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Vulnerable and Inadequately Protected: Solitary Confinement, Individuals with Mental Illness, and the Laws that Fail to Protect

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NOTE

VULNERABLE AND INADEQUATELY PROTECTED: SOLITARY CONFINEMENT, INDIVIDUALS WITH MENTAL ILLNESS, AND THE LAWS THAT FAIL TO PROTECT

I. INTRODUCTION

“About seven hundred, eight hundred”¹—that is the number of days Kalief Browder remembered being in solitary confinement.² For three years, Browder was incarcerated at New York City’s Rikers Island jail (“Rikers Island”)³ before the Bronx District Attorney’s Office informed the Bronx criminal court that it did not have sufficient evidence to proceed to trial.⁴ When Browder’s brother would visit him at Rikers Island, he noticed that Browder became thinner and depressed following his time in solitary confinement.⁵ After two years of pretrial detention, Browder’s despair increased, and he attempted to hang himself while in

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

2. *Id.*; Byron Pitts et al., *Who Kalief Browder Might Have Been if He Hadn’t Spent over 1,000 Days in Jail Without a Conviction*, ABC NEWS (June 17, 2015, 6:54 PM), <http://abcnews.go.com/US/kalief-browder-spent-1000-days-jail-charges/story?id=31832313> (“By the time Browder’s case was dismissed in June 2013, prison records show he . . . had spent 1,100 days behind bars, more than 800 of those were in solitary.”).

3. Michael Schwartz & Michael Winerip, *Kalief Browder, Held at Rikers Island for Three Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?action=click&contentCollection=Health&module=RelatedCoverage®ion=Marginalia&pgtype=article> (“Though he never stood trial or was found guilty of any crime, [Browder] spent three years at [Rikers Island], nearly two of them in solitary confinement.”).

4. Gonnerman, *supra* note 1. In May 2010, Browder was arrested and charged with robbery, grand larceny, and assault. *Id.* Because Browder was on probation as a youthful offender at the time of the arrest, Browder was remanded back to Rikers Island until he could post \$3000 in bail, an amount that his family could not afford. *Id.* In May 2013, three years and over thirty court dates later, the prosecution dismissed the case because the complainant, the prosecution’s only source of evidence, moved to Mexico. *Id.* As a result, the prosecution conceded that they would not be able to meet the burden of proof to proceed with the case. *Id.*; see also Schwartz & Winerip, *supra* note 3 (noting that the charges against Browder were dropped).

5. See Gonnerman, *supra* note 1.

solitary confinement.⁶ Browder returned to solitary confinement after a visit to the jail's clinic, and all but a plastic bucket was removed from his cell.⁷ Weeks later, Browder tried to use broken and sharpened pieces of the plastic bucket to cut his wrist.⁸

Over a year later, Browder's charges were dismissed, and he was finally released; six months later, Browder made another attempt to take his life.⁹ Despite his adamant attempts to reintegrate—earning his GED, enrolling in community college, securing a job, and attending weekly counseling sessions—he was unable to overcome “the side effects from what happened in there.”¹⁰ And, as his time post-release progressed, his “flashbacks to that time [were] becoming more frequent.”¹¹ In a post-release interview, Browder stated: “Prior to going to jail, I never had any mental illness . . . I never tried to kill myself, I never had any thoughts like that.”¹² Browder's experience at Rikers Island fatally changed him, and in 2015, Browder's mother went outside their home to investigate a loud thud and found Browder hanged himself from his bedroom window.¹³

Recent reports and filed complaints demonstrate that Browder's experience at Rikers Island was not an anomaly.¹⁴ Individuals with

6. *See id.*

7. *Id.*

8. *See id.*; see also Pitts et al., *supra* note 2 (explaining “prison records show [that Browder] had attempted suicide at least six times” during his time at Rikers Island).

9. Gonnerman, *supra* note 1.

10. *Id.*; see Mark Berman, *Kalief Browder and What We Do and Don't Know About Solitary Confinement in the U.S.*, WASH. POST (June 9, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/06/09/kalief-browder-and-what-we-do-and-dont-know-about-solitary-confinement-in-the-u-s/?utm_term=.00ac310cadef (“After fighting so hard to get out of jail . . . he ultimately was unable to overcome his own pain and torment which emanated from his experiences in solitary confinement,” Browder's family said in a statement.”).

11. Gonnerman, *supra* note 1.

12. Dana Ford, *Man Jailed as Teen Without Conviction Commits Suicide*, CNN (June 15, 2015, 4:49 PM), <http://www.cnn.com/2015/06/07/us/kalief-browder-dead>.

13. See Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; Schwirtz & Winerip, *supra* note 3.

14. See, e.g., JAMES GILLIGAN & BANDY LEE, REPORT TO THE NEW YORK CITY BOARD OF CORRECTION 3 (Sept. 5, 2013) (assessing whether identified New York City correctional facilities were complying with the Mental Health Minimum Standards, Dr. Gilligan and Dr. Lee found a rise in the use of solitary confinement). In 2012 and 2013, the U.S. Department of Justice (“DOJ”) also conducted an investigation at Rikers Island to determine whether the New York City Department of Corrections and Community Services violated any rights of its incarcerated persons. U.S. ATT'Y FOR THE S. DIST. OF N.Y., U.S. DEP'T OF JUSTICE, CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND 1, 2 (Aug. 4, 2014). The DOJ concluded that the “[Department of Corrections] relies far too heavily on punitive segregation as a disciplinary measure, placing adolescent inmates—many of whom are mentally ill—in what amounts to solitary confinement at an alarming rate and for excessive periods of time.” *Id.* at 3. Even though this

mental illness¹⁵ are disproportionately represented in jails and prisons, and incarcerated longer than individuals without mental illness.¹⁶ Similarly, individuals with mental illness are also disproportionately represented in solitary confinement—accounting for approximately one-quarter to one-half of individuals in solitary confinement.¹⁷ Several federal laws aim to protect incarcerated individuals and people with mental illness.¹⁸ Despite these efforts, however, this population continues to be exposed to increased risk when subjected to solitary confinement.¹⁹ Because “U.S. courts are, in general, deferential to the decisions and policies of administrators,”²⁰ courts have permitted lax standards when assessing the legality of prison conditions.²¹

This Note begins by examining the extent to which individuals with mental illness are subjected to and affected by solitary confinement.²² It also elucidates the current laws that seemingly create protections yet further the problem.²³ Moreover, this Note proposes three different approaches that seek to adequately protect individuals with mental

investigation narrowly focused on incarcerated adolescents, the report noted that the findings indicate the violations that occurred with that population, also occurred “in equal measure” with other populations. *Id.*

15. For the purposes of this Note, the general definition of mental illness is as follows:

A mental disorder is a syndrome characterized by clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities.

AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20 (5th ed. 2013).

16. See *infra* Part II.B; see also Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 401 (2006) (“Because misconduct records can lead to loss of any accumulated ‘good time,’ prisoners with mental illness tend to serve most or all of their maximum sentences. For example, the Pennsylvania Department of Corrections reports that prisoners with serious mental illness are three times as likely as other prisoners to serve their maximum sentence. According to the Bureau of Justice Statistics, mentally ill prisoners in state prison serve more time on average than other prisoners.” (footnote omitted)).

17. See Fellner, *supra* note 16, at 402-03; see also GILLIGAN & LEE, *supra* note 14, at 3 (noting that forty-one percent of the individuals in solitary confinement at Rikers Island’s Central Punitive Segregation Unit are mentally ill).

18. See *infra* Part III.B.

19. See *infra* Part II.B.

20. Tracy Hresko, Article, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 1, 15 (2006); see also *Hewitt v. Helms*, 459 U.S. 460, 467 (1983) (“We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests.”).

21. See *infra* text accompanying note 203.

22. See *infra* Part II.

23. See *infra* Part III.

illness who are placed in solitary confinement.²⁴ As such, Part II of this Note defines solitary confinement and discusses its history, prevalence, and impact, both in general and with respect to individuals with mental illness.²⁵ Part III examines the current legal landscape, both internationally and domestically.²⁶ Part III also elucidates the way in which U.S. laws significantly fail to protect individuals with mental illness.²⁷ Considering these shortcomings, Part IV proposes federal legislation that should be adopted to adequately protect this population and ensure uniformity.²⁸ More specifically, Part IV identifies three different legal approaches that aim to better protect individuals in solitary confinement.²⁹ Additionally, Part IV recommends ways in which the legal approaches can be modified to better protect individuals with mental illness in solitary confinement.³⁰ President Barack Obama noted in January 2016 that “[t]he United States is a nation of second chances, but the experience of solitary confinement too often undercuts that second chance.”³¹ This Note proposes ways to restore that second chance.³²

II. SOLITARY CONFINEMENT: HISTORY AND IMPACT

Solitary confinement has been a part of American correctional systems for approximately two centuries.³³ Throughout this time, its use has fluctuated and been studied and critiqued.³⁴ Since its inception, researchers have observed negative psychological effects in individuals subjected to solitary confinement.³⁵ Such effects have been particularly detrimental on individuals with mental illness.³⁶ As the prison population increased and the number of community-based mental health facilities decreased, the prevalence of individuals with mental illness in prisons increased disproportionately.³⁷ Moreover, as the number of

24. *See infra* Part IV.

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part III.

28. *See infra* Part IV.

29. *See infra* Part IV.

30. *See infra* Part IV.

31. Barack Obama, *Barack Obama: Why We Must Reform 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.

32. *See infra* Part IV.

33. *See infra* Part II.A.

34. *See infra* Part II.A.

35. *See infra* Part II.A.

36. *See infra* Part II.B.

37. *See infra* Part II.B.

solitary-confinement-eligible infractions increased, the number of individuals with mental illness in solitary confinement increased disproportionately as well.³⁸ Although the factors that drive this disproportionate representation vary,³⁹ what remains rather consistent are the long-term deleterious effects of solitary confinement.⁴⁰

A. Rise, Decline, and Resurgence

Aiming to encourage repentance and reformation,⁴¹ solitary confinement began in the United States in the early 1800s when two systems of incarceration—Philadelphia and Auburn—emerged.⁴² The Philadelphia system, which originated in a Philadelphia, Pennsylvania correctional facility, isolated incarcerated persons throughout their respective sentences.⁴³ Incarcerated persons were confined to their individual cells and speaking to others—fellow incarcerated persons or prison officials—was prohibited.⁴⁴ Utilizing a similar concept, the Auburn system, which originated in an Auburn, New York correctional facility, allowed incarcerated persons to work with fellow incarcerated persons, but they were required to do so in complete silence.⁴⁵ Mirroring the way in which the United States confined its incarcerated persons, some European nations followed suit and adopted the Philadelphia system.⁴⁶

38. See *infra* Part II.B.

39. See *infra* Part II.B.

40. See *infra* Part II.B.

41. See Juan E. Mendez (Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment), *Interim Rep. of the Special Rapporteur of the Human Rights Council On Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 23, U.N. DOC. A/66/268 (Aug. 5, 2011) (“The practice can be traced to the 1820s in the United States of America, where it was believed that isolation of prisoners would aid in their rehabilitation.”); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 456-57 (2006); Elizabeth Vasilades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT’L L. REV. 71, 73 (2005); Hresko, *supra* note 20, at 6.

42. See Joseph B. Allen, Note, *Extending Hope into “The Hole”*: Applying *Graham v. Florida to Supermax Prisons*, 20 WM. & MARY BILL RTS. J. 217, 220 (2011); see also *United States v. Moreland*, 258 U.S. 433, 449 (1922) (Brandeis, J., dissenting) (noting that prior to the Philadelphia system, incarcerated persons were sentenced to hard labor).

43. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 328 (2006); Smith, *supra* note 41, at 456.

44. See Smith, *supra* note 41, at 456.

45. *Id.* at 456.

46. *Interim Rep. of the Special Rapporteur of the Human Rights Council On Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 41, ¶ 23 (“Beginning in the 1830s, European and South American countries adopted this practice.”); Grassian, *supra* note 43, at 328; Smith, *supra* note 41, at 457.

Within decades, however, solitary confinement's deleterious effects on incarcerated people became apparent.⁴⁷ Studies showed that incarcerated people placed in solitary confinement suffered from "hallucinatory, paranoid, and confusional psychosis characterized by vivid hallucinations, dissociative tendencies, agitation, aimless violence, and delusions."⁴⁸ Individuals who did not have prior mental illness also exhibited these symptoms following time in solitary confinement.⁴⁹

In light of these findings and the Supreme Court's 1890 holding in *In re Medley*,⁵⁰ where the Court commented on solitary confinement's harmful effects,⁵¹ solitary confinement was used less frequently in the United States.⁵² In 1983, following a federal prison riot in Marion, Illinois, however, solitary confinement resurged.⁵³ Under the "Marion Model,"⁵⁴ incarcerated persons are subjected to "long-term, oftentimes indefinite, disciplinary segregation in which [they] are placed in virtually total isolation and severely restricted in their movements."⁵⁵ The Marion Model shifted solitary confinement's purpose from reformatory to punitive, and it is the prevalent model today in American prisons.⁵⁶ As prison populations grew and prisons became increasingly

47. *In re Medley*, 134 U.S. 160, 168 (1890); Vasiliades, *supra* note 41, at 78 ("Between 1854 and 1909, thirty-seven articles published in German journals collectively delineated hundreds of cases of psychoses linked to conditions of imprisonment.").

48. Vasiliades, *supra* note 41, at 78 (noting that the studies failed to show the direct cause of these ailments, but solitary confinement was "specifically cited as responsible for precipitating the psychosis"); see also Grassian, *supra* note 43, at 328-29 (describing the symptoms that individuals subjected to solitary confinement exhibited).

49. See Grassian, *supra* note 43, at 329.

50. 134 U.S. 160.

51. *Id.* at 168. After petitioner was sentenced to death for murdering Ellen Medley, Colorado enacted a statute requiring individuals awaiting execution to be placed in solitary confinement. See *id.* at 161-62. Petitioner did not dispute the conviction but challenged whether the solitary confinement law applied to him *ex post facto*. See *id.* at 162. After discussing solitary confinement's irreparable harm, the Court held that the Constitution barred Colorado from applying this statute *ex post facto*. See *id.* at 168, 175. Moreover, in the decision, the Court specifically addressed solitary confinement noting that its purpose was to be a "just punishment of the worst crimes of the human race." *Id.* at 169-70.

52. See Allen, *supra* note 42, at 220.

53. *Id.* at 221. The Marion correctional facility was created in 1963. Vasiliades, *supra* note 41, at 74. It sought to modify coercive behavior by isolating individuals for up to twenty-two hours a day, limiting their ability to participate in any rehabilitative programs. *Id.* Following the riot, prison officials placed all of Marion's incarcerated persons in solitary confinement indefinitely. Allen, *supra* note 42, at 221.

54. Hresko, *supra* note 20, at 8.

55. 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, 14 (2012).

56. See Hresko, *supra* note 20, at 7-8 (discussing the way in which many of the solitary confinement units now follow the Marion Model).

overcrowded—a consequence of mandatory sentencing, longer sentences, and harsher punishments for low-level offenses—solitary confinement became more prevalent.⁵⁷

Today, solitary confinement is known by many names—segregation, supermax, Secure Housing Unit (“SHU”), Special Housing Unit, the hole, the box, administrative segregation, isolation, lockdown, or the bing, to name a few.⁵⁸ Similarly, the justifications for its use also vary.⁵⁹ Moving away from its reformatory roots,⁶⁰ solitary confinement is used to ensure the mental stability of incarcerated persons,⁶¹ “to isolate prisoners who pose a threat to the safety and security of the prison,”⁶² to isolate individuals who are at risk of violence within the general population,⁶³ and to punish.⁶⁴ Solitary confinement is used as punishment for a variety of infractions.⁶⁵ For example, solitary confinement can be used for technical offenses such as “failure to keep a tidy cell, wasting food, or littering.”⁶⁶ During a twenty-one month-long investigation at Rikers Island, the U.S. Department of Justice (“DOJ”) noted that for the adolescent population, many of the infractions that yielded time in solitary confinement were for non-violent offenses.⁶⁷

Despite its differing names, reasons for use, and warranting infractions, solitary confinement conditions remain rather consistent.⁶⁸ Aiming to bar those incarcerated from human contact,⁶⁹ solitary confinement isolates an incarcerated person from other incarcerated persons,⁷⁰ confining the person to a cell for twenty-three to twenty-four

57. See Vasiliades, *supra* note 41, at 75 (“Under current prison practices, virtually all inmates from death row or the general population will spend time in segregation.”); see also *id.* (describing the factors that contribute to prison overcrowding).

58. See *Brown v. Plata*, 563 U.S. 493, 504 (2011); *Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 41, ¶ 26; Vasiliades, *supra* note 41, at 73-74; Jacob Zoghlin, Article, *Punishments in Penal Institutions: (Dis)-Proportionality in Isolation*, HUM. RTS. BRIEF, Winter 2014, at 24, 24; Gonnerman, *supra* note 1.

59. See Vasiliades, *supra* note 41, at 74.

60. Hresko, *supra* note 20, at 7.

61. Vasiliades, *supra* note 41, at 74.

62. Zoghlin, *supra* note 58, at 25.

63. See *id.*

64. See Vasiliades, *supra* note 41, at 73-74.

65. Zoghlin, *supra* note 58, at 25.

66. *Id.*

67. See U.S. ATT’Y FOR THE S. DIST. OF N.Y., *supra* note 14, at 49 (noting that the most common infractions included “failure to obey orders from staff (1,671 infractions), verbally harassing or abusing staff (561 infractions), [and] failure to obey orders promptly and entirely (713 infractions)”).

68. See *supra* notes 58-67 and accompanying text; *infra* notes 71-75 and accompanying text.

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

70. SAL RODRIGUEZ, SOLITARY WATCH, FACT SHEET: PSYCHOLOGICAL EFFECTS OF

hours out of the day.⁷¹ Moreover, individuals in solitary confinement are typically detained “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.”⁷² When incarcerated individuals have interaction with others, however, it is “generally monotonous, and often not empathetic,” thus being infrequent and substandard.⁷³ Radios and televisions are often prohibited, and books and very few belongings are allowed in a solitary confinement cell.⁷⁴ The person’s food is passed through a slot in the steel door, and recreation occurs in a barren area without any equipment.⁷⁵

An incarcerated person can spend anywhere from days to decades in solitary confinement.⁷⁶ Albert Woodfox, for example, served forty-three years in solitary confinement in a Louisiana state prison.⁷⁷ With respect to duration, the U.N. Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁷⁸ defines prolonged solitary confinement as any period of isolation exceeding fifteen days—the point at which the psychological harm from isolation “become[s] irreversible.”⁷⁹

B. Solitary Confinement and Mental Illness

As the United States began to move away from hospitalizing individuals with mental illness, “the nation’s jails and prison have become *de facto* mental hospitals.”⁸⁰ In fact, the correctional facilities in some cities house more individuals with mental illness “than all of the [city’s] mental hospitals combined.”⁸¹ Furthermore, it is estimated that

SOLITARY CONFINEMENT 1 (2011), <http://solitarywatch.com/wp-content/uploads/2011/06/fact-sheet-psychological-effects-final.pdf>.

71. See *id.*; Fellner, *supra* note 16, at 402.

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

73. See *Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 41, ¶ 25.

74. See Fellner, *supra* note 16, at 402.

75. *Id.*

76. See SAL RODRIGUEZ, SOLITARY WATCH, FACT SHEET: THE HIGH COST OF SOLITARY CONFINEMENT 1 (2011), <http://solitarywatch.com/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf>.

77. See Jacob Koffler, *What 43 Years of Solitary Confinement Does to the Mind*, TIME (June 9, 2015), <http://time.com/3914559/albert-woodfox-solitary-confinement-angola>.

78. See *Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 41, ¶ 26.

79. *Id.*

80. GILLIGAN & LEE, *supra* note 14, at 2.

81. *Id.* (noting that both Los Angeles and New York City jails each house more individuals with mental illness than the mental health institutions within their cities, and that about fifty years ago, approximately seventy-five percent of individuals with mental illness were in mental health

“[t]here are three times as many mentally ill people in prisons than in mental health hospitals, and the rate of mental illness in prisons is two to four times greater than in the general public.”⁸²

Some states have implemented mental health courts⁸³ to divert people with mental illness from the criminal justice system.⁸⁴ Mental health courts, however, are only an option for individuals who meet the eligibility requirements.⁸⁵ Individuals with mental illness who are otherwise ineligible for this diversion,⁸⁶ however, remain in the system.⁸⁷ In the federal court system, under 18 U.S.C. § 4244, the court may place an individual in treatment instead of prison if there is reasonable cause to believe that such defendant is suffering from a mental disease, and the court believes that a mental hospital is better equipped to treat the individual than a correctional facility.⁸⁸ If the court identifies mental illness, but not to a level that would warrant diversion, “the sentencing judge may recommend the offender’s placement in a correction facility capable of providing for his mental health needs . . . [but] these

facilities and twenty-five percent were in prisons). Today, that proportion has shifted significantly with only five percent of the population in mental health facilities and ninety-five percent in prisons. *Id.* at 2-3.

82. Fellner, *supra* note 16, at 392; see GILLIGAN & LEE, *supra* note 14, at 3 (noting that in Rikers Island specifically, in 2013, “roughly 40% of the inmates [had] a psychiatric diagnosis, and a third of them exhibit[ed] acute or chronic psychopathology severe enough to constitute major (psychotic, and in some cases life-threatening) mental illnesses”). Compare RODRIGUEZ, *supra* note 70 (estimating that twenty percent of all incarcerated persons are “seriously mentally ill” (quoting AM. PSYCHIATRIC ASS’N, PSYCHIATRIC SERVICES IN JAILS AND PRISONS (2d ed. 2000)), with *Serious Mental Illness (SMI) Among U.S. Adults*, NIH, <http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml> (estimating that individuals with serious mental illness make up 4.2% of all U.S. adults).

83. See, e.g., *Mental Health Courts*, NYCOURTS.GOV, https://www.nycourts.gov/courts/problem_solving/mh/key_principles.shtml [hereinafter *Mental Health Courts*, NYCOURTS.GOV]; *Mental Health Courts*, MD. CTS., <http://mdcourts.gov/opsc/mhc> [hereinafter *Mental Health Courts*, MD. CTS.] (providing two examples of mental health courts).

84. See, e.g., *Mental Health Courts*, NYCOURTS.GOV, *supra* note 83. New York State’s mental health courts aim to divert individuals with mental health diagnoses out of formal incarceration and into community-based services. *Id.* These programs, however, are only targeted to individuals whose current involvement with the criminal justice system is a by-product of mental illness. *Id.*

85. See Henry J. Steadman et al., *Effect of Mental Health Courts on Arrests and Jail Days: A Multisite Study*, 68 ARCHIVAL GEN. PSYCHIATRY 167, 167-68 (2011). Although mental health courts vary by jurisdiction, in general, such courts are a “postbooking jail diversion program” that aim to “mov[e] persons with mental illness out of the criminal justice system and into community treatment without sacrificing public safety.” *Id.* In lieu of incarceration, the mental health court refers eligible participants to community-based treatment and the court monitors their progress and compliance, reserving the right to sanction or revoke the option to participate. *Id.* at 168.

86. See, e.g., *Mental Health Courts*, NYCOURTS.GOV, *supra* note 83.

87. See *id.*

88. See E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625, 650 (2014).

recommendations [do not] bind[] correctional authorities.”⁸⁹ As a result, prison populations have a high prevalence of schizophrenia, bi-polar disorder, anxiety, depression, and personality disorders.⁹⁰ In spite of the high prevalence of mental illness, no concessions are made for individuals with mental illness while incarcerated,⁹¹ and thus, such individuals are treated the same as individuals without mental illness.⁹² Because “their illness leaves them less able to conform to the rules,” individuals with mental illness have a disproportionately high rate of prison infractions.⁹³ One report estimates that thirty-three to fifty percent of prisoners in solitary confinement have mental illness.⁹⁴

New York City jails, in particular, have increased the use of solitary confinement over time.⁹⁵ This trend occurred despite the city’s crime decrease and the increased population of individuals with mental illness at Rikers Island.⁹⁶ On July 23, 2013, two months after Browder’s release,⁹⁷ 73% of the adolescents in solitary confinement in New York City’s jails were seriously or moderately mentally ill.⁹⁸

To further complicate matters, prison staff has difficulty adequately screening for mental illnesses, leaving individuals with mental illness

89. *Id.* at 652.

90. HOLLY HILLS ET AL., DEP’T OF JUSTICE, EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT 2-3 (2004) (noting that approximately five percent of the prison population has schizophrenia; six percent has bi-polar disorder; nine percent has major depression; six percent has generalized anxiety disorder; and thirty to fifty percent have antisocial personality disorder).

91. See Fellner, *supra* note 16, at 394.

92. See *id.* at 395 (noting that individuals with mental illness have greater difficulty following prison rules and, in turn, they “may exhibit their illness through disruptive behavior, belligerence, aggression, and violence[,] . . . ways that prison systems consider punishable misconduct”).

93. *Id.* at 396. For example:

A study in New York found that inmates on the mental health roster “have higher infraction rates than [other] inmates.” In Washington State, “offenders with serious mental illness constitute 18.7 percent of the prison population but account for 41 percent of the infractions.” According to the Federal Bureau of Justice Statistics, mentally ill prisoners in state and federal prisons as well as local jails are more likely than others to have been involved in a fight or to have been charged with breaking prison rules.

Id. (footnotes omitted) (first quoting Kenneth Adams, *The Disciplinary Experiences of Mentally Disordered Inmates*, 13 CRIM. JUST. & BEHAV. 297, 304 (1986); and then quoting David Lovell & Ron Jemelka, *When Inmates Misbehave: The Costs of Discipline*, 76 PRISON J. 165, 167 (1996)).

94. RODRIGUEZ, *supra* note 70, at 1.

95. See GILLIGAN & LEE, *supra* note 14, at 3 (“From 2007 through June 30, 2013, the number of punitive segregation beds in the City jail system has grown from 614 to 998, a 61.5% increase. On January 1, 2004, 2.7% of the inmate population was in punitive segregation. By June 30, 2013 the percentage had jumped to 7.5%.”).

96. *Id.*

97. *Id.*; see also Gonnerman, *supra* note 13 (noting that Browder was released from Rikers Island in May 2013).

98. See GILLIGAN & LEE, *supra* note 14, at 3.

unidentified.⁹⁹ Certain barriers—staffing, an incarcerated person’s functioning limitations, lack of continuity of care, and an inadequate system of follow up—inhibit individuals with unidentified mental illness from receiving appropriate treatment while incarcerated.¹⁰⁰ With respect to staffing, in at least one state, the correctional system lacked 54.1% of the psychiatrists needed to meet the mental health needs of its incarcerated persons.¹⁰¹ As a result, the mental health staff were left to “manag[e] far larger caseloads than is appropriate and effective,” leaving them to do only “about 50% of what we should be doing.”¹⁰² Consequently, the U.S. Supreme Court noted:

This shortfall of resources relative to demand contributes to significant delays in treatment. Mentally ill prisoners are housed in administrative segregation while awaiting transfer to scarce mental health treatment beds for appropriate care. One correctional officer indicated that he had kept mentally ill prisoners in segregation for “6 months or more.” Other prisoners awaiting care are held in tiny, phone-booth sized cages. The record documents instances of prisoners committing suicide while awaiting treatment.¹⁰³

Because mental health professionals are few and far between in prison settings, such professionals are often used for treatment and assessment.¹⁰⁴ Screening, therefore, is often left to prison officials who may not have any mental health expertise.¹⁰⁵ Because the prison population includes individuals with cognitive and developmental limitations,¹⁰⁶ these limitations, coupled with mental illness and poor communication skills, impede an individual’s ability to effectively

99. Fellner, *supra* note 16, at 396-97 (“Officers typically do not understand the nature of mental illness and its behavioral impact. They cannot distinguish—and may not even know a distinction exists—between a frustrated or disgruntled inmate who ‘acts out’ and one whose ‘acting out’ reflects mental illness.”); Johnston, *supra* note 88, at 632-33.

100. See Johnston, *supra* note 88, at 633-36.

101. *Brown v. Plata*, 563 U.S. 493, 517-18 (2011). In this case, the Court held that as a result of the prison overcrowding, “the medical and mental health care provided by California’s prisons [fell] below the standard of decency that inheres in the Eighth Amendment.” *Id.* at 545.

102. *Id.* at 518.

103. *Id.* at 519.

104. See HILLS ET AL., *supra* note 90, at 14.

105. See *Coleman v. Wilson*, 912 F. Supp. 1282, 1320 (E.D. Cal. 1995) (affirming a magistrate judge’s ruling that due to inadequate training, the custodial staff is “frequently unable to differentiate between inmates whose conduct is the result of mental illness and inmates whose conduct is unaffected by disease”); HILLS ET AL., *supra* note 90, at 14; Johnston, *supra* note 88, at 635 (“[M]ental health professionals with extensive training in assessment and diagnoses, such as psychologists and psychiatrists, rarely conduct mental health screenings. Instead, the screens are often performed more economically . . . by nurses, counselors, or social workers.” (footnote omitted)).

106. See Johnston, *supra* note 88, at 635.

communicate mental illness symptoms during the screening process.¹⁰⁷ The inability to communicate symptoms, coupled with the lack of the staff's expertise during the screening process, may result in the misidentification of mental illness: individuals with mental illness may be deemed either as not having mental illness or malingering.¹⁰⁸ Furthermore, the prison staff that conduct the screening frequently must rely solely on the individual's self-reports, as they do not have access to the mental health assessments conducted during trial or any other mental health history.¹⁰⁹ After the first screening is completed and the individual is triaged accordingly, in some instances a second screening is not done.¹¹⁰ Since "mental health screening interviews are often conducted at the cell front, rather than in a private setting, . . . inmates are generally quite reluctant to disclose psychological distress" resulting from their solitary confinement.¹¹¹ In addition, "[s]eclusion, even when it is not punitive, does not allow for optimal observation, for one can only speak through a glass window or a hole in the door."¹¹² Given the foregoing barriers to appropriate and effective screening, individuals with mental illness may be placed in the general population without the appropriate treatment and care.¹¹³ Subsequently, when such an individual acts out, "correctional officers tend to misinterpret symptomatic illness as disorderly conduct."¹¹⁴

107. *Id.*

108. *Id.* ("[R]efusal to acknowledge one's disorder[] is a common symptom of some serious mental illnesses, and inmates may go to great lengths to hide their maladies as a manifestation of their disorders." (footnotes omitted)).

109. *Id.* at 635-36 ("Evaluators commonly do not have the results of prior psychiatric evaluations, even those conducted in connection with a competency examination, insanity proceeding, or pretrial detention. Inmates usually do not bring medication containers, prescriptions, or copies of their medical records to a diagnostic center. . . . Without this data, screeners must rely on inmates' willingness and ability to share information about their mental health. Consequently, prisoners' mental disorders can go undetected." (footnote omitted)).

110. *Id.* at 632 ("While inmates who screen positive for mental disorder will undergo additional assessment, few safety nets exist for prisoners whose mental health problems are not recognized or cognizable at the initial screening point. Legal commentators have urged prisons to conduct a subsequent screen to identify inmates whose disorders were not initially detected or who have developed mental health problems during the course of their confinement." (footnotes omitted)).

111. *See* Grassian, *supra* note 43, at 333.

112. GILLIGAN & LEE, *supra* note 14, at 12-13. Thus, solitary confinement also affects the quality of treatment provided since the seclusion inhibits the required observation, assessment, and treatment. *See id.*

113. *See* Johnston, *supra* note 88, at 632.

114. *Id.* at 633 ("[C]ustody staff essentially make medical judgments that should be reserved for clinicians" (quoting *Madrid v. Gomez*, 889 F. Supp. 1146, 1219 (N.D. Cal. 1995))); *see also* RODRIGUEZ, *supra* note 70, at 1 (asserting that because behavioral problems sometimes result from mental illness symptoms, solitary confinement is used to isolate those with mental illness); Fellner, *supra* note 16, at 397 (describing the way in which "[p]risoners who tear up bed-sheets to

Solitary confinement is known to both exacerbate symptoms in individuals with mental illness and create symptoms in individuals without.¹¹⁵ Individuals with mental illness who have been subjected to solitary confinement have been observed to decompensate¹¹⁶ while in segregation.¹¹⁷ Such decompensation increases the likelihood of self-harm and “lengthens the time needed for a mentally ill prisoner’s cognitive and psychological functioning to be restored and in some instances there will be no restoration.”¹¹⁸ When individuals with mental illness decompensate significantly while in solitary confinement, they are temporarily removed, treated, and returned to solitary confinement “where the cycle continues.”¹¹⁹ Notably, individuals who spent time in solitary confinement commit a disproportionate amount of prison suicides.¹²⁰ Specific psychiatric symptoms, which one expert identified

make a rope for hanging themselves have been punished for misusing state property,” thus being treated punitively and not therapeutically).

115. See GILLIGAN & LEE, *supra* note 14, at 4-5 (“Individuals with a pre-existing mental illness are particularly vulnerable to the pathogenic effects of solitary confinement, especially if they are already in the pathogenic setting of a jail.”); Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3, 2015), http://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html?_r=1. The following has been stated regarding the effect of solitary confinement on the mentally ill:

Prolonged solitary confinement (sensory deprivation and social isolation) can induce psychotic symptoms (such as hallucinations and delusions) and behavioral abnormalities (including suicidality and homicidality) in people who had not previously experienced such symptoms. While those with pre-existing symptoms may be more vulnerable to their exacerbation, those without pre-existing symptoms may also be vulnerable to experiencing such symptoms for the first time. Thus, the use of punitive segregation even among those not diagnosed as mentally ill is likely to increase the frequency of mental illness in the jail population, together with associated symptoms such as suicidal and assaultive behavior.

GILLIGAN & LEE, *supra* note 14, at 8. A report from 2011 further provided:

Research has shown that with respect to mental disabilities, solitary confinement often results in severe exacerbation of a previously existing mental condition. Prisoners with mental health issues deteriorate dramatically in isolation. The adverse effects of solitary confinement are especially significant for persons with serious mental health problems which are usually characterized by psychotic symptoms and/or significant functional impairment. Some engage in extreme acts of self-mutilation and even suicide.

Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 41, ¶ 68 (footnotes omitted).

116. See *Ind. Prot. & Advocacy Servs. Comm’n v. Ind. Dep’t of Corr.*, No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517, at *16 (S.D. Ind. Dec. 31, 2012).

117. *Id.*

118. *Id.*

119. Fellner, *supra* note 16, at 404.

120. See Goode, *supra* note 115 (“[S]uicides among prisoners in solitary confinement, who make up 3 to 8 percent of the nation’s prison population, account for about 50 percent of prison suicides.”); see also *Ind. Prot. & Advocacy Servs. Comm’n*, 2012 WL 6738517, at *16 (“Tragically, a disproportionately high percentage of suicides are committed by prisoners in segregation compared with those in the general population of a prison system.”); GILLIGAN & LEE, *supra* note

are common among individuals in solitary confinement, include (1) hypersensitivity to external stimuli; (2) perceptual distortions, illusions, and hallucinations; (3) panic attacks; (4) difficulties with thinking, concentration, and memory; (5) overt paranoia; and (6) problems with impulse control.¹²¹ Unfortunately, these psychological effects did not end when the isolation ended.¹²² Symptoms found to persist following solitary confinement were post-traumatic stress and lasting personality changes.¹²³

III. CURRENT LEGAL LANDSCAPE: DO OUR LAWS ADEQUATELY ADDRESS THE PROBLEM?

There are international and domestic laws that address the need to protect individuals who are incarcerated.¹²⁴ Further, international laws and U.S. courts have begun to address the need to protect individuals placed in solitary confinement.¹²⁵ International laws significantly limit the use of solitary confinement and establish safeguards that an incarcerated individual may employ prior to spending time in solitary confinement.¹²⁶ U.S. law, on the other hand, does not explicitly address solitary confinement.¹²⁷ Judicial decisions, however, address solitary confinement in circumstances where general prison conditions are challenged.¹²⁸ These decisions have also begun to address the use of solitary confinement and people with mental illness.¹²⁹ The U.S. legal system provides much less protection than international law, and the gap in protection leaves individuals with mental illness particularly susceptible to significant and long-term harm.¹³⁰

14, at 11 (“Those who are already ‘mentally ill and have a history of suicidal gestures/attempts (or who are at risk for suicidal behavior or acute decompensation)’ will be especially vulnerable to the harmful effects of solitary confinement.”).

121. Grassian, *supra* note 43, at 335-36.

122. *Id.* at 353-54.

123. *Id.* (“[T]hese individuals had become strikingly socially impoverished and experienced intense irritation with social interaction, patterns dramatically different from their functioning prior to solitary confinement.”).

124. *See infra* Part III.A–C.

125. *See infra* Part III.A–D.

126. *See* Fellner, *supra* note 16, at 409 (“International instruments . . . require . . . that the law or lawful regulations specify what conduct constitutes an offense and give the prisoner a right to be heard before disciplinary action is taken.”).

127. *See infra* Part III.B.

128. *See infra* Part III.C.

129. *See infra* Part III.C.

130. *Compare infra* Part III.A, with *infra* Part III.B (describing the way in which international standards note the maximum length an individual can be in solitary confinement but domestic laws do not).

A. *International Treaties and Conventions*

Various treaties address and set a standard for prisoner rights.¹³¹ In 1945, article 55 of the United Nations Charter (“U.N. Charter”) established “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹³² In 1948, article 5 of the Universal Declaration of Human Rights (“Universal Declaration”) established that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”¹³³

Although the U.N. Charter and the Universal Declaration did not explicitly enumerate the rights and standard of treatment for incarcerated individuals, in 1949, the Geneva Convention Relative to the Treatment of Prisoners of War did.¹³⁴ Applying only to prisoners of war,¹³⁵ this convention “delineated that prisoners . . . were to be treated humanely at all times, [and] also provided [the] basic definitions and principles for future international prisoner standards.”¹³⁶ In 1955, the United Nations issued the Standard Minimum Rules for the Treatment of Prisoners (“Standard Rules”),¹³⁷ which applied to prisons globally.¹³⁸ Pursuant to the Standard Rules, solitary confinement was to be used “only in exceptional circumstances.”¹³⁹

In 1992, the United States ratified the International Covenant on Civil and Political Rights¹⁴⁰ and two years later, in 1994, ratified the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Convention Against Torture”).¹⁴¹ The United States ratified these treaties with reservations, only barring treatment deemed unconstitutional.¹⁴² The U.N. Committee on Torture, formed to

131. Vasiliades, *supra* note 41, at 79-80.

132. *Id.* at 80.

133. *Id.* at 80-81.

134. *Id.* at 83.

135. *Id.* at 81-82.

136. *Id.* at 81.

137. *Id.* at 83.

138. *See id.*; *see also* Fellner, *supra* note 16, at 409 (noting that the Standard Rules not only require adequate mental health care for prisoners but also acknowledge that individuals with serious mental illness should not be in prison and should instead be in institutions for treatment).

139. *See* Vasiliades, *supra* note 41, at 83.

140. *See id.* at 84. Specifically addressing the treatment of prisoners, article 10 of the International Covenant on Civil and Political Rights provides that prisoners must be “treated with humanity and with respect” and that the “essential aim . . . [of prisons] shall be [the prisoner’s] reformation and social rehabilitation.” Fellner, *supra* note 16, at 407.

141. *See Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <http://indicators.ohchr.org> (last visited Nov. 26, 2016).

142. *See id.* (“[T]he United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel,

oversee the way in which participating countries implement the Convention Against Torture,¹⁴³ held that prolonged solitary confinement is torture and, in turn, a human rights violation.¹⁴⁴ Due to the reservations of the United States, however, the protections that the treaties aimed to provide—protection against cruel, inhuman, or degrading treatment, and treatment that causes severe mental pain or suffering—apply only to treatment that the Constitution prohibits.¹⁴⁵

Internationally, there is no consensus as to the appropriate length of time to sentence someone to solitary confinement.¹⁴⁶ But, the European Court of Human Rights held that confining someone to solitary confinement for three years violated article 3 of the European Convention of Human Rights.¹⁴⁷ Moreover, considering the health effects, the U.N. General Assembly provided:

[T]he use of solitary confinement itself can amount to acts prohibited by article 7 of the International Covenant on Civil and Political Rights, torture as defined in article 1 of the Convention against Torture or [other acts of] cruel, inhuman or degrading punishment as defined in article 16 of the Convention.¹⁴⁸

Nevertheless, individuals in the United States have failed in their attempts to challenge being detained in solitary confinement for up to forty years—thirty-seven years longer than what is acceptable under the European Convention of Human Rights.¹⁴⁹ The United States is a signatory on various international treaties in which it agrees to ensure humane treatment to people within its care.¹⁵⁰ Despite these agreements and the known mental health outcomes, solitary confinement continues to be employed in a manner that is below international standards.¹⁵¹

inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”).

143. See *Committee Against Torture*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx>.

144. See GILLIGAN & LEE, *supra* note 14, at 6.

145. See Vasiliades, *supra* note 41, at 85-86.

146. *Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 41, ¶ 61.

147. *Id.*

148. *Id.* ¶ 70.

149. See *id.* ¶ 61.

150. See *Status of Ratification Interactive Dashboard*, *supra* note 141 (noting the way in which the United States has signed and ratified both the International Covenant on Civil and Political Rights and the Convention Against Torture).

151. *Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 41, ¶ 74 (“Where the physical conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical

B. Domestic Laws: Are Individuals with Mental Illnesses Protected?

Individuals who are incarcerated are not stripped of their constitutional rights simply because they are imprisoned.¹⁵² Although there are statutes that give individuals who are incarcerated an avenue to assert their rights, there are others that inhibit this exercise.¹⁵³ While some legislation affirms prisoners' rights, subsequent legislation often limits such rights or erects barriers that inhibit incarcerated persons from asserting their rights or seeking redress when such rights are violated.¹⁵⁴

1. Civil Rights of Institutionalized Persons Act and Prison Litigation Reform Act: One Gives Rights, While the Other Takes Them Away

In response to various complaints of constitutional violations in prisons,¹⁵⁵ Congress enacted the Civil Rights of Institutionalized Persons Act ("CRIPA")¹⁵⁶ to provide a means for incarcerated individuals to seek redress.¹⁵⁷ Pursuant to CRIPA, the DOJ is authorized to investigate conduct that violates the constitutional rights of institutionalized individuals.¹⁵⁸ Accordingly, the DOJ has the authority to protect the constitutional rights of individuals confined in jails, prisons, and other public correctional facilities.¹⁵⁹ Close to two decades later, Congress

pain or suffering of individuals who are subjected to the confinement, the conditions of solitary confinement amount to torture or to cruel and inhuman treatment as defined in articles 1 and 16 of the Convention, and constitute a breach of article 7 of the Covenant.").

152. See *Turner v. Safley*, 482 U.S. 78, 84 (1987).

153. See *infra* Part III.B.1–2 (discussing the way in which the law limits a person's ability to bring a claim to challenge a violation). Compare 42 U.S.C. §§ 1983, 12132 (2012), with *id.* §§ 1997a(a), 1997e. Section 1983 provides a cause of action allowing individuals to bring a suit against the government in response to a constitutional violation. *Id.* § 1983. Similarly, the Americans with Disabilities Act ("ADA") of 1990 explicitly prohibits discrimination against people with disabilities in various settings, including incarceration. *Id.* § 12131. Pursuant to the ADA, mental illness is a disability and unjustified and intentional isolation of a person with mental illness constitutes discrimination. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999).

154. See *infra* Part III.B.1–2.

155. Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 493 (2001).

156. 42 U.S.C. § 1997.

157. Branham, *supra* note 155, at 493–94.

158. 42 U.S.C. § 1997a(a) ("Whenever the Attorney General has reasonable cause to believe that any State . . . or agent thereof . . . is subjecting persons residing in or confined to an institution . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . the Attorney General . . . may institute a civil action . . . against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities . . .").

159. *Id.* §§ 1997a(a), 1997(1).

enacted the Prison Litigation Reform Act (“PLRA”).¹⁶⁰ The PLRA has two main aims—end the courts’ increased management of correctional facilities and reduce the number of unsubstantiated claims by prisoners.¹⁶¹ As such, PLRA provides that “[n]o federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”¹⁶² Additionally, PLRA “requires that prisoners exhaust all internal administrative remedies before bringing a lawsuit, imposes filing fees, limits damages and attorney’s fees, and requires judicially enforceable consent decrees to contain findings of federal law violations.”¹⁶³

Although these statutes provide an avenue to seek redress, the avenue is not as apparent for individuals with mental illness in solitary confinement.¹⁶⁴ The effects of solitary confinement are commonly psychological.¹⁶⁵ The burden to prove an accompanying physical injury bars individuals only psychologically injured as a result of solitary confinement from seeking redress.¹⁶⁶ Additionally, one researcher argued that an individual’s mental illness may make it more difficult to comply with the formal grievance process, including adhering to the prescribed deadlines.¹⁶⁷ Both CRIPA and PLRA provide the means for individuals in solitary confinement to sue for violations.¹⁶⁸ However, the symptoms associated with mental illness make these means unrealistic, leaving such individuals without a viable remedy for the harms inflicted by solitary confinement.¹⁶⁹

Recently, the DOJ began investigating claims made by individuals with mental illness in connection with solitary confinement.¹⁷⁰ These

160. Branham, *supra* note 155, at 487.

161. *Id.* at 487-89.

162. 42 U.S.C. § 1997e(e). In addition to having to prove a physical injury, the PLRA also provides an administrative exhaustion requirement, thus creating an additional barrier for incarcerated persons to overcome to redress their injuries. *Id.* § 1997e(a) (“No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

163. Fellner, *supra* note 16, at 406.

164. *See, e.g., supra* note 162 and accompanying text (providing that a physical injury is required to bring a suit under this statute).

165. *See supra* notes 48, 121 and accompanying text.

166. *See supra* note 162 and accompanying text.

167. Fellner, *supra* note 16, at 406.

168. *See supra* Part III.B.1.

169. *See, e.g., supra* text accompanying note 167.

170. *See* Settlement Agreement at 1, *United States v. Territory of the V.I.*, 280 F.R.D. 232 (D.V.I. Aug. 31, 2012) (No. 1986-265), ECF No. 689-1 (documenting that the DOJ brought an action against the Virgin Islands to “remedy the ongoing constitutional violations” in its prisons); JOCELYN SAMUELS, U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE PENNSYLVANIA DEPARTMENT

investigations found that at least one state's correctional facilities used solitary confinement in a manner that violated the Eighth Amendment and the American with Disabilities Act.¹⁷¹ However, the subsequent reports that were produced only included recommendations for improvements.¹⁷² The DOJ also failed to provide any details on how it plans to ensure future compliance.¹⁷³

2. Federal Torts Claims Act: Additional Barriers and Limitations

Pursuant to the Federal Torts Claims Act ("FTCA"), federal prisoners may bring an action against the government for money damages upon any "injury . . . caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment."¹⁷⁴ Other provisions within this statute, however, prohibit individuals with mental illness who have experienced aggravated psychological harm in solitary confinement to seek redress through this statute.¹⁷⁵ Specifically, two barriers hinder this population: (1) required proof of physical injury¹⁷⁶ and (2) required administrative exhaustion.¹⁷⁷ For example, the FTCA bars individuals convicted of a felony who are awaiting sentencing or serving a sentence from bringing a cause of action under this statute for "mental or emotional injury suffered while in custody without a prior showing of physical injury."¹⁷⁸ Similarly, an individual is barred from bringing a cause of action under the FTCA "unless the claimant [has] first presented the claim to the appropriate Federal agency."¹⁷⁹

OF CORRECTIONS' USE OF SOLITARY CONFINEMENT ON PRISONERS WITH SERIOUS MENTAL ILLNESS AND/OR INTELLECTUAL DISABILITIES 4 (2014) (documenting that DOJ investigated constitutional violations at the Pennsylvania Department of Corrections); U.S. ATT'Y FOR THE S. DIST. OF N.Y., *supra* note 14, at 1 (documenting that the DOJ investigated the way in which adolescent males were treated at Rikers Island).

171. See SAMUELS, *supra* note 170, at 3-4.

172. See *id.* at 22-25; U.S. ATT'Y FOR THE S. DIST. OF N.Y., *supra* note 14, at 51-63.

173. See SAMUELS, *supra* note 170, at 22-25; U.S. ATT'Y FOR THE S. DIST. OF N.Y., *supra* note 14, at 51-63.

174. 28 U.S.C. § 1346(b)(1) (2012).

175. See, e.g., *id.* §§ 1346(b)(2), § 2675(a).

176. 28 U.S.C. § 1346(b)(2) ("No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury.")

177. *Id.* § 2675(a) (establishing that, in order to bring a claim against the government, "the claimant shall have first presented the claim to the appropriate Federal agency").

178. *Id.* § 1346(b)(2).

179. *Id.* § 2675(a).

*C. Judicial Involvement: Balancing Administrative and
Mental Health Needs*

The Supreme Court has held that “[p]rison walls do not form a barrier separating inmates from the protections of the Constitution,”¹⁸⁰ and that prison staff have a duty to protect the individuals within their care.¹⁸¹ The Court, on the other hand, also acknowledged:

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.¹⁸²

As a result, the Court gives “prison administrators . . . wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”¹⁸³ Because solitary confinement is an administrative punishment, prison administrators have the sole discretion to impose this sanction.¹⁸⁴ As such, they may do so absent the procedural safeguards normally present—such as access to jury trials before a presiding judge with legal representation¹⁸⁵—thus, hindering the ability to challenge placement in solitary confinement.¹⁸⁶ Concerned that “accommodating mental illness will provide excuses for prisoner misconduct,” during administrative hearings within the correctional facility,¹⁸⁷ the prisoner’s mental illness is not taken into consideration.¹⁸⁸ Moreover, because the burden of proof at these hearings is only a preponderance of evidence,¹⁸⁹ incarcerated individuals accused of

180. See *Turner v. Safley*, 482 U.S. 78, 84 (1987).

181. See *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); see also *Hayes v. N.Y.C. Dep’t of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996) (interpreting this duty pursuant to the Eighth Amendment).

182. *Turner*, 482 U.S. at 84-85.

183. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); see also *Turner*, 482 U.S. at 89 (“Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solution to the intractable problems of prison administration.”).

184. See *Zoghlin*, *supra* note 58, at 25.

185. *Id.*

186. *Id.*

187. *Fellner*, *supra* note 16, at 398.

188. See *id.* (“[P]unishment supersedes any potential recognition that a mentally ill prisoner may not have been meaningfully able to control his behavior.”).

189. *Zoghlin*, *supra* note 58, at 25.

infractions are often found guilty.¹⁹⁰ This unbridled discretion allows prison staff to “determin[e] when and for how long solitary confinement may be imposed on an inmate.”¹⁹¹ As such, incarcerated persons often have a difficult time challenging or seeking recourse regarding their solitary confinement placement.¹⁹²

Cases addressing solitary confinement have come before the court since the late 1890s.¹⁹³ Pursuant to the Eighth Amendment, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”¹⁹⁴ At least one court held that the Eighth Amendment requires jail officials to “‘provide humane conditions of confinement’ for prisoners.”¹⁹⁵ To prevail in an Eighth Amendment challenge, the “prisoner[] must show both an objective and serious injury (either physical or psychological) and a culpable subjective intent on the part of the prison authorities.”¹⁹⁶

To date, the Supreme Court has yet to rule whether solitary confinement specifically violates the Eighth Amendment.¹⁹⁷ In 1995, however, a district court held that the California Department of Correction’s use of solitary confinement violated the plaintiffs’ Eighth Amendment rights.¹⁹⁸ Considering the Department’s “deliberate indifference to the serious harm visited on the class members,” the court deemed its use of solitary confinement unconstitutional “[1] because mentally ill inmates are placed in administrative segregation and segregated housing without any evaluation of their mental status, [2] because such placement will cause further decompensation, and [3] because inmates are denied access to necessary mental health care while they are housed.”¹⁹⁹ Similarly, in 2012, a district court held that the Indiana Department of Correction’s use of solitary confinement on incarcerated persons who were mentally ill violated such persons Eighth

190. *Id.*

191. Hresko, *supra* note 20, at 13.

192. *See id.* at 15.

193. *See In re Medley*, 134 U.S. 160, 173 (1890) (holding that the additional sentence to solitary confinement *ex post facto* was unconstitutional). In its ruling, the Court noted that solitary confinement was “itself an infamous punishment.” *Id.* at 169.

194. U.S. CONST. amend. VIII.

195. *See Ind. Prot. & Advocacy Servs. Comm’n v. Ind. Dep’t of Corr.*, No. 1:08-cv-01317-TWO-MJD, 2012 WL 6738517, at *20 (S.D. Ind. Dec. 31, 2012) (quoting *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)).

196. Fellner, *supra* note 16, at 405.

197. Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. ON LEGIS. 1, 10 (2015).

198. *See Coleman v. Wilson*, 912 F. Supp. 1282, 1282 (E.D. Cal. 1995).

199. *Id.* at 1320-21.

Amendment rights.²⁰⁰ But, because the Eighth Amendment applies only to individuals convicted of crimes, pretrial detainees like Browder are unable to seek redress under the Eighth Amendment.²⁰¹

Individuals who are incarcerated can also challenge the constitutionality of solitary confinement under the Fourteenth Amendment's Due Process Clause.²⁰² In addition to granting prison administrators wide discretion to use solitary confinement, the Court also held that implementing such punishment with a lax, non-adversarial process does not violate an incarcerated person's Fourteenth Amendment rights.²⁰³ More specifically, in *Hewitt v. Helms*,²⁰⁴ the petitioner was placed in solitary confinement following a prison riot.²⁰⁵ The petitioner argued that the Due Process Clause²⁰⁶ affords him the "right to remain in the general population."²⁰⁷ The Court disagreed.²⁰⁸ The Court also examined whether the petitioner's Fourteenth Amendment Due Process rights were violated when he was placed in solitary confinement absent a formal trial and adjudication.²⁰⁹ Noting that only an "informal, nonadversary review" of evidence is required, the Court held that such action was not unconstitutional.²¹⁰ The Court

200. *Ind. Prot. & Advocacy Servs. Comm'n*, 2012 WL 6738517, at *25. More specifically, the court stated:

Applying the standard just described, the Court finds that mentally ill prisoners within the [Indiana Department of Correction ("IDOC")] segregation units are not receiving minimally adequate mental health care in terms of scope, intensity, and duration and the IDOC has been deliberately indifferent. Based on the facts and law set forth in this Entry, therefore, it is the Court's conclusion that the treatment of the mentally ill prisoners housed in IDOC segregation units and the New Castle Psychiatric Unit, and the failure to provide adequate treatment for such prisoners, violates the Eighth Amendment's proscription against the imposition of cruel and unusual punishment.

Id. at *23.

201. *See Lewis v. Downey*, 581 F.3d 467, 474 (7th Cir. 2009) ("The Supreme Court has not directly addressed whether the Eighth Amendment is applicable to pre *sentencing* detainees, but it has indicated that the answer is no. According to the Court, 'the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.' The Court later confirmed that such a 'formal adjudication' includes both conviction and sentence." (first quoting *Ingraham ex rel. Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977); and then quoting *Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989)); *Watkins v. City of Battle Creek*, 273 F.3d 682, 685-86 (6th Cir. 2001).

202. *See, e.g., Sandin v. Conner*, 515 U.S. 472, 475-76 (1995); *Hewitt v. Helms*, 459 U.S. 460, 462 (1983).

203. *See Hewitt*, 459 U.S. at 474.

204. *Id.* at 462-64.

205. *See id.*

206. *See id.* at 466-67.

207. *Sandin*, 515 U.S. at 480.

208. *See id.*

209. *See Hewitt*, 459 U.S. at 472.

210. *See id.* at 472, 476 ("An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to

nevertheless provided that language in the state procedural guidelines created a liberty interest, which, if violated, can be used as a means to seek redress by those who are incarcerated.²¹¹ Years later, the Court found this ruling problematic.²¹² In *Sandin v. Conner*,²¹³ the petitioner argued that his transfer from the general population to solitary confinement violated his rights under the Due Process Clause.²¹⁴ The Court affirmed that there are instances where liberty interests are created while someone is incarcerated that are protected by the Due Process Clause.²¹⁵ But, the Court held that such transfer did not violate the Due Process Clause because “segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest,” nor did the state’s action extend the petitioner’s sentence without formal adjudication.²¹⁶

The Supreme Court has not ruled on the constitutionality of solitary confinement and pretrial detainees. In *Bell v. Wolfish*,²¹⁷ the Court held that “under the Due Process clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”²¹⁸ However, if the “[g]overnment . . . has legitimate interests that stem from its need to manage the facility,” the prison may enforce administrative measures to ensure prison safety even when such measures may exceed the very purpose of pretrial confinement, which is to ensure that the pretrial detainee appears in court.²¹⁹ As a result, the Due Process Clause affords pretrial detainees additional procedural rights that are not required for convicted individuals.²²⁰ This protection,

transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.”)

211. See *Sandin*, 515 U.S. at 480.

212. See *id.* at 481 (“By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlement to various state-conferred privileges.”). Additionally, the Court noted:

Hewitt has produced at least two undesirable effects. First, it creates disincentives for States to codify prison management procedures in the interest of uniform treatment. . . . Second, the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.

Id. at 482.

213. *Id.* 475-76.

214. *Id.*

215. See *id.* at 483-84.

216. *Id.* at 486.

217. 441 U.S. 520 (1979).

218. *Id.* at 535-36.

219. See *id.* at 540.

220. Compare *supra* text accompanying note 196, with *supra* note 210 and accompanying text.

however, is subject to a limitation.²²¹ Regarding solitary confinement specifically, at least one court has held that the Fourteenth Amendment's Due Process Clause is violated upon placing a pretrial detainee in isolation absent a legitimate institutional objective and evaluation of the incarcerated person's medical needs.²²²

The Eighth and Fourteenth Amendments each provide a distinct means to seek redress.²²³ The Eighth Amendment protects individuals who have already been sentenced, leaving individuals like Browder to look elsewhere for protection.²²⁴ The petitioner must further show that the prison staff had deliberate indifference when the harm was inflicted.²²⁵ The Fourteenth Amendment, on the other hand, applies to pretrial detainees and sentenced individuals alike.²²⁶ The lax, non-adversarial process and safety exception, however, limit the Fourteenth Amendment's availability, leaving this population no real tool to seek redress.²²⁷

D. Settlement Agreements: A Step in the Right Direction, Are They Enough?

More often than not, actions brought against correctional facilities for mistreatment or constitutional violations are settled.²²⁸ For example, in *Ingles v. Toro*,²²⁹ a class of incarcerated persons sued various corrections officials alleging that the officials' excessive use of force violated the class members' constitutional rights.²³⁰ The parties settled and the court noted its concern that "[t]he agreement is a private

(noting that an informal hearing is required prior to placing a pretrial detainee in solitary confinement, whereas such hearing is not required for convicted individuals similarly placed).

221. See *Bell*, 441 U.S. at 546 ("The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights . . . A detainee simply does not possess the full range of freedoms of an unincarcerated individual.").

222. See *Nelson v. Shuffman*, 603 F.3d 439, 450-51 (8th Cir. 2010).

223. See *supra* notes 193-222 and accompanying text.

224. See *supra* note 201 and accompanying text.

225. See *supra* text accompanying note 199.

226. See *supra* notes 202-22 and accompanying text.

227. See *supra* notes 202-10 and accompanying text.

228. For class-action settlements in which plaintiffs sued correctional facilities for mistreatment, see, for example, *Ingles v. Toro*, 438 F. Supp. 2d 203, 208 (S.D.N.Y. 2006); Settlement Agreement, *Ashker v. Governor of California*, No. C 09-05796 CW (N.D. Cal. Jan. 13, 2015), ECF No. 486-3; Stipulation, *Parsons v. Ryan*, 289 F.R.D. 513 (D. Ariz. Oct. 14, 2014) (No. CV 12-00601-PHX-DJH), ECF No. 1185; Stipulation for a Stay with Conditions, *Peoples v. Fischer*, No. 11-CV-2694 (SAS) (S.D.N.Y. Feb. 19, 2014), ECF No. 123; and Jessica Corso, *Pa. Settles Lawsuit over Treatment of Mentally Ill Inmates*, LAW360 (Jan. 6, 2015, 5:50 PM), <http://www.law360.com/articles/608580/pa-settles-lawsuit-over-treatment-of-mentally-ill-inmates>.

229. 438 F. Supp. 2d at 206-07.

230. See *id.*

settlement and . . . not an enforceable court order or consent decree.”²³¹ Following this settlement, however, subsequent reviews “revealed continued instances of serious injury to class members.”²³² Similarly, in *Ashker v. Governor of California*,²³³ following a class action brought by incarcerated persons who were in solitary confinement for ten years or more and challenged the prison’s indefinite use of solitary confinement, California agreed to reduce the number of individuals in solitary confinement and limit the way in which solitary confinement is used.²³⁴ This agreement gave a magistrate judge the authority to oversee compliance.²³⁵ In *Parsons v. Ryan*,²³⁶ the petitioners alleged that the prison’s excessive use of solitary confinement resulted in harm and deaths. The Arizona Department of Corrections agreed to modify its use of solitary confinement for individuals with mental illness, allowing such population more time outside of the cell and access to mental health treatment.²³⁷ In *Disability Rights Network v. Wetzel*,²³⁸ where the petitioners argued that the state’s correctional facilities used solitary confinement with individuals who are mentally ill in a manner that was unconstitutional, the Pennsylvania Department of Corrections agreed to stop placing mentally ill incarcerated persons in solitary confinement and to screen all incarcerated persons for mental illness.²³⁹ In the

231. *Id.* at 209, 214-16.

I am troubled by one aspect of the proposed settlement—the requirement that any claim of a breach of the Agreement may be addressed only by bringing a new lawsuit for breach of contract in state court or by reinstating this action. . . . [P]laintiffs will be reluctant to enter into a ‘private settlement agreement’ because the PLRA limits the means by which they may enforce such an agreement to seeking relief in state court under state law. Plaintiffs may return to federal court only to seek reinstatement of the action—in essence, to rescind the agreement and to proceed to trial. . . . This decision was certainly reasonable and understandable, in view of the risks and burdens of proceeding to trial and the significant and wide-ranging relief obtained as a result But it makes little sense that, if a perceived problem with compliance should arise, short of seeking reinstatement of this action, plaintiffs can seek relief only in state court under state law.

Id. at 214-16.

232. *Ingles v. Toro*, 01 Civ. 8279 (DC) (S.D.N.Y.), LEGAL AID SOC’Y, <http://www.legal-aid.org/en/lawreform/lawreform/prisonersrightsproject/activecases/violenceandpersonalsafety/inglesvtoro.aspx> (last visited Nov. 26, 2016).

233. Settlement Agreement, *supra* note 228.

234. See Margo Schlanger & Amy Fettig, *Eight Principles for Reforming Solitary Confinement*, AM. PROSPECT, Fall 2015, at 34; see also Settlement Agreement, *supra* note 228.

235. See Settlement Agreement, *supra* note 228.

236. Stipulation, *supra* note 228.

237. *Parsons v. Ryan*, AM. C.L. UNION, <https://www.aclu.org/cases/parsons-v-ryan?redirect=prisoners-rights/parsons-v-ryan> (last updated Apr. 11, 2016); see Stipulation, *supra* note 228, at 7-9.

238. Complaint at 1-3, *Disability Rights Network of Pa. v. Wetzel*, No. 1:13-CV-00635 (Mar. 11, 2013), ECF No. 1.

239. *Id.*; Corso, *supra* note 228.

Peoples v. Fischer interim settlement,²⁴⁰ New York became the first state to ban the use of solitary confinement as a disciplinary measure for juveniles and pregnant women and also set forth a plan to eliminate its use as a disciplinary measure on a grander scale.²⁴¹

In 2013, the Virgin Islands agreed to discontinue using solitary confinement on individuals with serious mental illness in the Golden Grove Adult Correctional and Detention Facility.²⁴² The settlement agreement provided for the appointment of a neutral monitor to ensure compliance.²⁴³ The Virgin Islands, however, has failed to comply.²⁴⁴ According to a February 2015 compliance report, “one individual with chronic and persistent serious mental illness who has been housed in segregation for at least 10 years” was still in segregation despite the agreement.²⁴⁵ In addition to failing to comply with this term of the agreement, the correctional facility was deemed non-compliant with the following: housing incarcerated persons with mental illness based on their classification, establishing a policy for medical and mental health rounds to ensure adequate access to care and monitoring, and using segregation in lieu of mental health treatment.²⁴⁶ A subsequent compliance report in June 2015 yet again highlighted non-compliance in the same areas.²⁴⁷ Settlement agreements, at best, are working to identify solutions.²⁴⁸ These solutions, however, lack uniform protection for all individuals who are mentally ill, as the agreements only bind those

240. Stipulation for a Stay with Conditions, *supra* note 228, at 3-4.

241. Schlanger & Fettig, *supra* note 234; *see also* Stipulation for a Stay with Conditions at 3-4, *supra* note 228.

242. Settlement Agreement, *supra* note 170, at 1; Schlanger & Fettig, *supra* note 234.

243. Settlement Agreement, *supra* note 170, at 15.

244. KENNETH A. RAY, DEP'T OF JUSTICE, SIXTH COMPLIANCE MONITORING REPORT 67 (2015), http://www.justice.gov/sites/default/files/crt/legacy/2015/05/29/goldengrove_mtrpt6_2-14-15.pdf (noting that the facility was noncompliant in (1) developing a procedure for those in isolation to prevent decompensation, (2) having a mental health provider review disciplinary sanctions to determine whether the behavior was a symptom of mental illness, and (3) diverting individuals with mental illness from segregation and providing out-of-cell activities for those who are there).

245. *Id.*

246. *Id.*

247. KENNETH A. RAY, DEP'T OF JUSTICE, SEVENTH COMPLIANCE MONITORING REPORT 4-5 (2015), http://www.justice.gov/sites/default/files/crt/legacy/2015/06/03/goldengrove_mtrpt7_6-2-15.pdf (“[Ninety-two percent] of Agreement provisions remain in noncompliance. . . . Mentally ill inmates languish in isolation conditions and problems with inmates accessing medical and mental health services continue. Many inmates are held in administrative and disciplinary segregation for extraordinary periods of time—some indefinitely—and without an adequate review process prior to or during such detention.”).

248. Compare Part III.B-C, with *supra* notes 228-46 and accompanying text (demonstrating the way in which settlement agreements result in prisons agreeing to change their solitary confinement policies and procedures).

specific correctional facilities.²⁴⁹ Moreover, even though the facilities are bound, the agreements are ignored, or worse, the petitioners face retaliation from the prison administrators.²⁵⁰

Settlement agreements, international laws, domestic laws, and judicial decisions, whether directly or indirectly, require that an individual's rights be protected even while imprisoned.²⁵¹ International law requires humane care while imprisoned and limits solitary confinement's use and duration.²⁵² Federal statutes give incarcerated individuals a cause of action, if confinement conditions violate their rights,²⁵³ and give the DOJ supervisory authority of prison conditions.²⁵⁴ Additionally, case law extends the protections afforded by the Americans with Disability Act to safeguard against discriminatory treatment in prison for individuals with disabilities.²⁵⁵ It also affirms that prison officials are mandated to protect the incarcerated persons in their care.²⁵⁶ These avenues have limitations that inhibit redress and yield lack of uniform protection.²⁵⁷ As a result, individuals with mental illness continue to be both placed in solitary confinement and negatively impacted by its egregious effects.²⁵⁸

IV. PRISONS, INDIVIDUALS WITH MENTAL ILLNESS, AND SOLITARY CONFINEMENT: RECOMMENDATIONS

The criminal justice system focuses primarily on adjudicating guilt and innocence and, as a result, prison conditions are often ignored.²⁵⁹ As

249. See, e.g., *supra* notes 233, 237, 239, 241 and accompanying text (providing different settlement outcomes pursuant to the different agreements).

250. See, e.g., *supra* notes 244-45 and accompanying text.

251. See, e.g., text accompanying note 180.

252. See *supra* Part III.A.

253. 42 U.S.C. § 1983 (2012).

254. *Id.* § 1997a(a).

255. *Id.* § 12132.

256. 28 U.S.C. § 1346(b)(1)–(2) (2012) (giving the district courts jurisdiction to hear suits brought against the government alleging injury but prohibiting incarcerated persons from bring suits while incarcerated); 28 U.S.C. § 2675(a) (providing that an action may be brought against the United States for injury provided the claimant first goes through the appropriate administrative channels).

257. See *supra* Part III.B.1–2.

258. See *supra* Part II.B.

259. See *Davis v. Ayala*, 135 S. Ct. 2187, 2209-10 (2015) (Kennedy, J., concurring) (“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. Prisoners are shut away—out of sight, out of mind. It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts.”).

discussed above, many laws attempt to address the way in which individuals with mental illness are treated with respect to solitary confinement.²⁶⁰ Internationally, the laws “acknowledg[e] that the rule of law and fundamental norms of justice do not stop at the prison gate.”²⁶¹ In the United States, however, the laws, at best, acknowledge a right afforded to this population but fail to provide an adequate remedy.²⁶²

Courts have begun to slowly chip away at solitary confinement.²⁶³ But, the current landscape yields only limited oversight to ensure compliance and a lack of national uniformity when prisons place individuals with mental illness in solitary confinement.²⁶⁴ As long as prison administrators are allowed to use solitary confinement, laws must be enacted to minimize its deleterious effects.²⁶⁵ President Obama, moved by Browder’s story,²⁶⁶ instructed the DOJ to conduct a study and devise recommendations for solitary confinement.²⁶⁷ In January 2016, President Obama announced plans to adopt the DOJ’s recommendations to reform federal solitary confinement through a series of executive actions.²⁶⁸ Although these executive actions are a much-needed step in the right direction, federal legislation is a better route because these executive actions can be repealed or significantly limited at a later date by Congress or subsequent presidents.²⁶⁹

260. See *supra* Part III.A–C.

261. Fellner, *supra* note 16, at 409.

262. See *supra* Part III.B.

263. See *supra* Part III.D.

264. See, e.g., *Ingles v. Toro*, 438 F. Supp. 2d 203, 209–10 (S.D.N.Y. 2006) (conferring supervisory authority to the Department of Corrections); Settlement Agreement, *supra* note 228, at 19–20 (conferring supervisory authority to a Magistrate Judge who will hear cases brought by plaintiffs for breach of contract); Stipulation for a Stay with Conditions, *supra* note 228, at 7–8 (conferring supervisory authority between parties in which defendant is required to provide periodic reports of compliance to plaintiff’s counsel).

265. See *infra* Part IV.A–C.

266. Obama, *supra* note 31.

267. *Id.*

268. Marina Koren, *Obama’s Executive Actions on Solitary Confinement*, ATLANTIC (Jan. 26, 2016), <http://www.theatlantic.com/politics/archive/2016/01/obama-solitary-confinement/427056>; Obama, *supra* note 31.

269. John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 393 (2010). The following illustrates the different congressional reactions to executive action:

Congress has its own remedies and may react in several ways. First, it may introduce a new version of, or an amendment to, that prior legislation upon which the order espouses justification to give better detail as to the expectations of Congress over the presidential action. Should the President subsequently veto the amended statute, Congress may override the veto by a vote of two-thirds of its membership in each chamber. Congress may alternatively rewrite the law to which the order subscribes so that the order comes in direct conflict with the amended statute. Congress may refuse to fund the agency charged with carrying out the order . . . Finally, Congress may challenge the order in

Therefore, Congress should enact comprehensive federal legislation through its taxing or spending powers—a model for states—that controls and limits a prison’s use of solitary confinement on individuals with mental illness.²⁷⁰ Such legislation will better protect this population uniformly while bringing the United States more in line with international standards.²⁷¹ The Solitary Confinement Study and Reform Act of 2014 (“Solitary Confinement Act”), section 137 of the N.Y. Correction Law (“SHU Exclusion Law”), and the *Peoples v. Fisher* settlement agreement all provide necessary elements to ensure individuals with mental illness are protected in the event that they are sentenced to solitary confinement.²⁷² Of the three, New York’s SHU Exclusion Law is the only legislation that specifically targets individuals with mental illness in solitary confinement.²⁷³ Although the remaining two address solitary confinement conditions in general, the provided recommendations can easily be adapted to meet the needs of individuals with mental illness.²⁷⁴ Below, all three solutions are described and the tenets are enumerated.²⁷⁵ Additionally, recommendations are offered to ensure that the tenets apply specifically to individuals with mental illness.²⁷⁶

A. Solitary Confinement Study and Reform Act

In May 2014, Representative Cedric Richmond introduced the Solitary Confinement Act to Congress.²⁷⁷ Considering the lack of uniformity in the way in which solitary confinement is used across the country, coupled with the constitutional concerns, Representative

court by means of affected parties with standing, on grounds that it exceeds presidential authority or deviates from congressional intent.

Id.; see, e.g., *id.* at 403-06 (commenting on the way in which President Obama revoked and amended various executive orders from prior presidents during his early days in office); Michele Estrin Gilman, *If at First You Don’t Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103, 1123-24 (2007) (elucidating the way in which Clinton reversed Reagan’s “gag rule” executive order, later reinstated by Bush).

270. See *infra* Part IV.A–C.

271. *Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 41, ¶ 75 (“The use of solitary confinement can be accepted only in circumstances where its duration must be as short as possible and for a definite term that is properly announced and communicated.”).

272. See *infra* Part IV.A–C.

273. See *infra* Part IV.B.

274. See *infra* notes 283, 303-06 and accompanying text.

275. See *infra* Part IV.A–C.

276. See *infra* Part IV.A–C.

277. Richmond, *supra* note 197, at 13.

Richmond proposed the Solitary Confinement Act to legislate change.²⁷⁸ The Act's purposes are as follows:

- (1) [D]evelop and implement national standards for the use of solitary confinement to ensure that it is used infrequently and under extreme circumstances;
- (2) establish a more humane and constitutionally sound practice of segregated detention or solitary confinement in the Nation's prisons;
- (3) accelerate the development of best practices and make reforming solitary confinement a top priority in each prison, jail, and juvenile detention system at the Federal and State levels;
- (4) increase the available data and information on the incidence of solitary confinement consequently improving the management and administration of correctional and juvenile justice facilities;
- (5) standardize definitions used for collecting data on the incidence of solitary confinement;
- (6) increase the accountability of prison, jail, and juvenile corrections officials who fail to design and implement humane and constitutionally sound solitary confinement practices;
- (7) protect the Eighth Amendment rights of Federal, State, and local prisoners and juvenile detainees; and
- (8) reduce costs that solitary confinement imposes on interstate commerce.²⁷⁹

Further, the Solitary Confinement Act establishes a commission to study solitary confinement's conditions, prevalence, and effects in U.S. prisons and jails and to develop national standards.²⁸⁰ The Solitary Confinement Act was not passed, but it was reintroduced in 2015.²⁸¹

If Congress does not pass the Solitary Confinement Act, which applies to all incarcerated persons, it should enact similar legislation that applies specifically to incarcerated individuals with mental illness in federal prisons.²⁸² As a result, to best protect individuals with mental illness, the following variations are recommended:

- (1) [D]evelop and implement national standards for the use of solitary confinement *with individuals with mental illness* to ensure that it is used infrequently and under extreme circumstances;
- (2) establish a more humane and constitutionally sound practice of segregated

278. *Id.* ("The bill aims to study and promote reforms to how solitary confinement is done in America and to bring the practice more in line with the U.S. Constitution."). Additionally, Richmond notes that "[w]e have to respect the challenges of housing the nation's offenders, but we must make sure the systems that prison officials have in place are humane." *Id.* at 15.

279. Solitary Confinement Study and Reform Act of 2014, H.R. 4618, 113th Cong. § 2(1)–(8) (2014).

280. *Id.* §§ 3–4.

281. Solitary Confinement Study and Reform Act of 2015, H.R. 3399, 114th Cong. § 1 (2015); see H.R. 4618—*Solitary Confinement Study and Reform Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4618/all-actions?overview=closed> (last visited Nov. 26, 2016).

282. See *infra* text accompanying note 283.

detention or solitary confinement *for individuals with mental illness* in the Nation's prisons; (3) accelerate the development of best practices and make reforming solitary confinement *for individuals with mental illness* a top priority in each prison, jail, and juvenile detention system at the Federal and State levels; (4) increase the available data and information on the incidence of solitary confinement *with individuals with mental illness* consequently improving the management and administration of correctional and juvenile justice facilities; (5) standardize definitions used for collecting data on the incidence of solitary confinement *with individuals with mental illness*; (6) increase the accountability of prison, jail, and juvenile corrections officials who fail to design and implement humane and constitutionally sound solitary confinement practices *for individuals with mental illness*; (7) protect the Eighth Amendment rights of Federal, State, and local prisoners and juvenile detainees *with mental illness*; and (8) reduce costs that solitary confinement *with individuals with mental illness* imposes on interstate commerce.²⁸³

As mentioned, the legislation should establish a commission to study solitary confinement's conditions, prevalence, and effects in U.S. prisons and jails, but specifically with respect to individuals with mental illness, and also develop national standards to guide its limited use with this population.²⁸⁴ Considering the prevalence of mental illness in prisons and its disproportionate prevalence in solitary confinement,²⁸⁵ the proposal, which slightly alters the Solitary Confinement Act, both captures the extent of the problem and puts practices in place to better treat incarcerated individuals with mental illness.²⁸⁶

B. New York's Secure Housing Unit Exclusion Law

In 2011, New York became the first state to enact legislation to change the prison conditions for individuals with mental illness.²⁸⁷ The SHU Exclusion Law limits the use of solitary confinement by prohibiting its use on individuals with serious mental illness.²⁸⁸ Under this statute, serious mental illness includes some of the following diagnoses or observations: schizophrenia, delusional disorder, major depressive disorders, bipolar disorder I and II, active suicidal ideations

283. See *supra* text accompanying note 279 (mirroring the Solitary Confinement Act but making it applicable specifically to individuals with mental illness).

284. See *supra* note 280 and accompanying text.

285. See, e.g., text accompanying note 98.

286. See *supra* notes 80-82, 283 and accompanying text.

287. Phyllis Vine, *Solitary Confinement Reformed in New York*, MIWATCH.ORG, http://www.miwatch.org/2011/07/solitary_confinement_reformed.html (last visited Nov. 26, 2016).

288. N.Y. CORRECT. LAW § 137(6)(d)(i) (McKinney 2012).

or recent suicidal attempts, and significant mental deterioration while in solitary confinement.²⁸⁹ Moreover, some of the law's tenets include (1) transferring individuals with mental illness out of solitary confinement and into therapeutic settings;²⁹⁰ (2) establishing a procedure specifying the frequency in which mental health screening is conducted on individuals in solitary confinement;²⁹¹ (3) incorporating a mental health clinician's mental health assessment and determinations upon deciding when to terminate the solitary confinement sentence;²⁹² and (4) prohibiting a restricted diet, unless otherwise required, for individuals in solitary confinement with mental illness.²⁹³ Because this law aims to cater an individual's treatment while incarcerated to their mental health needs, this legislation is a progressive step in the right direction, a framework Congress should consider enacting, and should be a model for similar state legislation. To maximize the way in which it protects individuals with mental illness in federal prisons, the following variations should be added to the above tenets: (1) require that individuals completing the mental health screenings are adequately trained²⁹⁴ and (2) include the above protections not only to individuals who have active mental illness but also to individuals who have an acute history of mental illness.²⁹⁵

C. Peoples v. Fischer Settlement Agreement

After spending 780 days in solitary confinement for a non-violent offense, Leroy Peoples brought an action, individually and on behalf of similarly situated individuals, against the New York State Department of Corrections and Communities Services ("NY DOCCS") Commissioner Brian Fischer for the disproportionate and unconstitutional use of solitary confinement.²⁹⁶ The complaint alleged that "New York . . . uses

289. *Id.* § 137(6)(e)(i).

290. *Id.* § 137(6)(1)(d)(i).

291. *Id.* § 137(6)(d)(ii)(A)–(C).

292. *Id.* § 137(6)(d)(ii)(D).

293. *Id.* § 137(6)(d)(iv).

294. *But cf. supra* note 105 and accompanying text (ensuring that individuals completing the screening are trained to work effectively with this population).

295. *See supra* note 110 and accompanying text (articulating the way in which solitary confinement not only exacerbates mental illness with individuals who are mentally ill but also can create mental illness in otherwise mentally stable individuals). By including individuals with an acute history, the law will ensure that individuals that may have difficulty communicating their symptoms are equally protected. *See supra* notes 106-08, 113-14 and accompanying text.

296. *See* Third Amended Class Action Complaint at 1-4, Peoples v. Fischer, No. 11-CV-2694 (SAS) (S.D.N.Y. Mar. 6, 2013), ECF No. 93; *Historic Settlement Overhauls Solitary Confinement in New York*, NYCLU (Dec. 16, 2015), <http://www.nyclu.org/news/historic-settlement-overhauls-solitary-confinement-new-york>.

extreme isolation as a disciplinary tool of first resort with astonishing frequency and length for the violation of any one of over one hundred internal prison regulations.”²⁹⁷ The complaint further alleged that once sentenced to solitary confinement, the NY DOCCS failed to conduct any periodic review to assess whether solitary confinement was still warranted.²⁹⁸

In an interim settlement agreement, in 2014, the petitioner agreed to discontinue the action, provided that the NY DOCCS revamped its solitary confinement practices.²⁹⁹ As enumerated in the agreement, the NY DOCCS agreed to develop a system that would ensure the time sentenced in solitary confinement is proportional to the infraction and to cease using solitary confinement with pregnant women, juveniles, and individuals with developmental disabilities.³⁰⁰ In 2015, the parties finalized their agreement.³⁰¹ Pursuant to the agreement, the NY DOCCS will (1) reduce the number of violations punishable by solitary confinement; (2) implement maximum sentences on offenses—thirty days for most first-time, non-violent offenses and a three-month maximum sentence of solitary confinement for most other offenses; (3) ensure basic human needs are met for individuals in solitary confinement, including adequate meals and phone privileges; and (4) provide training for correctional officers in which they would learn techniques to reduce the need to use solitary confinement.³⁰² Mirroring these tenets, Congress should enact legislation that requires all federal correctional facilities to follow suit. To best assist individuals with mental illness, however, this Note proposes that the following variations be adopted: (1) violations that result due to symptoms of mental illness are not punishable with solitary confinement;³⁰³ (2) if an individual exhibits symptoms of mental illness while in solitary confinement, such sentence should be terminated;³⁰⁴ (3) basic needs include regular mental

297. Third Amended Complaint, *supra* note 296, at 11, 14 (noting that some of the infractions that may result in solitary confinement include an untidy cell, littering, unauthorized jewelry, or an unreported illness).

298. See Third Amended Complaint, *supra* note 296, at 16.

299. See Stipulation for a Stay with Conditions, *supra* note 228, at 2-4.

300. See *id.* at 3-4.

301. See *Historic Settlement Overhauls Solitary Confinement in New York*, *supra* note 296.

302. *Id.*

303. *But cf.* *supra* note 114 and accompanying text (ensuring that individuals who, due to mental illness, are less able to conform to prison rules are not being punished for exhibiting symptoms of mental illness). Additionally, this modification would ensure that the prisons and jails are treating individuals with mental illness in accordance with the ADA, which provides that mental illness is a disability and unjustified and an intentional isolation of a person with mental illness constitutes discrimination. See *supra* note 153 and accompanying text.

304. *But cf.* *supra* text accompanying note 119 (ensuring that individuals removed from

health treatment, medication, and monitoring;³⁰⁵ and (4) training for correctional officers to differentiate between an individual acting out and an individual exhibiting symptoms of mental illness.³⁰⁶

V. CONCLUSION

Notably, “near-total isolation exact[s] a terrible price,”³⁰⁷ and that price is even greater for individuals with mental illness.³⁰⁸ In 2010, sixteen-year-old Kalief Browder was arrested for crimes that he did not commit.³⁰⁹ Following lengthy court delays and postponements, Browder was finally released from pretrial detention three years later.³¹⁰ In the general population, Browder was subjected to a prison environment that a DOJ investigation found to have a “deep-seated culture of violence,” riddled with attacks from officers and other incarcerated persons.³¹¹ Furthermore, the investigation found incarcerated persons sustained injuries that included “broken jaws, broken orbital bones, broken noses, long bone fractures, and lacerations requiring [stitches].”³¹² Despite this environment, solitary confinement proved to be more detrimental to Browder.³¹³

As prison populations increased and the number of community-based mental health facilities decreased, the prevalence of mental illness in prisons began to rise.³¹⁴ Moreover, as the number of individuals in prison with mental illness began to rise, while the number of mental health professionals working in prisons declined, the number of infractions resulting in solitary confinement soared among individuals with mental illness.³¹⁵ Dr. Stuart Grassian noted that “[t]he restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental function.”³¹⁶ As

solitary confinement because of mental health deterioration are not returned to solitary confinement where the individual may suffer another relapse).

305. *But cf. supra* note 110 and accompanying text (ensuring that individuals sentenced to solitary confinement are assessed periodically for mental illness and treated accordingly, including both individuals who were screened positive and negative for mental illness during the initial assessment).

306. *See supra* note 108 and accompanying text.

307. *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

308. *See supra* Part II.B.

309. Gonnerman, *supra* note 1.

310. *Id.*

311. U.S. ATT’Y FOR THE S. DIST. OF N.Y., *supra* note 14, at 3.

312. *Id.*

313. Gonnerman, *supra* note 13.

314. *See supra* notes 80-82 and accompanying text.

315. *See supra* notes 80-82, 95-98 and accompanying text.

316. Grassian, *supra* note 43, at 354.

a result, it is no surprise that there is a higher prevalence of suicide rates between individuals in solitary confinement than individuals in the general population.³¹⁷ Solitary confinement's long-term effects are particularly damaging.³¹⁸ These effects, however, are even more damaging to a population already vulnerable due to existing mental illness.³¹⁹

As the Supreme Court has noted, “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.”³²⁰ As a result, the courts are required to balance the individual's rights against a prison's administrative needs.³²¹ Settlement agreements, federal statutes, and judicial decisions aim to protect individuals with mental illness in the prison system, while balancing the prison's competing needs.³²² Despite these laws, individuals with mental illness continue to be significantly harmed by solitary confinement making it clear that these laws are inadequate.³²³ Therefore, Congress should enact legislation to adequately address this issue.³²⁴ The Solitary Confinement Act, New York's SHU Exclusion Law, and the *Peoples v. Fischer* settlement agreement all provide tenets that could be implemented to better protect individuals with mental illness in solitary confinement.³²⁵

Jails and prisons previously shared the same design as zoos, but when “it became clear that animals restricted to such living conditions exhibited behavioral abnormalities or simply died,” zoos changed how it housed its animals.³²⁶ Prisons and jails, however, have yet to follow suit, continuing to house people in a manner that is substandard to animals.³²⁷ Arguably, “[t]he laws and practices that have established and perpetuated this tragedy deeply offend any sense of human

317. Goode, *supra* note 115.

318. See Grassian, *supra* note 43, at 335-36.

319. See *supra* notes 115-23 and accompanying text.

320. Ind. Prot. & Advocacy Servs. Comm'n v. Ind. Dep't of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517, at *25 (S.D. Ind. Dec. 31, 2012) (quoting *Turner v. Safley*, 482 U.S. 78, 84-85 (1987)).

321. See *supra* Part III.C.

322. See *supra* Part III.C-D.

323. See *supra* notes 115-23 and accompanying text.

324. See *supra* Part IV.

325. See *supra* Part IV.

326. GILLIGAN & LEE, *supra* note 14, at 17 (“Thus we now allow animals to be kept only in ‘zoological parks’ designed to recreate the kinds of environments that they had evolved to survive in.”).

327. *Id.* (“But when it comes to human beings, we house them in physical environments in the likes in which no zoo director would be permitted to place wild animals.”).

decency.”³²⁸ It is time Congress enacts federal legislation to ensure that humans, particularly individuals with mental illness, who are incarcerated no longer fall subject to confinement conditions deemed unsuitable for zoo animals.³²⁹ History, research, and sadly Kalief Browder, continue to demonstrate solitary confinement’s grave effects on individuals with mental illness.³³⁰ Failing to reform the way solitary confinement is used on individuals with mental illness leaves an already vulnerable population—who the government has a duty to protect while incarcerated³³¹—susceptible to increased harm and exposed to fatal and irreversible consequences.³³²

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328. Grassian, *supra* note 43, at 355.

329. Compare *supra* notes 69-75 and accompanying text (describing solitary confinement’s conditions), with *supra* note 326 and accompanying text (describing the conditions that are unsuitable for animals in zoos).

330. See *supra* notes 1-13 and accompanying text (describing Kalief Browder’s experience with solitary confinement); *supra* Part II.A (describing solitary confinement’s history); *supra* Part II.B (describing the research on solitary confinement).

331. *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Hayes v. N.Y.C. Dep’t of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996).

332. See, e.g., *supra* notes 12-13 and accompanying text.

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