

# Equal Justice Initiative

## Criminal Justice Issues and Prisoners' Rights

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06.26.15

Supreme Court Justice Anthony Kennedy in a concurring opinion released last week criticized the widespread use of solitary confinement and called for reconsideration of America's reliance on mass incarceration.

The five-page concurrence, written in plain, powerful prose, came in *Davis v. Ayala*, in which the Court ruled 5-4 that the trial judges error in permitting the prosecution to disclose its reasons for [excluding people of color from the jury](#) outside the presence of the defense was harmless.

Justice Kennedy agreed with the majority opinion, but wrote separately about Hector Ayala's 25 years in solitary confinement on California's death row, in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone.

Observing that 25,000 people in the United States are now serving all or most of their prison sentence in solitary confinement, Justice Kennedy detailed [t]he human toll wrought by extended terms of isolation, including madness and suicide, anxiety, panic, withdrawal, hallucinations, and self-mutilation. Research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price.

Solitary confinement is an added punishment, the justice reasoned, and consideration of whether this added punishment falls short of contemporary standards of decency, and therefore violates the Eighth Amendment's prohibition of cruel and unusual punishment, is needed.

To date, the many issues presented by solitary confinement have been too easily ignored by the public and the legal community, because [p]risoners are shut away out of sight, out of mind, Justice Kennedy wrote. The public has been unaware of or indifferent to prison conditions, deferring to judges and lawyers who are likewise ignorant of or disinterested in what happens after guilt is adjudicated.

But today [t]here are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular, and Justice Kennedy urged the legal community to focus its attention on these issues, including by bringing a solitary confinement challenge before the Court.

In a case that presented the issue, he suggests, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.

Justice Kennedy is a champion of the Eighth Amendment. He wrote the majority opinions in *Roper v. Simmons*, which barred the execution of juveniles; *Kennedy v. Louisiana*, which struck down capital punishment for non-homicide crimes; and [Graham v. Florida](#), which abolished life imprisonment without parole sentences for children convicted of non-homicide crimes. In 2011, he joined the majority in *Brown v. Plata* to uphold a landmark federal court order requiring California to release prisoners in order to ease prison overcrowding, and in 2012, he provided the fifth vote in [Miller v. Alabama](#), which struck down mandatory life-without-parole sentences for children.

Justice Kennedy's citation of the case of Kalief Browder, who committed suicide this month after spending years in solitary confinement as a teenager at Rikers Island for allegedly stealing a backpack, underscores the urgency of the need to re-evaluate American correctional policies. Over 150 years ago, Dostoyevsky wrote, 'The degree of civilization in a society can be judged by entering its prisons,' Justice Kennedy concluded. There is truth to this in our own time.

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122 Commerce Street Montgomery, AL 36104 [\(334\) 269-1803](tel:(334)269-1803) [\[emailprotected\]](#)

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