/files/area/center/liman/document/aimingtoreductic.pdf>.

132. ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISON AND PUNISHMENT IN EARLY AMERICA 59 (1992).

133. *Id.*

134. *Id.*

135. *Id.* at 65.

implemented the first strictly solitary confinement system.¹³⁶ Prisoners were not allowed to speak and were kept isolated in their cells.¹³⁷

Since 1740, philanthropists had endorsed solitary confinement as a way of separating inmates from sin in order to facilitate their spiritual recovery.¹³⁸ They believed that keeping prisoners away from social interaction would force them to meditate on their guilty consciences, talk to God, repent of their sins, and promise to live a better life.¹³⁹ The idea was that the lives of criminals could not be reformed unless they wanted to reform themselves and turn away from sin.¹⁴⁰ “Incarceration. . . induced criminals to listen without distraction to the voice of their own consciences.”¹⁴¹ Proponents of solitary confinement believed that having to face one’s guilty conscience was painful enough that solitary confinement would dissuade inmates from ever committing wrongful acts again.¹⁴² At the same time, they believed solitary confinement would not go so far as to harden the attitudes of inmates, especially once inmates were convinced that the punishment was just and for their own good.¹⁴³

Another method of incarceration arose in the form of the Auburn prison system. Started in 1823 in New York, the Auburn system included separate confinement at night and group hard labor during the day. It also imposed other disciplinary rules such as a strict rule of silence, orderly marching to and from cells, and constant oversight of prisoners during work hours.¹⁴⁴ While supporters of both the Pennsylvania system and the Auburn system lobbied state legislatures, most states chose to implement the Auburn model.¹⁴⁵ Of the states that did choose to adopt the Pennsylvania prison model, all of them, with the exception of Pennsylvania, quickly abandoned it, as this Note will later discuss.¹⁴⁶

B. *Why Long-Term Solitary Confinement Is “Unusual”*

Long-term solitary confinement can properly be deemed unusual because 1) it is a practice that previously fell out of use for over a century, and 2) it has not been practiced for a long enough time since its resurgence to be deemed a “usual” practice.¹⁴⁷

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

137. *Id.*

138. HIRSCH, *supra* note 132, at 19.

139. *Id.*

140. *Id.*

141. *Id.*; see also MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 78 (1978) (“In the silence of their cells, superintended by an authority too systematic to be evaded, too rational to be resisted, prisoners would surrender to the lash of remorse.”).

142. Hirsch, *supra* note 132, at 20.

143. *Id.*

144. *Id.* at 65; see also DAVID POLIZZI, SOLITARY CONFINEMENT: LIVED EXPERIENCES AND ETHICAL IMPLICATION 21 (2017).

145. Hirsch, *supra* note 132, at 65–66.

146. Bennion, *supra* note 136, at 747.

147. It is important to flag here another argument in favor of finding long-term solitary confinement “unusual.” As mentioned in footnote 47, *supra*, in relation to David Hershenov’s work, a practice that has been in

First, long-term solitary confinement is a practice that previously fell out of usage for over a century in this country.¹⁴⁸ A punishment is “usual” according to a proper original reading of the Cruel and Unusual Punishments Clause if it has been “*continuously* employed throughout the jurisdiction for a *very long time*.”¹⁴⁹ After the construction of the Cherry Hill prison in Pennsylvania, prisons implementing long-term solitary confinement surfaced across the country¹⁵⁰ in states such as Massachusetts, Maryland, and New Jersey.¹⁵¹ However, this trend did not last long. Officials found that these prisons were expensive to maintain and severely detrimental to the mental health of prisoners.¹⁵² Prominent figures who visited these early prisons commented on the wretched conditions of solitary confinement.¹⁵³ After visiting the Cherry Hill prison in 1842, Charles Dickens stated that its “rigid, strict, and hopeless solitary confinement” was “cruel and wrong.”¹⁵⁴ He said, “I hold this slow and daily tampering with the mysteries of the mind, to be immeasurably worse than any torture of the body.”¹⁵⁵ Likewise, Alexis de Tocqueville stated that solitary confinement was a practice that “proved fatal for the majority of prisoners” because it “devours the victim incessantly and unmercifully; it does not reform, it kills.”¹⁵⁶ Every state that implemented the Pennsylvania system between 1830 and 1880, other than Pennsylvania itself,¹⁵⁷ abandoned it within just two decades.¹⁵⁸ Though solitary confinement was introduced in various

use for a long time may nonetheless be deemed unusual if the public does not have sufficient awareness of the practice. This is because a practice cannot truly be deemed “usual” unless it has been practiced for a long period of time *and* enjoys the consent of the people. Although this argument will not be pursued in this paper, it is likely a viable one if evidence can be marshaled to show that the public is unaware of the extent to which long-term solitary confinement is used today in the American incarceration system and/or its detrimental effects.

148. Bennion, *supra* note 136, at 747.

149. Stinneford, *supra* note 41, at 1745 (emphasis added).

150. Hafemeister & George, *supra* note 10, at 12 n.44.

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

152. Hafemeister & George, *supra* note 10, at 10–11.

153. See generally DICKENS, *supra* note 2, at 146–47; TORSTEN ERIKSSON, THE REFORMERS: AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS 49 (1976) (quoting de Tocqueville).

154. DICKENS, *supra* note 2, at 146–47.

155. *Id.*

156. ERIKSSON, *supra* note 153, at 49

157. Bennion, *supra* note 136, at 747.

158. See Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 35, 56 n.54 (1921). Barnes details the states that introduced the Pennsylvania model of solitary confinement only to abandon it within two decades. In Maine, it was introduced in 1824 and abandoned in 1827. In Maryland, it was introduced in 1809 and abandoned in 1838. In Massachusetts, it was introduced in 1811 and abandoned in 1829. In New Jersey, it was introduced in 1820, abandoned in 1828, reintroduced in 1833, and abandoned again in 1858. In Rhode Island, it was introduced in 1838 and abandoned in 1844. Lastly, in Virginia it was introduced in 1824 and abandoned in 1827. *Id.* See also Hafemeister & George, *supra* note 10, at 11–12; Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NPR (July 26, 2006), <https://www.npr.org/templates/story/story.php?storyId=5579901> (“The first experiment in solitary confinement in the United States beg[an] at the Eastern State Penitentiary in Philadelphia . . . But many of the inmates [went] insane commit[ted] suicide, or [were] no longer able to function in society, and the practice [was] slowly abandoned during the following decades.”).

parts of the United States, it quickly fell into disuse.¹⁵⁹ In fact, a 1939 prison psychiatric report recommended that the practice no longer be adopted in *any* civilized nation.¹⁶⁰

Even the Supreme Court took notice of the opposition to the practice of long-term solitary confinement. In the 1890 case of *In re Medley*, the Court condemned the use of solitary confinement for a period of just four weeks on a man who was already sentenced to death.¹⁶¹ Though it did not hold that long-term solitary confinement was *per se* cruel and unusual, the Court struck down a Colorado statute requiring that prisoners be placed in solitary confinement until the time of their execution as an *ex post facto* law.¹⁶² The Court stated that the use of solitary here was not “a mere unimportant regulation as to the safe-keeping of the prisoner” and could not be “relieved of its objectionable features.”¹⁶³ It pointed out that the practice attracted considerable public attention and was found to be too severe in the mid-1800s.¹⁶⁴ Despite some experimentation in the country with solitary confinement, the Court noted that:

“[E]xperience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”¹⁶⁵

This demonstrates that long-term solitary confinement never became a “usual” practice after it first arose in the United States. In fact, nearly every state explicitly rejected the practice after they saw the detrimental effects it had on prisoners.¹⁶⁶

After long-term solitary confinement fell into disuse for most of the nineteenth and twentieth centuries, it resurged in the 1980s.¹⁶⁷ However, it has not been practiced for a long enough time since then to be considered a “usual” practice. There are several reasons why the practice resurfaced. Beginning in the late 1970s, the prison population increased exponentially.¹⁶⁸ In 1978, there were 307,276 inmates in state and federal prisons¹⁶⁹ and by the end of 2012, that number increased to

159. See *supra* text accompanying note 158.

160. J.G. WILSON & M.J. PESCOR, PROBLEMS IN PRISON PSYCHIATRY 25 (1939).

161. *In re Medley*, 134 U.S. 160, 161–62 (1890).

162. *Id.* at 171.

163. *Id.* at 167.

164. *Id.* at 168.

165. *Id.*

166. Hafemeister & George, *supra* note 10, at 11–12.

167. Bennion, *supra* note 136, at 747.

168. *Id.* at 747–48.

169. *Id.*

1,571,013,¹⁷⁰—a more than 400% increase. In the 1970s, many abandoned the goal of rehabilitation as the primary justification for imprisonment because they believed rehabilitative efforts had no noticeable effect on recidivism.¹⁷¹ In its stead, incapacitation and retribution became the central goals of incarceration, cementing the idea that prisons ought to aim to punish, not cure.¹⁷² This, in turn, made it much easier to justify longer and more stringent sentences that utilized long-term solitary confinement.

Prison officials also resorted to solitary confinement to address the issue of gang-related violence within prisons that became increasingly difficult to control.¹⁷³ In 1983, after inmates murdered two corrections officers at a penitentiary in Marion, Illinois, the prison was put on permanent lockdown.¹⁷⁴ That prison became the first “supermax” prison in the country.¹⁷⁵ Supermax prisons feature long-term, segregated housing for criminals who are considered especially dangerous.¹⁷⁶ By 2004, forty-four states had supermax prisons housing about 25,000 inmates.¹⁷⁷ In 2014, sources reported that there were 80,000 to 100,000 inmates housed in solitary confinement in the United States.¹⁷⁸ Today, every U.S. jurisdiction practices some form of solitary confinement in which inmates are kept in cells for at least twenty-two hours a day.¹⁷⁹ However, long-term solitary confinement has only been used in a widespread fashion for about thirty-five years (from 1983 to the present).¹⁸⁰

A practice is “usual” according to the original meaning of the Cruel and Unusual Punishments Clause if it has been used *continuously* for a *very long time* throughout the jurisdiction.¹⁸¹ Long-term solitary confinement has not been used continuously for a very long time throughout the country. Though the practice resurged in the 1980’s and is now used in every state, a period of thirty-five years is not long enough to incorporate a punishment into the common law. While the historical evidence does not provide a specific period of time that a punishment

170. See E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUST. STATS., U.S. DEP’T OF JUSTICE, PRISONERS IN 2012—ADVANCE COUNTS (2013), <https://bjs.gov/content/pub/pdf/p12ac.pdf>. Although the United States holds just five percent of the world’s population, it holds 25% of its prisoners. Bennion, *supra* note 136, at 748.

171. Craig Haney, *Demonizing the “Enemy”: The Role of “Science” in Declaring the “War on Prisoners,”* 9 CONN. PUB. INT. L.J. 185, 186 (2010).

172. Bennion, *supra* note 136, at 750.

173. See *Wilkinson v. Austin*, 545 U.S. 209, 213–14 (2005).

174. Bennion, *supra* note 136, at 750–51; see also SANTOS, *supra* note 129, at 30–38 (describing the gruesome murders of the officers at the Marion Penitentiary that led to lockdown); Polizzi, *supra* note 144, at 26–27 (same).

175. Bennion, *supra* note 136, at 750–51.

176. Daniel P. Mears, *Evaluating the Effectiveness of Supermax Prisons*, URB. INST. JUST. POL’Y CTR. 1, 4 (2006), https://www.urban.org/research/publication/evaluating-effectiveness-supermax-prisons/view/full_report.

177. *Id.* at ii.

178. See Baumgartel, *supra* note 9, at 3.

179. Eastaugh, *supra* note 10, at 117.

180. Bennion, *supra* note 136, at 750–51.

181. Stinneford, *supra* note 41, at 1745.

must be used to be considered “usual,” mere decades is not enough. As Edward Coke explained, a certain practice has to be “fined and refined” until it reaches a level of perfection that warrants the status of being “usual” under the common law.¹⁸² A period of thirty-five years pales in comparison to the long usage of formerly accepted punishments such as whipping, the pillory, and the ducking stool. For example, whipping was an accepted form of judicial corporal punishment in the U.S. for two centuries.¹⁸³ Even punishments that used to be traditional can *become* unusual when they fall out of use for a long time—usually for a century or more—¹⁸⁴and become desuete, like the ducking stool.¹⁸⁵ Long-term solitary confinement fell out of usage in all “jurisdictions” (except Pennsylvania) from at least the mid-1800s to the latter half of the 1900s, a period of over a century.¹⁸⁶ Since then, prisons in America have only employed the practice for about thirty-five years. As such, long-term solitary confinement is still an “unusual” practice.¹⁸⁷

The Supreme Court’s current evolving standards approach would fail to recognize this. If asked whether long-term solitary confinement is cruel and unusual, the justices would likely state that the practice is not at all unusual because it has been used in many jurisdictions across the United States for the past thirty-five years and counting and thus enjoys a “national consensus.”¹⁸⁸ The proper original understanding of the Cruel and Unusual Punishments Clause corrects this conclusion. A national consensus at any given point in time is not enough to find that a punishment is usual. “Unusual” does not just simply mean “strange” or “out of the ordinary”—it means “contrary to ‘long usage.’”¹⁸⁹ Because long-term solitary confinement fell out of use and has not been practiced for a long enough time since its resurgence, it is a practice that has not enjoyed continuous use and is therefore unusual.

C. *Why Long-Term Solitary Confinement is “Cruel”*

Long-term solitary confinement is “cruel” because it is unjustly harsh in light of longstanding practice.¹⁹⁰ While it lacks the gruesome pomp and circumstance of being subjected to whipping, the breaking wheel, disembowelment, or a number of other gory punishments that have fallen out of use, long-term solitary confinement

182. 1 COKE, *supra* note 73, at 701.

183. HERBERT ARNOLD FALK, CORPORAL PUNISHMENT: A SOCIAL INTERPRETATION OF ITS THEORY AND PRACTICE IN THE SCHOOLS OF THE UNITED STATES 31 (1941).

184. Stinneford, *supra* note 13, at 497–98.

185. See *James v. Commonwealth*, 12 Serg. & Rawle 220, 228 (Pa. 1825).

186. Bennion, *supra* note 136, at 747.

187. *Id.* at 750–51.

188. See *Roper v. Simmons*, 543 U.S. 551, 564 (2005); *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

189. Stinneford, *supra* note 41, at 1745.

190. See Stinneford, *supra* note 13, at 464.

is a quiet and invidious form of punishment that amounts to torture.¹⁹¹ As the Supreme Court has repeatedly stated, torture is prohibited under the Cruel and Unusual Punishments Clause.¹⁹² As stated in this Note,¹⁹³ the inquiry is whether a certain punishment is significantly harsher than the longstanding punishment it replaces, not whether it is unnecessarily painful *per se*.¹⁹⁴ While the evidence can support an argument that solitary confinement *is* unnecessarily painful *per se*, it is also unjustly harsh when compared to the punishment it replaces—namely, being confined in a prison’s general population.¹⁹⁵

Some may argue that solitary confinement is preferable to being held in general population because of the risk of physical, verbal, and sexual abuse in general population. However, studies demonstrate that detrimental mental effects are more likely to develop in solitary confinement than in general population. For example, in 2005, of the 44 prisoners within the California prison system who committed suicide, 70% of them were held in solitary confinement.¹⁹⁶ Furthermore, very minor infractions in solitary confinement, for which prisoners in general population would not be punished, will likely lead to more time spent there because prisoners in solitary are scrutinized closely and subject to absolute institutional control.¹⁹⁷ While placement in general population does pose a risk of assault, prisoners in general population typically have access to vocational, educational, and recreational programs, interaction with guards and other inmates, and visitation rights to see family and friends.¹⁹⁸ Prisoners in solitary confinement often lack every single one of these privileges, which contributes to their mental torment and deterioration.¹⁹⁹

Although researchers cannot conduct experiments precisely imitating the conditions of long-term solitary confinement due to practical and ethical constraints, solitary confinement’s effects are described in personal accounts, descriptive studies,

191. DICKENS, *supra* note 2, at 146–47. Dickens condemned solitary confinement because though its “wounds are not upon the surface, and it extorts few cries that human ears can hear,” it is “a secret punishment which slumbering humanity is not roused up to stay.” *Id.*

192. See *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (“[I]t is safe to affirm that punishments of torture . . . are forbidden by [the Eighth] [A]mendment to the Constitution.”); *In re Kemmler*, 136 U.S. 436, 447 (“Punishments are cruel when they involve torture . . .”); *Estelle v. Gamble*, 429 U.S. 97, 102 (proscribing torture and barbarous punishment was “the primary concern of the drafters” of the Eighth Amendment).

193. See *infra* Part II.B.

194. Stinneford, *supra* note 41, at 1745.

195. “General population” refers to the population of prisoners not given any specific treatment or classification within a prison. Prisoners in general population typically eat, converse, and engage in recreation with other prisoners.

196. Don Thompson, *Convict Suicides in State Prisons Hit Record High: '05 Numbers Prompt Calls for Focus on Prevention*, ASSOCIATED PRESS (Jan. 3, 2006).

197. Polizzi, *supra* note 144, at 74.

198. Rodriguez, *supra* note 125.

199. *Id.*

and systematic research. Psychologist Craig Haney and criminologist Mona Lynch reviewed studies spanning three decades and conducted across several continents by psychiatrists, sociologists, architects, and other professionals.²⁰⁰ All of the studies reveal similar negative psychological effects. They report that prisoners placed in solitary confinement experience “insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, emotional breakdowns, self-mutilation, and suicidal impulses.”²⁰¹ Every major study of solitary confinement in which non-voluntary confinement lasted for more than ten days showed signs of negative psychological effects.²⁰² Researchers who attribute these symptoms to mistreatment by guards and loss of educational, vocational, and recreational opportunities fail to recognize that these are part and parcel of solitary confinement.²⁰³ The practice is detrimental not just because prisoners are completely cut off from meaningful social interaction but also because of these ancillary aspects of the practice.²⁰⁴

Solitary confinement imposes extreme sensory deprivation because it consists of conditions that reduce, alter, or interfere with a person’s normal stimulation from and interaction with her environment.²⁰⁵ Among other things, solitary confinement enforces complete seclusion, minimal social interaction, and an inability to know how much time is passing.²⁰⁶ Many prisoners in solitary have panic attacks, hear voices, hallucinate, experience failure to tolerate ordinary stimuli, and have difficulty thinking, concentrating, and remembering due to the sensory deprivation inherent in solitary confinement.²⁰⁷ After just a few days spent in solitary confinement, a prisoner’s electroencephalogram (“EEG”) test results can indicate a shift toward an abnormal pattern that is indicative of stupor and delirium.²⁰⁸

Personal accounts of time spent in solitary paint the full picture of the torment prisoners face. Jack Abbott, who had multiple stints in solitary confinement, stated

200. 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, 530 (1997).

201. *Id.*; see also HANS TOCH ET AL., MEN IN CRISIS: HUMAN BREAKDOWNS IN PRISON 5–16 (1975).

202. Haney & Lynch, *supra* note 200, at 531.

203. *See id.*

204. *Id.*

205. *See* Leo Goldberger, *Experimental Isolation: An Overview*, 122 AM. J. PSYCHIATRY 774, 775 (1966) (describing conditions that cause extreme sensory deprivation).

206. JEFFREYS, *supra* note 129, at 61–62 (discussing how solitary confinement disturbs inmates’ internal sense of time).

207. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL’Y 325, 335 (2006).

208. *Id.* at 331.

that the punishment is so powerful that it can “alter the ontological makeup of a stone.”²⁰⁹ He detailed the despair he felt: “You sit in solitary confinement stewing in nothingness The lethargy of months that add up to years in a cell, alone, entwines itself about every ‘physical’ activity of the living body and strangles it slowly to death”²¹⁰ The late senator John McCain spent five and a half years as a prisoner of war in Vietnam where he endured regular beatings, torture to the point of having broken bones, and denial of medical treatment.²¹¹ Still, he described the two years he spent in solitary confinement there as the worst form of punishment he had experienced.²¹² He stated, “It’s an awful thing, solitary . . . It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.”²¹³ Likewise, a military study of one hundred and fifty American naval aviators held in captivity in Vietnam “reported that they found social isolation to be as torturous and agonizing as any physical abuse they suffered,” and many of them suffered a greater degree of torture than Senator McCain.²¹⁴

The extreme social isolation inherent in solitary confinement is what makes it most detrimental. The importance of social contact and support in social psychology is well-documented.²¹⁵ Social psychologists like Charles Cooley and George Herbert Mead believed that theories of selfhood rest *entirely* on social interaction.²¹⁶ And even psychologists with more moderate views understand the importance of social interaction for mental, emotional, and physical health and development. A number of studies highlight the connection between isolation and psychiatric illness.²¹⁷

209. JACK ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* 45 (1981). See also Alan Prendergast, *The Caged Life*, DENVER WESTWORD (Aug. 16, 2007), <http://www.westword.com/news/the-caged-life-5094837>. Prendergast detailed the experience of Tommy Silverstein, an inmate held in solitary confinement for 28 years. Silverstein killed one of the officers in the 1983 Marion Penitentiary killings. He likened his time in solitary to “slow constant peeling of the skin, stripping of the flesh, the nerve-wracking sound of water dripping from a leaky faucet in the still of the night while you’re trying to sleep. Drip, drip, drip, the minutes, hours, days, weeks, months, years, constantly drip away with no end or relief in sight.” Silverstein is currently the longest-held prisoner in solitary confinement within the Federal Bureau of Prisons.

210. ABBOTT, *supra* note 209, at 44.

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

212. *Id.*

213. *Id.*

214. *Id.*

215. See Graham Thornicroft, *Social Deprivation and Rates of Treated Mental Disorder: Developing Statistical Models to Predict Psychiatric Service Utilisation*, 158 BRIT. J. PSYCHIATRY 475, 477–78 (1991); Sidney Cobb, *Social Support as a Moderator of Life Stress*, 35 PSYCHOSOMATIC MED. 300 (1976); E. H. Hare, *Mental Illness and Social Conditions in Bristol*, 102 J. MENTAL SCI. 340 (1956); George Herbert Mead, *The Genesis of the Self and Social Control*, 35 INT’L J. ETHICS 251, 268 (1925); CHARLIE HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER 168–210 (1902).

216. See COOLEY, *supra* note 215, at 168–210; Mead, *supra* note 215, at 268.

217. See Cobb, *supra* note 215, at 300; Hare, *supra* note 215, at 340; Thornicroft, *supra* note 215, at 475.

Man is a social animal; he does not live alone. From birth to death he lives in the company of his fellow men. When he is totally isolated, he is removed from all of the interpersonal relations which are so important to him, and taken out of the social role which sustains him. His internal as well as his external life is disrupted. Exposed for the first time to total isolation . . . he develops a predictable group of symptoms, which might almost be called a "disease syndrome."²¹⁸

What makes solitary confinement even more horrific is that it is not a punishment reserved for the most incorrigible criminals. People are placed in solitary for months or years not only for violent acts but for petty offenses such as possession of contraband, drug use, ignoring orders, and using profanity.²¹⁹ Some people are placed in solitary when they have untreated mental illnesses, need protection from other prisoners, or report rape or abuse by prison officials.²²⁰ The practice has become a way for prison and jail officials to effectively exercise total control over prisoners.²²¹

Under the Supreme Court's current deliberate indifference standard,²²² a prisoner who wants to show that the conditions of their solitary confinement violate the Cruel and Unusual Punishments Clause must show that the prison official(s) involved were both "aware of facts from which the inference could be drawn that a substantial risk of harm exist[ed]," and "dr[ew] the inference."²²³ Such a standard easily allows prison officials to escape liability because they can argue that they were simply following prison protocol and were unaware of the harm that solitary confinement can cause. This standard is indicative of the cruel-intent reading of "cruel," which the historical evidence does not support.²²⁴ A cruel-effect reading of "cruel," as previously discussed, is aligned with an original meaning of the Clause and would enable prisoners in solitary confinement to more effectively litigate their claims.²²⁵ Rather than having to delve into the subjective consciences of prison officials, prisoners may point to the well-documented effects of prolonged solitary confinement to establish that the practice itself is cruel.²²⁶ When comparing solitary confinement to confinement in general population, the evidence demonstrates that the former is unjustifiably harsher and has torturous, sometimes irreparable, consequences on prisoners.²²⁷

218. Lawrence E. Hinkle & Harold E. Wolff, *Communist Interrogation and Indoctrination of "Enemies of the States,"* 76 ARCHIVES NEUROLOGY & PSYCHIATRY 115, 127 (1956).

219. Rodriguez, *supra* note 125.

220. *Id.*

221. *Id.*

222. See *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

223. *Id.* at 837.

224. Stinneford, *supra* note 13, at 464.

225. Stinneford, *supra* note 13, at 445.

226. Haney & Lynch, *supra* note 200, at 530.

227. *Id.*

CONCLUSION

The Supreme Court can remedy the defects in its Eighth Amendment jurisprudence by applying the original understanding of the Cruel and Unusual Punishments Clause. Particularly by defining “unusual” as “contrary to ‘long usage,’” the Court can analyze punishments under the proper meaning of the Clause.²²⁸ In doing so, it would find that long-term solitary confinement violates the Eighth Amendment because it is a practice that is unjustly harsh in light of longstanding practice. Long-term solitary confinement quickly fell out of use in most of the country after several states experimented with it in the early 1800s and recognized the detrimental effects it had on prisoners. While it resurfaced in the 1980s, it has not existed long enough in the United States since then to be deemed a “usual” practice. Moreover, it is an odious and unproductive form of punishment compared to typical incarceration in general population. As such, long-term solitary confinement is a cruel and unusual punishment. It can lead to irreparable human damage – suicides like that of Kalief Browder, a young man wrecked by the torment of solitary confinement. While the practice has garnered a notable amount of concern and even ire from psychologists, professors, Supreme Court justices,²²⁹ and even our last president,²³⁰ it is still used to some degree in every

228. Stinneford, *supra* note 41, at 1745.

229. Justices Kennedy and Breyer have both voiced their disapproval of long-term solitary confinement. Justice Kennedy’s concurrence in *Davis v. Ayala*, 135 S. Ct. 2187 (2015), garnered a significant amount of attention. Though the issue in the case did not have to do with solitary confinement, Justice Kennedy condemned the fact that the prisoner in that case served most of his twenty-five years in prison in solitary confinement. Kennedy referenced the death of Kalief Browder and cited research that the practice “exact[s] a terrible price” and ought to be meaningfully assessed. *Id.* at 2208–10. Notably, Kennedy stated, “Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next.” *Id.* at 2209. During his remarks at a House Appropriations Subcommittee hearing on the 2016 Budget Request for the Supreme Court, Kennedy stated, “[T]his idea of total incarceration just isn’t working—and it’s not humane . . . Solitary confinement literally drives men mad.” See Jean Casella, *Supreme Court Justice Kennedy: “Solitary Confinement Literally Drives Men Mad,”* SOLITARY WATCH (Mar. 25, 2015), <http://solitarywatch.com/2015/03/25/supreme-court-justice-kennedy-corrections-system-is-broken-and-solitary-confinement-literally-drives-men-mad/>.

Similarly, Justice Breyer signaled his disapproval of solitary confinement in his dissent to a denial of the stay of an execution by the Supreme Court. *Ruiz v. Texas*, 137 S. Ct. 1246 (2017) (Breyer, J., dissenting). In that case, the prisoner had been on death row for 22 years, most of which he spent in solitary confinement. *Id.* at 1246. He argued that his execution would violate the Eighth Amendment because it was preceded by incarceration in traumatic conditions. *Id.* Breyer cited both *In re Medley* and Kennedy’s concurrence in *Davis v. Ayala* to argue that the Supreme Court ought to review this case. *Id.* at 1246–47. He stated that Ruiz’s placement in solitary confinement had no legitimate penological purpose and that he developed symptoms associated with solitary confinement, including “severe anxiety and depression, hallucinations, disorientation, memory loss, and sleep difficulty.” *Id.* at 1247.

230. See Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html?noredirect=on&utm_term=.40d15ac9b27e. In January of 2016, following the death of Kalief Browder, President Barack Obama announced a ban on solitary confinement for juvenile inmates in federal prisons, as well as a limit of 60 days on solitary confinement for a first offense for all other inmates. As of yet, Donald Trump has not reversed this policy.

state today.²³¹ It is high time for the Supreme Court to faithfully apply the meaning of the Eighth Amendment and render long-term solitary confinement a shameful vestige of this country's past.

231. See *One Year Since Pelican Bay Settlement, Long-Term Solitary Drops 99%*, CTR. FOR CONST. RIGHTS: THE DAILY OUTRAGE (Oct. 18, 2016), <https://ccrjustice.org/home/blog/2016/10/18/one-year-pelican-bay-settlement-long-term-solitary-drops-99>. Long-term solitary confinement has drastically decreased in California since the parties in a class action suit, *Ashker v. Governor of California*, 2014 WL 2465191 (N.D. Cal. June 2, 2014), reached a historic settlement agreement on September 1, 2015 to end indeterminate solitary confinement. California had previously been the state most egregious in its use of solitary confinement, isolating more people for longer periods of time than any other state. When this case was filed, the Pelican Bay State Prison alone had 500 prisoners who had been held in solitary for over ten years, of which 78 had been held for more than twenty years and six had been held for over thirty years. The settlement requires California state prisons to properly investigate whether prisoners have actually violated prison rules before putting them in solitary, and it prohibits the prisons from imposing indeterminate terms of solitary confinement. The number of California prisoners held in indefinite solitary has since dropped by 97 percent. See *Summary of Ashker v. Governor of California Settlement Terms*, CTR. FOR CONST. RIGHTS, <https://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf>.