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Hannah May

Comment

Buried Alive: *Gay v. Baldwin* and Unconstitutional Solitary Confinement for Prisoners with Mental Illness

Hannah May[*]

Few inmates placed in solitary confinement escape the detrimental consequences of the punitive, oppressive conditions. Anthony Gay is no exception. As a teenager, Gay pled guilty to robbery for stealing a hat and a $1 bill and violated his probation by driving a vehicle without a license when he was twenty years old. Gay was supposed to be released in three and a half years with good behavior, but he suffers from borderline personality disorder. The symptoms of his mental illness, such as self-mutilation and throwing bodily fluids, manifested in prison. The manifestations of his mental illness landed him in solitary confinement, where he remained for the next twenty years of his life. Gay's mental health decompensated to a point so severe that he needed acute inpatient care. Over the twenty years he spent in solitary confinement, he never received the proper mental health care, and he filed a lawsuit against the IDOC claiming his treatment violated his Eighth and Fourteenth Amendment Rights.

The Supreme Court has not yet addressed the constitutionality of psychological conditions imposed on inmates in solitary confinement. Therefore, lower courts across the country have crafted their own nuanced standards to deal with this issue. Gay v. Baldwin *sits in the Central District of Illinois, where the Seventh Circuit has ruled that psychological claims need to be accompanied by either a physical injury or an extreme and officially sanctioned psychological harm in order for a prisoner to allege a sufficiently serious injury that would hold a prison official liable for the harm under the Eighth Amendment. This Comment contends that the Central District of Illinois, and upon appeal, the Seventh Circuit, should hold that the use of solitary confinement as punishment for prisoners with serious mental illness under any circumstances constitutes a deliberate indifference for the prisoner's health, for which prison officials may be held liable as a violation of the Eighth Amendment.*

* Loyola University Chicago School of Law, Civitas ChildLaw Fellow, J.D. Candidate, 2022. Thank you to the *Loyola University Chicago Law Journal* for its support. My thanks especially to Rebecca Bavlsik, Katie Piscione, and Jackie McDonnell for their assistance in the process.

INTRODUCTION

> He is a man buried alive; to be dug out in the slow round of years; and in the mean time dead to everything but torturing anxieties and despair.
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> – *Charles Dickens*[1]

Prolonged solitary confinement goes by different names in United States prisons, but the conditions are virtually the same.[2] The primary

1. In 1842, Dickens recounted his real-life visit to Philadelphia's Eastern State Penitentiary, in which he described the prisoners housed in solitary confinement. Justice Sotomayor quotes Dickens to advocate for courts and prison officials to remain alert to the constitutional problems raised by keeping prisoners in solitary confinement. Apodaca v. Raemisch, 139 S. Ct. 5, 9 (2018) (Sotomayor, J., concurring) (quoting CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 148 (J. Whitley & A. Goldman eds. 1972)).

2. *See* Lindley A. Bassett, *The Constitutionality of Solitary Confinement: Insights from Maslow's Hierarchy of Needs*, 26 HEALTH MATRIX 403, 408 (2016) (describing the conditions of solitary confinement in the background section of the article); *see also* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115–16 (2008) (introducing the harsh forms of solitary confinement used in different state supermax prisons). Across the United States, the practice of isolating people in closed cells is variably known as solitary confinement, administrative segregation, restrictive housing, isolation, SHU (special housing units), supermax, and other terms. *See, e.g.*, *Solitary Confinement Facts*, AM. FRIENDS SERV. COMM.,

purposes of solitary confinement are (1) to protect an individual from particular threats, (2) to impose a sanction for a discrete act, or (3) to control an inmate perceived to pose a current or future risk.[3] Prisoners in solitary confinement spend twenty-three hours per day isolated in a concrete or steel-walled cell, sometimes as small as six feet by twelve feet, which might not even include a window.[4] Prisoners in solitary confinement have little to no contact with other prisoners or prison guards.[5] Overall, jurisdiction policies vary in terms of the detail provided regarding the restrictions placed upon individuals held in solitary confinement.[6]

Few inmates placed in solitary confinement escape the detrimental consequences of the punitive, oppressive conditions.[7] As early as the 1830s, scientists documented concern with the long-term psychological effects of solitary confinement.[8] The psychological effects of prolonged

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https://www.afsc.org/resource/solitary-confinement-facts (last visited Mar. 29, 2021) [https://perma.cc/M6UA-BSGU]. For simplicity, the practice will be referred to as "solitary confinement" throughout this Comment.

3. All jurisdictions provide for some form of separation of inmates from the general population in prisons. Correctional policies explain that prison administrators understand the ability to separate inmates as central to protecting the safety of both inmates and staff; however, controversy surrounds this form of control over inmates, its effects, and the discretion used in duration of the separation. Hope Metcalf et al., *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies* 1 (Yale L. Sch. Pub. L. Working Paper No. 301, 2013), https://ssrn.com/abstract=2286861 [https://perma.cc/5UNR-QWAW].

4. ILL. ADMIN. CODE tit. 20 §540.620 (2021); Bassett, *supra* note 2, at 408; Alexa T. Steinbuch, *The Movement Away from Solitary Confinement in the United States*, 40 NEW ENG. J. CRIM. & CIV. CONFINEMENT 499, 507 (2014).

5. *See* sources cited *supra* note 4.

6. A wide net of authority permits inmates to be placed in solitary confinement. Specific jurisdiction policies outline the procedures to segregate inmates, and only a few jurisdictions impose specific controls on such decision-making. Metcalf et al., *supra* note 3, at 5. In Illinois, inmates may be placed in "temporary confinement pending a disciplinary hearing or investigation;" "disciplinary segregation resulting from a disciplinary hearing;" or the Chief Administrative Officer may place an inmate in "administrative detention for up to 90 days." ILL. ADMIN. CODE tit. 20, § 504.610 (2021); ILL. ADMIN. CODE tit 20 § 504.690 (2021).

7. The United States had sources dating back to the early nineteenth century that provided information regarding the damaging effects of solitary confinement. *See* Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 576 (1999) (discussing the observations of Charles Dickens—mistakenly attributed to Charles Darwin—and Alexis de Tocqueville); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 371 (2018) (discussing the systematic early studies of solitary confinement in the United States).

8. Rebman, *supra* note 7, at 576–77 (Charles Dickens (mistakenly referred to as Darwin in the article) described inmates he saw in solitary confinement as "dead to everything but torturing anxieties and horrible despair. . . . The first man . . . answered . . . with a strange kind of pause . . . [he] fell into a strange stare as if he had forgotten something . . . . [Of another] Why does he stare at his hands and pick the flesh open, . . . and raise his eyes for an instant to those bare walls."); *Id.* at 577 n.80. Alexis de Tocqueville expressed similar concern with the long-term effects of solitary

solitary confinement are particularly relevant to Illinois, where the Illinois Department of Corrections (IDOC) found that of the roughly 1,100 Illinois prisoners in solitary confinement, more than 900 had been diagnosed with mental illnesses, with one in three diagnosed with a serious mental illness.[9] Furthermore, in October 2022, the Central District of Illinois will hear *Gay v. Baldwin*, which directly addresses the intersection of solitary confinement and mental illness.[10]

As a teenager, Anthony Gay pled guilty to robbery for stealing a hat and a $1 bill; he was placed on probation.[11] Gay, in youthful error, violated his probation by driving a vehicle without a license, and the court sentenced him to prison in 1994.[12] The prison was supposed to release him in three and a half years with good behavior.[13] However, Gay suffers from borderline personality disorder and the symptoms of his mental illness, such as self-mutilation and throwing bodily fluids, manifested in prison.[14] Instead of providing mental health treatment, the IDOC cited him for a variety of violations and placed him in solitary confinement, which lasted for twenty years.[15] Gay's mental health further deteriorated in solitary confinement, and he began to engage in acts of self-mutilation.[16] In fact, Gay's mental health deterioration was so severe that he was among a small number of prisoners deemed so mentally ill that they need acute inpatient care.[17]

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confinement on the inmates, as well as on society, when those inmates are released back into the general population. *Id.* at 577 n.81.

9. Rasho v. Walker, No. 07-1298, 2018 WL 10646910, at *15 (C.D. Ill. Oct. 30, 2018) ("In the IDOC, over 80% of the inmates in the IDOC who are in segregation are mentally ill." (citing Pl. Ex. 22, "897 out of 1105 inmates in segregation are mentally ill.")); Shannon Halligan, *Bill Could Limit Use of Solitary Confinement in Illinois*, WGN (Mar. 10, 2020, 4:22pm), https://wgntv.com/news/bill-could-limit-use-of-solitary-confinement-in-illinois/ [https://perma.cc/5FB2-R2GV]; *see also* Rasho v. Walker, No. 07-1298, 2018 WL 2392847, at *1 (C.D. Ill. May 25, 2018) ("There are approximately 44,000 inmates in the custody of the IDOC, of whom more than 12,000 are believed to be mentally ill. Approximately 4,800 of these inmates are considered 'seriously mentally ill.'" (citations omitted)).

10. Text Order, Gay v. Baldwin, No. 19-cv-01133 (C.D. Ill. Jan. 22, 2021).

11. Complaint at 1, Gay v. Baldwin, No. 19-cv-01133 (N.D. Ill. Oct. 28, 2018) [hereinafter *Gay* Complaint].

12. *Id.* At the time of his probation violation, Gay was only twenty years old.

13. *Id.*

14. *Id.* at 1–2. *See also* Skodol et al., *infra* note 175, at 159 (explaining borderline personality disorder).

15. *Gay* Complaint, *supra* note 11, at 2.

16. *Id.*

17. *Id.* at 3 (citing Rasho v. Walker, No. 07-1298, 2018 WL 2392847 (C.D. Ill. May 25, 2018), a class action civil lawsuit concerning IDOC's treatment of mentally ill prisoners); *see also* Amanda Antholt et al., *Mentally Ill Prisoners Win Injunction, Judge Declares that the IDOC's Failure to Provide Mental Health Care is an "Emergency Situation"*, EQUIP FOR EQUALITY (May 25, 2018), https://www.equipforequality.org/news-item/judge-issues-opinion-on-rasho/

Gay filed a lawsuit against prison officials at the IDOC, claiming a violation of his Eighth and Fourteenth Amendment rights.[18] The Eighth and Fourteenth Amendments constrain the use of solitary confinement to punish prisoners.[19] It is unconstitutional for the federal government to inflict cruel and unusual punishment per the Eighth Amendment.[20] Through the incorporation doctrine, the Eighth Amendment is applicable to the states via the Due Process Clause of the Fourteenth Amendment.[21] The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law . . . ."[22] Gay claims his Eighth Amendment rights were violated by the IDOC's deliberate indifference to his medical needs, and his Fourteenth Amendment rights were violated by the IDOC's denial of an opportunity to challenge his placement in solitary confinement for two decades.[23]

The Eighth Amendment functions in the criminal justice system through regulation of formal sentences that may be imposed for particular offenses and of the conditions under which prisoners must serve those sentences.[24] After a defendant is sentenced, the Eighth Amendment's "evolving standards of decency" principle regulates prison conditions,

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[https://perma.cc/9XVS-ZE3M] (discussing how the court in *Rasho v. Baldwin* ordered the IDOC "to provide mental health treatment to prisoners who are on 'crisis watches' and in segregation" and to provide "medication management, mental health evaluations and necessary mental health staff throughout the system").

18. *See generally Gay* Complaint, *supra* note 11.

19. *See* Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 941 (2018) (discussing how the two sources of constitutional law that bear on issues relating to a prison administrator's use of solitary confinement are the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's prohibition against "cruel and unusual punishments"). In 1962, the Court found that the Eighth Amendment was incorporated against the states via the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 667 (1962). The Eighth and Fourteenth Amendments limit which types of prisoners can be placed in solitary confinement and the time they can be held there and require that prisoners receive sufficient due process before and during their confinement. Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 507 (2014).

20. U.S. CONST. amend. VIII.

21. *Robinson*, 370 U.S. at 675.

22. U.S. CONST. amend. XIV.

23. *See generally Gay* Complaint, *supra* note 11.

24. Multiple Supreme Court plurality opinions have used the Eighth Amendment as a standard in ascertaining whether sentences were imposed fairly in light of the facts of the individual case and by comparison with penalties imposed in similar cases. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 154, 195, 198 (1976) (plurality opinion) (discussing this constitutional safeguard against arbitrary and capricious sentencing); Proffitt v. Florida, 428 U.S. 242, 250–51, 253 (1976) (plurality opinion) (discussing how the trial judge must focus on the circumstances of the crime and the character of the individual defendant); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion) (deciding that Texas's capital-sentencing procedures did not violate the Eighth Amendment). *See also* Weems v. United States, 217 U.S. 349, 373 (1910) (concluding that the Framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789, but also intended to prevent the authorization of "a coercive cruelty being exercised through other forms of punishment").

including the provision of medical and mental health care; the use of force by officers; and the material, lived conditions of prisoners such as living space, food, and sanitation.[25] The Eighth Amendment constrains state action, extending from sentencing to release from custody, meaning the nature of Eighth Amendment claims depends on the context of the particular challenge.[26]

When solitary confinement implicates one's liberty interest as it relates to atypical prison conditions, the Fourteenth Amendment's Due Process Clause is implicated as well.[27] Generally, under the Fourteenth Amendment, procedural due process provides prisoners both an opportunity to know why a prison is placing them in solitary confinement and an opportunity to be heard about not being placed in solitary confinement.[28] However, while the Supreme Court has acknowledged the applicability of Fourteenth Amendment claims to solitary confinement, it has not defined when such confinement would be constitutional.[29]

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25. The standard originated in 1958, in *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). This passage from the *Trop* opinion was repeated by the Court in 2002, adding that cruel and unusual punishment is "judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail." Atkins v. Virginia, 536 U.S. 304, 311–12 (2002). *See also* Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 409–10 (2011) (contending that the Court has deployed an "evolving standards of decency" formula to evaluate a range of issues from application of harsh punishment to certain classes of offenders); *but see* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. REV. 1739, 1751–52, 1756 (2008) (criticizing the Court's use of "objective indicia" as being inconsistently applied and prone to manipulation by the Court).

26. Modern jurisprudence surrounding prison conditions stems from *Estelle v. Gamble*, in which the Court held that the Eighth Amendment protected prisoners from harm caused by the "deliberate indifference" of prison officials. Estelle v. Gamble, 429 U.S. 97, 104 (1976); *see* Gordon, *supra* note 19, at 509–10 (describing the Supreme Court's process of analyzing the Eighth Amendment's prohibition on cruel and usual punishment); *see also* Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. LEGIS. 1, 6 (2015) (discussing how solitary confinement may violate the Eighth Amendment); Reinert, *supra* note 19, at 944–46.

27. Reinert, *supra* note 19, at 941; *see* Wilkinson v. Austin, 545 U.S. 209, 223 (2005) (stating that the supermax conditions in the case before the Court were "atypical and significant . . . under any plausible baseline."); *but see* JENNIFER WEDEKIND, SOLITARY WATCH, FACT SHEET: SOLITARY CONFINEMENT AND THE LAW 1 (2011), https://solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-solitary-confinement-and-the-law2.pdf [https://perma.cc/SLP3-FVUG] ("[T]he courts have consistently stated that prisoners retain only the most limited liberty interests and courts are exceedingly deferential to the decisions of prison administrators." (citing Hewitt v. Helms, 459 U.S. 460, 467 (1983))).

28. Reinert, *supra* note 19, at 943. The opportunity to be heard as to why one is placed in solitary confinement includes a hearing before an "impartial" decisionmaker, even though this may potentially be an employee of the prison, and a limited opportunity to examine witnesses and offer evidence (but no right to be represented). *Wilkinson*, 545 U.S. at 216, 226–30 (discussing procedures necessary before placement of a person in Ohio's maximum-security unit).

29. *See Wilkinson*, 545 U.S. at 223 (noting that the courts have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system).

Lacking the guidance of a standard from the Supreme Court, lower courts across the country crafted their own nuanced standards regarding the constitutionality of psychological conditions imposed on inmates in solitary confinement.[30] *Gay v. Baldwin* sits in the Central District of Illinois, where the Seventh Circuit has created its own standards for Eighth Amendment and Fourteenth Amendment claims.[31] The Seventh Circuit has previously required psychological harm claims to be accompanied by either a physical injury or an extreme and officially sanctioned psychological harm in order for a prisoner to allege a "sufficiently serious" injury that would hold a prison official liable under the Eighth Amendment.[32] *Gay v. Baldwin* is a unique case because Gay's psychological harm manifested through severe forms of physical harm, such as self-mutilation.[33] Gay's complaint correctly alleges the pain and suffering caused by the psychological harm is cruel and unusual by today's standards of decency.[34] As such, the Central District of Illinois, and upon appeal, the Seventh Circuit, should join with those jurisdictions which have already condemned the practice and adopt a new standard, holding that the use of solitary confinement as punishment for prisoners with serious mental illness, under any circumstances, constitutes a deliberate indifference for the prisoner's health, for which prison officials may be held liable as a violation of the Eighth Amendment.

Part I of this Comment examines the history of Eighth Amendment and Fourteenth Amendment jurisprudence relating to solitary confinement, tracing back to the seventeenth century. It highlights key Supreme Court cases such as *In re Medley*, *Trop v. Dulles*, *Hutto v. Finney*, *Estelle v. Gamble*, and *Farmer v. Brennan* to reveal that the Court gradually grew less receptive to hearing solitary confinement cases as the practice became more prevalent throughout the country. Examining the Court's more recent denial of certiorari on solitary confinement cases, including

30. Rebman, *supra* note 7, at 605; Rosalind Dillon, *Banning Solitary for Prisoners with Mental Illness: The Blurred Line Between Physical and Psychological Harm*, 14 NW. J. L. & SOC. POL'Y 265, 290 (2019).

31. Rebman, *supra* note 7, at 604 (citing Doe v. Welborn, 110 F.3d 520, 524 (7th Cir. 1997), in which the court held that the fear of assault, unaccompanied by physical injury does not reflect the deprivation of the "minimal civilized measures of life's necessities"); *see also* Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996) ("[I]t is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment.").

32. *See* Doe v. Welborn, 110 F.3d 520, 524 (7th Cir. 1997) (holding that the fear of assault, unaccompanied by physical injury does not reflect the deprivation of the "minimal civilized measures of life's necessities" (citing Rhodes v. Chapman, 452 U.S. 337, 349 (1981))); *see also* Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996) (claiming that rather than any fear of assault, it is the reasonably preventable assault itself that gives rise to a claim under the Eighth Amendment).

33. *Gay* Complaint, *supra* note 11, at 10–13.

34. *Infra* Section III.D.1.

the dissenting Justices' reasoning, shows that Justices are more willing to speak out against the harmful effects of solitary confinement. Next, it reviews solitary confinement jurisprudence in the Seventh Circuit, which binds the Central District of Illinois in *Gay v. Baldwin*.

Part II reviews the current state of solitary confinement practices, beginning with current international practices compared to United States practices. This part demonstrates that solitary confinement practices differ depending on their focus on the rehabilitation of prisoners as opposed to the punishment of prisoners. Further, this part analyzes studies that look at the psychological impact of solitary confinement on prisoners to show that solitary confinement is especially problematic for those with serious mental illness. Part II also specifically looks to the current state of solitary confinement in Illinois.

Part III then discusses the gruesome facts and procedural posture of *Gay v. Baldwin* as well as pending Illinois legislation restricting the use of prolonged solitary confinement. Further, it argues that the Central District of Illinois should hold that the IDOC officials violated Gay's Eighth Amendment rights to be free from cruel and unusual punishment and should be held liable for their deliberate indifference to Gay's physical and psychological health. Both the evolving standards of decency doctrine and the deliberate indifference doctrine are analyzed in light of the facts in *Gay v. Baldwin*.

Finally, Part IV focuses on the impact the proposed *Gay* court's holding would have in Illinois. The court's holding, coupled with new legislation restricting the use of solitary confinement for prisoners with mental illness, would follow public opinion in favor of these restrictions and create real change within the Illinois Department of Corrections.

I. HISTORY OF SOLITARY CONFINEMENT

A. Solitary Confinement and the Court's Legal Standards

Solitary confinement is a common practice used both as punishment or as an administrative tool by federal and state penitentiaries to ensure the safety of inmates and prison staff and maintain control of the prison population.[35] A prominent prison reform think tank studied data from the Bureau of Justice Statistics and concluded that the number of inmates in

35. *See* Steinbuch, *supra* note 4, at 500–01 (introducing the variety of reasons that solitary confinement is used: as a form of punishment for prison rule violations or "disciplinary segregation"; to remove prisoners believed to pose a risk to security or prison safety or "administrative segregation"; and as a way to segregate prisoners believed to be at risk in the general prison population or "protective custody."); *see generally* Richmond, *supra* note 24, at 2 (explaining the background of the use of solitary confinement in the United States as reasoning for the support of new federal legislation that would provide guidelines about when solitary confinement is unconstitutional).

solitary confinement increased almost 41% from 1995 to 2005.[36] On a single average day in 2011 or 2012, up to 4.4% of federal and state inmates and 2.7% of jail inmates were held in solitary confinement.[37] Nearly 20% of prison inmates and 18% of jail inmates spent some time in solitary confinement, and approximately 10% of all prison inmates and 5% of jail inmates spent longer than thirty days in solitary confinement.[38] Various sources report that the United States has more prisoners in solitary confinement than any other country.[39] Overall, the use of solitary confinement in the United States is widespread.[40]

The use of solitary confinement as punishment in the United States dates back to the late seventeenth century, stemming from the Quaker belief that prisoners isolated in cells with only a Bible could use the time to reflect, repent, pray, and eventually reform.[41] Contemporary purposes underlying solitary confinement are broader. Today, it is used both as a punitive tool and an administrative tool to protect the general population from the prisoner and to protect the prisoner from the general population.[42]

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36. The number of inmates nationwide in solitary confinement increased from 57,591 in 1995 to 81,622 in 2005. Richmond, *supra* note 24, at 3 (citing *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Michael A. Jacobson, Director, Vera Institute of Justice)).

37. The Report is based on data from the National Inmate Survey, 2011–12, conducted in 233 state and federal prisons and 357 local jails, with a sample of 91,177 inmates nationwide. ALLEN J. BECK, U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, 1 (2015).

38. *Id.*

39. *See, e.g.*, Juan E. Méndez, *Afterword: "Exposing Torture"*, *in* HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT 224–25 (Jean Casella, James Ridgeway, & Sarah Shourd, eds. 2016) ("[I]t is safe to say that the United States uses solitary confinement more extensively than any other country, for longer periods, and with fewer guarantees.").

40. *See* Bassett, *supra* note 2, at 410 (stating context to provide background on the legal theories prisoners employ to challenge the practice of solitary confinement under the Eighth Amendment).

41. Dillon, *supra* note 30, at 269 (citing Harry Elmer Barnes, *Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 48 (1921)); David O. Boehm, *Adapting Sanctions to Conduct Poses Centuries-Old Challenge*, N.Y. ST. B. ASS'N J., Oct. 2001, at 33, 33–34 (2001); Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 155 (1995).

42. *See* Farmer v. Brennan, 511 U.S. 825, 830 (1994) (noting it was not disputed that the petitioner was placed in solitary confinement for both violations of prison rules and for safety concerns); *see also* Doe v. Welborn, 110 F.3d 520, 524–25 (7th Cir. 1997) (holding that the effects of protective custody in solitary confinement do not violate the Eighth Amendment); Bassett, *supra* note 2, at 412 (explaining that the practice is considered necessary to maintain prison control, protect inmates, staff, and even to prevent escapes).

Throughout history, the Court has grappled with the constitutionality of solitary confinement as punishment.[43] The Supreme Court addressed the issue of solitary confinement for the first time in 1890 with *In re Medley*, describing the punishment as an "example[] of the just punishment of the worst crimes of the human race."[44] In 1958, the Supreme Court established what has come to be known as the "evolving standards of decency" doctrine, stating that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[45] The doctrine considers several factors in deciding whether a type of punishment violated society's evolving standards of decency, including but not limited to (1) the actions of state legislatures, (2) the opinions of relevant professional organizations, (3) international norms,[46] and (4) the history of the specific punishment's use.[47]

In 1976, the Court established a second standard for solitary confinement claims in *Estelle v. Gamble*: the "deliberate indifference" standard.[48] The deliberate indifference standard provides that prison officials within a correctional institution violated the Eighth Amendment when (1) the correctional institution exposed inmates to a substantial risk of serious harm and (2) the prison officials acted with deliberate indifference to inmate health or safety.[49] Overall, with an Eighth Amendment solitary confinement claim, a court's analysis centers on the

43. Reinert, *supra* note 19, at 946. State and federal courts have heard numerous cases involving Eighth Amendment challenges to the practice of solitary confinement. However, solitary confinement has withstood the challenges and is not *per se* violative of the Eighth Amendment. Anthony Giannetti, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 BUFF. PUB. INT. L.J. 31, 37 (2011–2012).

44. *In re* Medley, 134 U.S. 160, 170 (1890).

45. Trop v. Dulles, 356 U.S. 86, 101 (1958); Andrew Leon Hanna, *The Present Constitutional Status of Solitary Confinement*, U. PA. J. CONST. L. ONLINE, Apr. 2019, at 1, 3 [hereinafter Hanna, *Constitutional Status*] (introducing the Eighth Amendment analysis of solitary confinement and referencing the seminal Supreme Court case *Trop v. Dulles*); Steinbuch, *supra* note 4, at 519.

46. *Infra* Section II.A.

47. Samuel B. Lutz, *The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition*, 80 N.Y.U. L. REV. 1862, 1867–68 nn.10–11 (2005) ("As its name implies, the evolving standards of decency doctrine requires courts to analyze prevailing community standards in order to determine whether a particular punishment conforms with established or developing social norms."); Andrew Leon Hanna, *Series on Solitary Confinement & the Eighth Amendment: Solitary Confinement as Per Se Unconstitutional*, U. PA. J. CONST. L. ONLINE, May 2019, at 1, 1.

48. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (establishing the "deliberate indifference" doctrine to determine when the poor provision of medical care rises to the level of violating the Eighth Amendment); Hanna, *Constitutional Status*, *supra* note 45, at 3–4.

49. Farmer v. Brennan, 511 U.S. 825, 834–40 (1994). The Court devised the doctrine of deliberate indifference to determine whether the specific conditions a prisoner is subjected to during confinement violate the Eighth Amendment. Hanna, *Constitutional Status*, *supra* note 45, at 4.

objective harm the prison created and the subjective state of mind of the prison officials.[50]

The Fourteenth Amendment's Due Process Clause allows prisoners to meaningfully challenge their placement in solitary confinement.[51] In many cases, prisoners challenging the constitutionality of their placement in solitary confinement bring both Eighth and Fourteenth Amendment claims. The Supreme Court stated that prisoners retain only limited liberty interests in Due Process claims, and courts must be exceedingly deferential to the decisions made by prison officials.[52] The Court provided that if a transfer out of the general population to solitary confinement were to impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," a liberty interest may be found.[53] Nevertheless, the Court has not defined a baseline for the atypical and significant hardship standard.[54] Even so, the Court has held in Due Process cases that meaningful periodic hearings must be afforded to ensure that administrative segregation is not a "pretext for indefinite confinement."[55]

Notwithstanding its indefinite standards, as early as 1890, the Supreme Court recognized the harmful effects of solitary confinement.[56] In fact, the Court in 1890 held that adding solitary confinement as an additional punishment on top of a death sentence was unconstitutional under the

50. *Farmer*, 511 U.S. at 834; Rebman, *supra* note 7, at 593–94; Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 69 (2009) (focusing on the deference in action by the courts on how different types of Eighth Amendment challenges are resolved).

51. *Supra* notes 24–29, and accompanying text.

52. *See e.g.*, Hewitt v. Helms, 459 U.S. 460, 467 (1983) ("[P]rison officials have broad administrative authority . . . over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests . . . . [O]ur decisions have consistently refused to recognize more than the most basic liberty interests in prisoners.").

53. Wilkinson v. Austin, 545 U.S. 209, 223 (2005). In *Wilkinson*, the Court required that a prisoner be given a statement of reasons for why they were being assigned to a supermax facility and there be an opportunity for the prisoner to be heard on the issue. *Id.* at 230. Prior to *Wilkinson*, the Court ruled that prisoners do not have a liberty interest in being taken out of the general prison population and temporarily placed in administrative segregation because the nature of the conditions of solitary confinement "does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence." Sandin v. Conner, 515 U.S. 472, 485 (1995); Julia M. Glencer, *An Atypical and Significant Barrier to Prisoners' Procedural Due Process Claims Based on State-Created Liberty Interests*, 100 DICK. L. REV. 861, 869 (1996) ("[J]udges deferred to the informed judgment of prison officials intimately versed in the maintenance of a secure and effective prison.").

54. *Wilkinson*, 545 U.S. at 223.

55. *Hewitt*, 459 U.S. at 477 n.9.

56. *In re* Medley, 134 U.S. 160, 168 (1890) ("A considerable number of the prisoners fell, even after a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community . . . .").

Eighth Amendment,[57] but the practice otherwise continued, and the Court consistently failed to deem it unconstitutional.

In 1958, the Court addressed the constitutionality of nonphysical forms of cruel and unusual punishment in *Trop v. Dulles*.[58] The Court in *Trop* ruled that it was unconstitutional to revoke citizenship as a punishment for a crime, referencing the evolving standards of decency marking the progress of a maturing society.[59] The Court recognized that the Eighth Amendment does not require physical mistreatment or primitive torture to constitute barred punishment, but rather the power to punish under the Eighth Amendment must be exercised within the limits of civilized standards.[60]

Thirty years later in *Hutto v. Finney*, the Supreme Court addressed whether punitive isolation for more than thirty days in the Arkansas prison system constituted cruel and unusual punishment as prohibited by the Eighth and Fourteenth Amendments.[61] The trial court described the conditions of the jail as "a dark and evil world completely alien to the free world."[62] The Court held that punitive isolation for longer than thirty days in the prison constituted cruel and unusual punishment.[63] The majority conceded that solitary confinement alone was not necessarily unconstitutional and may in fact serve an important, legitimate interest in the administration of a prison.[64] Taken as a whole, the conditions in Arkansas' prisons, combined with the severe risk to an inmate's health

57. *See In re Medley*, 134 U.S. at 173. Petitioner James Medley was held in solitary confinement for forty-five days while awaiting execution following the conviction for the murder of his wife and argued that the period of solitary confinement was inhumane and violated the Eighth Amendment barring cruel and unusual punishment. *Id.* at 161–62. In the Court's opinion, the majority recognized the harmful effects of solitary confinement and stated that solitary confinement, as intended by the Colorado statute, was "prescribed and carried out, to mark [those in solitary confinement] as examples of the just punishment of the worst crimes of the human race." *Id.* at 170. The Court found that the additional punishment of solitary confinement on top of Medley's death sentence was unconstitutional, yet the practice generally was still legal. *Id.* at 173.

58. Trop v. Dulles, 356 U.S. 86, 87 (1958); *see also* Rebman, *supra* note 7, at 567, 586–87 (discussing *Trop*, 365 U.S. at 101, and stating that the Court determined that the use of denationalization as punishment for desertion from the United States Army constituted cruel and unusual punishment, stating that while denationalization is not a physical form of punishment, this is a "form of punishment more primitive than torture . . . [which] subjects the individual to a fate of ever-increasing fear and distress."); *see also* Hanna, *Constitutional Status*, *supra* note 45, at 3–4 (detailing the "evolving standards of decency" doctrine and the "deliberate indifference" doctrine).

59. *Trop*, 356 U.S. at 101.

60. *Id.* at 100–01.

61. Hutto v. Finney, 437 U.S. 678, 680 (1978).

62. *Id.* at 681 (quoting Holt v. Sarver, 309 F. Supp. 362, 381 E.D. Ark. 1970).

63. *Id.* at 688 ("The 30-day limit will help to correct [the conditions in the Arkansas prisons]. Moreover, the limit presents little danger of interference with prison administration, for the Commissioner of Corrections himself stated that prisoners should not ordinarily be held in punitive isolation for more than 14 days." (citations omitted)).

64. *Id.*

and safety accompanying confinement in isolation, constituted cruel and unusual punishment.[65] Further, the majority reasoned that the length of the confinement cannot be ignored in deciding whether the confinement meets constitutional standards.[66]

That same year, the Supreme Court provided the foundation for the modern test for Eighth Amendment claims in *Estelle v. Gamble*.[67] In *Estelle*, the plaintiff claimed that prison personnel provided inadequate medical treatment after he sustained a back injury when a bale of cotton fell on him while he was unloading a truck.[68] The Court established that the government is obligated to provide medical care for those it incarcerates, because failure to do so may actually produce physical torture, prohibited under the Eighth Amendment.[69] The Court stated that the infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation.[70] The Court held that deliberate indifference by prison officials to the serious medical needs of a prisoner constituted unnecessary and wanton infliction of pain; however, an inadvertent failure to provide adequate medical care, or negligence on behalf of medical personnel, did not constitute a violation of the Eighth Amendment.[71]

Finally, in 1994, the Court established its two-pronged test for Eighth Amendment claims in *Farmer v. Brennan.*[72] Petitioner Farmer, a preoperative transsexual projecting feminine characteristics, was incarcerated with other males in the federal prison system, sometimes in the general prison population, but more often in solitary confinement.[73] Farmer claimed to have been beaten and raped by another inmate after

65. *Id.* at 685–86 ("In the [district] court's words, punitive isolation 'is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof.'" (citation omitted)).

66. *Id.* at 686–87 (using prison conditions to describe when the length of time spent in solitary confinement may be violative of the Eighth Amendment by stating "[a] filthy, overcrowded cell and a diet of 'gruel' might be tolerable for a few days and intolerably cruel for weeks or months.").

67. Estelle v. Gamble, 429 U.S. 97, 103 (1978). In *Estelle*, the Court first applied the Eighth Amendment cruel and unusual punishment clause to deprivations not specifically a part of the sentence. *See* Rebman, *supra* note 7, at 587 (citing *Estelle* in providing the framework for the Eighth Amendment test).

68. *Estelle*, 429 U.S. at 98.

69. *Id.* at 103 ("These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration.").

70. *Id.* at 103.

71. *Id.* at 105–06.

72. Farmer v. Brennan, 511 U.S. 825, 825 (1994). *See also* Rebman, *supra* note 7, at 587 (outlining the facts of *Farmer*, analyzing the Court's reasoning, and how the *Farmer* standard applies to the conditions of solitary confinement, and claims of medical indifference, failure-to-protect, and excessive force).

73. *Farmer*, 511 U.S. at 829.

being transferred by federal prison system officials from a correctional institution to a penitentiary and placed in its general population.[74] The prisoner brought suit against the prison officials, claiming that the officials demonstrated "deliberate indifference" by placing him in a general prison population, thereby failing to keep him safe from harm allegedly inflicted by other inmates.[75]

The Court held that prison officials may be liable under the Eighth Amendment for acting with deliberate indifference to inmate health or safety only if they know that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it.[76] Additionally, a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and the official must in fact draw the inference.[77]

Farmer v. Brennan defined the term deliberate indifference, introduced by *Estelle*, as requiring a showing that the prison official was subjectively aware of the risk to the prisoners.[78] The Eighth Amendment also imposes duties on prison officials to provide humane conditions of confinement.[79] To violate the cruel and unusual punishment clause of the Eighth Amendment, a prison official must have a sufficiently culpable state of mind.[80] The Court's decision that Eighth Amendment liability requires consciousness of a risk is thus based on the Constitution and cases, not merely the parsing of the phrase "deliberate indifference."[81]

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74. A penitentiary is typically a higher security facility. In essence, Farmer was moved from the less dangerous correctional facility to penitentiary with "more troublesome prisoners." *Id.* at 830.

75. *Id.* at 831.

76. *Id.* at 847.

77. *Id.* at 837. The petitioner proposed that the Court adopt civil-law recklessness, and the respondents urged the Court to adopt an approach to deliberate indifference that is consistent with recklessness in criminal law. *Id.* The Court rejected petitioner's invitation to adopt an objective test for deliberate indifference. *Id.* The Court reasons that an official's failure to alleviate significant risk that he should have perceived but did not, while it is not cause for commendation, cannot be condemned as the infliction of punishment under the common law. *Id.* at 838.

78. *Id.* at 829.

79. Prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of inmates. *Farmer*, 511 U.S. at 832 (citing Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)) (noting that while the Constitution does not mandate comfortable prisons, it neither permits inhumane ones). In the prohibition of cruel and unusual punishments, the Eighth Amendment places restricts and imposes duties on prison officials. *Farmer*, 511 U.S. at 832.

80. *Farmer*, 511 U.S. at 834 (citing Wilson v. Seiter, 501 U.S. 294, 297 (1991)).

81. The Court was not rejecting petitioner's arguments for a thoroughly objective approach to deliberate indifference without recognizing that on the crucial point, whether a prison official must

Under the deliberate indifference test, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.[82]

B. Supreme Court's Recent Denial of Certiorari on Solitary Confinement Cases

The Supreme Court has not heard a solitary confinement case since *Farmer v. Brennan* in 1994. In recent decades, the Court has denied petitions of certiorari addressing the issue of solitary confinement.[83] Nonetheless, in concurrences or dissents of these recent denials of certiorari, Justices Kennedy, Breyer, and Sotomayor called attention to the broader Eighth Amendment concerns raised by solitary confinement.

In the 2015 case *Davis v. Ayala*, Justice Kennedy filed a separate concurring opinion to address the factual circumstance of the prisoner's placement in solitary confinement for the majority of his more than twenty-five years in custody.[84] Justice Kennedy noted that there is no accepted mechanism during the sentencing stage for judges to take into account whether inmates may be forced to serve their time in prison or in solitary confinement.[85] Discussions among legal practitioners and policymakers too easily overlook the reality of what comes next for prisoners after the adjudication of their guilt or innocence, Kennedy explained.[86] He highlighted indications of new and growing awareness in the broader public regarding solitary confinement in particular,[87] suggesting that the judiciary may soon be required to rule directly on the

know of a risk, or whether it suffices that he should know, the term does not speak with certainty. *Id.* at 840.

82. *Id.* at 843 (discussing examples of what would and would not be included in their definition of deliberate indifference of a substantial risk).

83. Davis v. Ayala, 576 U.S. 257 (2015); Ruiz v. Texas, 137 S. Ct. 1246 (2017); Smith v. Ryan, 137 S. Ct. 1283 (2017); Apodaca v. Raemisch, 139 S. Ct. 5 (2018).

84. *Davis*, 576 U.S. at 286 (Kennedy, J., concurring) (explaining that he joins the Court's opinion because he sees it as complete and correct in all respects). The factual circumstance to which Justice Kennedy responds was mentioned at oral arguments but has no direct bearing on the precise legal questions presented by the case. There was not a clear opportunity to enter the details of the confinement into the discussion and the precise details of Ayala's confinement were not established in the record.

85. *Id.* at 288.

86. *Id.* Justice Kennedy reasoned that even if laws condoned or permitted the added punishment of solitary confinement, "so stark an outcome ought not to be the result of society's simple unawareness or indifference."

87. *Id.* at 289 (citing Jennifer Gonnerman, *Before the Law*, NEW YORKER, Oct. 6, 2014, at 26) (detailing multiyear solitary confinement of Kalief Browder, who was held—but never tried— for stealing a backpack); Michael Schwirtz & Michael Winerip, *Man, Held at Rikers for 3 Years Without Trial, Kills Himself*, N.Y. TIMES, June 9, 2015, at A18.

constitutionality of solitary confinement.[88]

Justice Breyer dissented in 2017 in the denial of petitioner Ruiz's application for a stay of execution of a sentence of death in *Ruiz v. Texas*.[89] Ruiz spent twenty-two years on death row, most of which he spent in solitary confinement.[90] Ruiz argued that his planned execution violated the Eighth Amendment because it followed a lengthy death row incarceration in traumatic conditions, principally his permanent solitary confinement.[91] Breyer recalled that the Court in *In re Medley* recognized a long-standing serious objection to extended solitary confinement.[92] In doing so, he explained that the human toll accompanying extended solitary confinement was exacerbated by the imminent execution.[93] Breyer reasoned that if extended solitary confinement alone raised serious constitutional questions, Ruiz's twenty years of solitary confinement must raise the same concern.[94]

Justice Breyer similarly dissented later that same year in *Smith v. Ryan*, where petitioner Smith was sentenced to death and held in prison for nearly forty years, most of which he spent in solitary confinement.[95] Justice Breyer questioned the purpose of holding any human in solitary confinement for forty years, and stated that members of the Court recognized in past cases that "[y]ears on end of near-total isolation exact a terrible price."[96] Justice Breyer highlighted the need for the Court to consider a case on the constitutionality of solitary confinement for those awaiting capital punishment.[97]

In *Apodaca v. Raemisch*, petitioners were all previously incarcerated at the Colorado State Penitentiary and held in "administrative segregation," otherwise known as solitary confinement.[98] The petitioners

88. *Davis*, 576 U.S. at 289–90 ("In a case that presented the issue [of solitary confinement], the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.").

89. Ruiz v. Texas, 137 S. Ct. 1246, 1246 (2017) (Breyer, J., dissenting).

90. *Id.*

91. *Id.*

92. *Id.* at 1247.

93. Further, Ruiz had developed symptoms during his incarceration that were long associated with solitary confinement, namely severe anxiety and depression, suicidal thoughts, hallucinations, disorientation, memory loss, and sleep difficulty. *Id.*

94. *Id.*

95. Smith v. Ryan, 137 S. Ct. 1283, 1283 (2017) (Breyer, J., dissenting) (noting that because of constitutional deference in petitioner's sentencing, his execution has been long delayed).

96. *Id.* ("What legitimate purpose does it serve to hold any human being in solitary confinement for 40 years awaiting execution?").

97. *Id.* Breyer also cites Kennedy's concurrence from *Davis v. Ayala* and *In re Medley* in supporting the need for the Court to hear argument on the issue. *Id.*

98. The prisoners' confinement had been described in another case as "a single cell

were denied any out-of-cell exercise other than the prescribed hour in the room for between eleven and twenty-five months.[99] In 2015, they filed lawsuits alleging that this deprivation violated their Eighth Amendment rights to be free from cruel and unusual punishments.[100] Justice Sotomayor concurred in the Court's denial of certiorari but noted that to deprive a prisoner of any outdoor exercise for an extended period of time in the absence of an especially strong basis for doing so is deeply troubling and has been recognized as such for many years.[101] Justice Sotomayor highlighted that solitary confinement "imprints on those it clutches a wide range of psychological scars."[102]

C. Seventh Circuit Solitary Confinement Jurisprudence in Light of the Court's Denied Certiorari Petitions

Because the Court has denied certiorari petitions on solitary confinement cases, lower courts have had to address the issue with limited guidance for interpretation of the Eighth Amendment. Increasing judicial awareness of the harms of solitary confinement to prisoners with mental illness has led to multiple cases holding that solitary confinement for the mentally ill violates the Eighth Amendment.[103] Specifically, the

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approximately 90 square feet in size . . . A light in the cell is left on 24 hours a day. The inmates' daily existence is one of extreme isolation. . . . The inmates have little human contact except with prison staff and limited opportunities for visitors." Apodaca v. Raemisch, 139 S. Ct. 5, 6 (2018) (Sotomayor, J., concurring) (quoting Anderson v. Colorado, 887 F. Supp.2d 1133, 1137 (D. Colo. 2012)).

99. *Id.* at 7.

100. Respondents moved to dismiss the cases, and the district court denied both motions to dismiss. The Court of Appeals for the Tenth Circuit reversed both denials, concluding that its prior precedents allowed reasonable debate on the constitutionality of disallowing outdoor exercise. *Id.*

101. Justice Sotomayor concurred in denial of certiorari because the factual record before the Court and the legal analysis provided by lower courts is not well suited to the Court's questioning. *Id.* Further, Justice Sotomayor noted that in *Spain v. Procunier*, then-Judge Kennedy ruled that in the absence of adequate justification from the state, it was cruel and unusual punishment for a prisoner to be confined for a period of years without opportunity to go outside except for occasional court appearances, attorney interviews, and hospital appointments. Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979).

102. *Apodaca*, 139 S. Ct. at 8 (Sotomayor, J., concurring). Justice Sotomayor continues by quoting Charles Dickens's real-life visit to Philadelphia's Eastern State Penitentiary, in which he described the prisoners housed there in solitary confinement: "He sees the prison-officers, but with that exception he never looks upon a human countenance, or hears a human voice. He is a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but the torturing anxieties and horrible despair." *Id.* at 9 (citing CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 148 (J. Whitely & A. Goldman eds., 1972).

103. Braggs v. Dunn, 257 F. Supp. 3d 1171, 1201, 1267 (M.D. Ala. 2017) (finding that the Alabama Department of Corrections operated a constitutionally inadequate mental healthcare system, one component of which was inadequate screening and intake); Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001) (ordering a prison to remove inmates with serious mental illness from its "supermax" facility and to monitor the mental health status of inmates in

Seventh Circuit's *Wallace v. Baldwin* explained the Seventh Circuit's stance on the relationship between the proper use of solitary confinement and mental illness.[104]

In 2006, Wallace was convicted of murder and sentenced to life without parole.[105] A few months after Wallace entered prison, he assaulted a guard and was placed in solitary confinement.[106] Wallace suffered from serious mental illness and alleged that his prolonged isolation exacerbated his mental illness, increased his risk of suicide, and violated his Eighth and Fourteenth Amendment rights.[107] Wallace's case was not allowed to proceed in forma pauperis[108] because he received three strikes[109] under the Prison Litigation Reform Act.[110] Wallace appealed the denial, and the appellate court found that the district court's rationale for denying in forma pauperis status was erroneous.[111] The core of the complaint was that solitary confinement intensified his mental illness, including PTSD, causing nightmares, severe anxiety, and most relevant to this case, suicidal thoughts.[112] Wallace described his confinement as "akin to being sealed inside a coffin."[113]

"supermax"); Coleman v. Wilson, 912 F. Supp. 1282, 1320 (E.D. Cal. 1995) (adopting the magistrate judge's conclusion that "inmates are denied access to necessary mental health care while they are housed in [solitary confinement].").

104. Wallace v. Baldwin, 895 F.3d 481 (7th Cir. 2018).

105. *Id.* at 482.

106. *Id.*

107. *Id. See also* Second Amended Complaint, Wallace v. Baldwin, No. 17-576 (S.D. Ill. Dec. 7, 2018).

108. Proceeding in forma pauperis allows a party to proceed with a lawsuit without prepayment of fees. To proceed in forma pauperis, a prisoner may submit an affidavit that includes a statement of all assets such prisoner possesses and that the person is unable to pay such fees or give security. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress. 28 U.S.C. § 1915(a)(1). *See also In Forma Pauperis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

109. Wallace submitted an application to proceed in forma pauperis with his complaint. Wallace reported that the three strikes he incurred under the Prison Litigation Reform Act were for filing actions in federal court that were dismissed as frivolous, malicious, or for failure to state a claim. Wallace argued that the district court should allow him to proceed without prepayment of the full filing fee because he faced "imminent danger of serious physical injury," as a result of his periodic suicidal ideation. *Wallace*, 895 F.3d. at 483–84.

110. *Id.* at 482. The Prison Litigation Reform Act was a federal law passed in 1996 in response to a significant increase in prisoner litigation in the federal court system. The PLRA sought to reduce frivolous litigation, and exhaust administrative remedies before proceeding with litigation. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1366 (1996); 42 U.S.C. § 1997e (1994 ed. & Supp. II).

111. *Wallace*, 895 F.3d. at 483–84.

112. *Id.* at 483.

113. "He spends 23 to 24 hours a day alone in a cell that is 'significantly smaller' than 50 square feet. The cell is dark, noisy, infected with insects, freezing in the winter, and hot in the summer. Because of his segregation, he cannot attend educational or religious classes, visit the law library used by the general population, or earn income from a prison job." *Id.* at 483.

Wallace argued that the district court should have allowed him to proceed in court without prepayment of a full filing fee because he faced imminent danger of serious physical injury.[114] The district court ruled that Wallace's periodic suicidal ideation did not place him in imminent danger because his complaint did not allege that he was currently considering suicide and because a prisoner cannot create the imminent danger requirement of § 1915(g) of the in forma pauperis statute.[115]

The Seventh Circuit overruled the district court's ruling that a prisoner cannot create the imminent danger because it does not account for "genuine dangers beyond the conscious control of [the] prisoners" suffering from mental illness.[116] The court recognized the common-sense appeal of the district court's general rule, at least to the extent that it is based on truly voluntary actions by the prisoner.[117] Wallace argued that any challenge to solitary confinement based on a claimed risk of self-harm could satisfy the imminent danger exception of § 1915(g).[118] While the Seventh Circuit determined that Wallace made a sufficient showing that he faced imminent danger, the court did not rule that any challenge to solitary confinement based on a claimed risk of self-harm could satisfy the imminent danger exception.[119]

Because no per se holding against solitary confinement exists in almost any form in any jurisdiction across the nation, prisoners and their families are left to argue the case-by-case application of the evolving standards of decency doctrine and the deliberate indifference doctrine when pursuing Eighth Amendment claims against prison officials for placement in solitary confinement.[120] A few courts have issued preliminary injunctions to ban certain types of solitary confinement and have occasionally held

114. Brief for Appellant at 12, Wallace v. Baldwin, 895 F.3d 481 (7th Cir. 2018) (No. 17-576); 28 U.S.C. § 1915(g) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.").

115. *Wallace*, 895 F.3d. at 483; Wallace v. Baldwin, 2017 WL 2865317 (S.D. Ill. 2017) (order vacated in part).

116. *Wallace*, 895 F.3d. at 484.

117. *Id.* ("In the case however, of someone suffering from mental illness that inclines him toward self-harm—a condition that is unfortunately common in American prisons—that general rule sweeps too broadly.").

118. *Id.*

119. *Id.* at 484–85.

120. *See* Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 32 (2012) (stating that in cases of inmates with mental illness placed in prolonged supermax solitary confinement, courts tend to defer to legitimate penological interests and recognize a need to defer to legitimate security concerns of prison officials); Steinbuch, *supra* note 4, at 530–31; Hanna, *Constitutional Status*, *supra* note 45, at 12.

certain forms of the practice to be unconstitutional.[121] The momentum of lower courts is shifting toward tougher restrictions on solitary confinement.[122] District courts are more frequently showing significant concern with the practice of solitary confinement. Nevertheless, the continued lack of guidance on this issue leads to difficulties for claimants and lower courts alike, as is demonstrated best by *Gay v. Baldwin*.

II. CURRENT SOLITARY CONFINEMENT PRACTICES

A. International Standards for Solitary Confinement

Many international treaties and bodies denounce the use of solitary confinement.[123] The Commentary of 1960 on the Geneva Convention III, relative to the Treatment of Prisoners of War, deemed solitary confinement not merely punishment but more severe than disciplinary punishment.[124] The Committee Against Torture, the official governing body of the UN Convention Against Torture, has recommended that countries abolish the practice of isolation.[125] Likewise, in 1992, the

121. *See* Hanna, *Constitutional Status*, *supra* note 45, at 6. Hanna discusses four types of especially harsh types of segregation that might be considered as possessing "plus factors" that elevate the harshness of the segregation beyond a baseline—long-term segregation, segregation of those with serious mental illness, segregation of youth, and segregation of individuals on death row. *See also* Steinbuch, *supra* note 4, at 523, 531 (discussing states that have been forced to reform solitary confinement practices because of the rising costs of civil rights-based litigation).

122. *See* Steinbuch, *supra* note 4, at 522 (stating that there has been success for inmates bringing narrower claimed focused on a single restriction as part of their solitary confinement routine); Hanna, *Constitutional Status*, *supra* note 45, at 6; Gordon, *supra* note 19, at 497.

123. Eleanor Umphres, *Solitary Confinement: An Unethical Denial of Meaningful Due Process*, 30 GEO. J. LEGAL ETHICS 1057, 1067 (2017); Miller, *supra* note 41, at 141–48.

124. *See* Umphres, *supra* note 123, at 1068. The Commentary specified that confinement "must not represent for the accused person a penalty more severe than a disciplinary punishment. Solitary confinement . . . is therefore excluded." Geneva Convention Relative to the Treatment of Prisoners of War art. 103, para. 3, Aug. 12, 1949, Commentary of 1960.

125. U.N. Committee Against Torture: Observations of the Committee Against Torture on the Revision of the Standard Minimum Rules for the Treatment of Prisoners ⁋⁋ 32–33 (2014), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/419/98/PDF/G1441998.pdf?OpenElement [https://perma.cc/HDZ5-Y2P9] ("[T]he Committee's long-standing recommendation has been that solitary confinement might constitute torture or inhuman treatment and should be regulated as a measure of last resort to be applied in exceptional circumstances, for as short a time as possible and under strict supervision, including being subject to judicial review. Indefinite solitary confinement is prohibited. Solitary confinement should be prohibited as a punishment for juveniles, prisoners with psychosocial and/or intellectual disabilities and others in situations of special vulnerability, including pregnant women, women with infants and breastfeeding mothers. Solitary confinement should be prohibited for life-sentenced prisoners and prisoners sentenced to death, and for pre-trial detainees. The Committee has recommended that there should be a prohibition on sequential disciplinary sentences resulting in an uninterrupted period of solitary confinement in excess of the maximum period." (citations omitted)). *See* G.A. Res. 39/46, Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) (establishing the

United Nations Human Rights Committee suggested that prolonged isolation may amount to a violation of international human rights law.[126] Recently, in 2011, the United Nations Special Rapporteur on Torture presented a report on solitary confinement that found solitary confinement, when used as a punishment, can amount to cruel, inhuman, or degrading treatment or punishment and even torture.[127] In fact, the United Nations Standard Minimum Rules for the Treatment of Prisoners state that solitary confinement should only be used in exceptional cases as a last resort; solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures; and, indefinite and prolonged solitary confinement should not be used.[128]

In 2015, Ireland's High Court went so far as denying the United States' request to extradite a prisoner in Ireland so he could face charges in a United States federal court.[129] The High Court's Justice Donnelly based her decision in large part on her considerations about solitary confinement in United States prisons.[130] Justice Donnelly found that the

Committee Against Torture). *See also* FAQ SOLITARY WATCH, SOLITARY CONFINEMENT IN THE UNITED STATES, http://solitarywatch.com/facts/faq/ [https://perma.cc/5S74-MLDA]; Umphres, *supra* note 123, at 1068.

126. UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (March 10, 1992), https://www.refworld.org/docid/453883fb0.html [https://perma.cc/NWB2-C4J8]. *See* Umphres, *supra* note 123, at 1068. *See also United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert*, UNITED NATIONS HUMAN RIGHTS (Feb. 28, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25633 [https://perma.cc/W9E5-X7KN]; *see also* P. Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 441–48 (2006).

127. Juan Mendéz (Special Rapporteur of the Human Rights Council), U.N. General Assembly, *Interim Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2, U.N. Doc. A/66/268 (Aug. 5, 2011), https://ia801000.us.archive.org/10/items/452639-un-report-on-torture/452639-un-report-ontorture.pdf [https://perma.cc.7U6V-NRHX]. *See also* Umphres, *supra* note 123, at 1068.

128. The Ass'n of State Correctional Administrators, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, LIMAN CTR. FOR PUB. INTEREST L. AT YALE L. SCH. 92 (Oct. 2018) [hereinafter LIMAN, *Reforming Restrictive Housing*] (citing United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules); U.N. OFF. DRUGS & CRIME, THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS (2015), https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf) [https://perma.cc/E83P-YZRL].

129. Umphres, *supra* note 123, at 1068 (citing Alison O-Riordan, *Man's US Extradition Over Terror Refused*, IRISH EXAM'R (May 22, 2015), http://www.irishexaminer.com/ireland/mans-us-extradition-over-terror-refused-332215.html [https://perma.cc/P962-WLW4]).

130. *Id.* (citing Att'y Gen. v. Damache [2015] IEHC 339, 11.11.18–19 (Ir.)) Justice Donnelly also wrote, "judicial review has to meet certain minimal levels which amount to an independent judicial authority reviewing the merits of and reasons for a prolonged measure of solitary confinement. The level of scrutiny by the U.S. courts does not, on the evidence presented by the U.S. authorities, reach that minimal standard." *Damache*, IEHC 339 at 11.11.18.

routine isolation from meaningful contact and communication with staff and other inmates that occurs in United States prisons amounts to a breach of the Irish unenumerated constitutional right to freedom from torture, inhuman or degrading treatment.[131]

Some countries' general prison policies focus on rehabilitation as opposed to punishment, and other countries have made significant strides in reducing their use of segregation.[132] Scandinavian countries, as well as Germany and the Netherlands, model their general prison policies around a sincere dedication to rehabilitation and not to punishment.[133] By statute, solitary confinement cannot exceed two weeks per year in the Netherlands and four weeks per year in Germany.[134] In the 1980s, England shifted its focus on preventing prison violence rather than punishments for it.[135] There are now fewer prisoners in extreme custody in all of England than there are in the state of Maine.[136] Although the international focus is the generalized harm caused by solitary confinement, the psychological impact of the practice on prisoners with mental illnesses is well-documented.

B. Psychological Impact of Solitary Confinement on Prisoners with Mental Illness

Solitary confinement is especially dangerous when inflicted on vulnerable populations, including mentally ill prisoners.[137] A judge in the Western District of Wisconsin noted that subjecting a mentally ill prisoner to solitary confinement, marked by conditions lacking any physical or social points of reference, might amount to psychological

131. Umphres, *supra* note 123, at 1068–69.

132. RAM SUBRAMANIAM & ALISON SHAMES, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 12–13 (2013), https://www.vera.org/downloads/Publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states/legacy_downloads/european-american-prison-report-v3.pdf [https://perma.cc/YK4N-ZQEN]; Doran Larson, *Why Scandinavian Prisons Are Superior*, ATLANTIC (Sept. 24, 2013), http://www.theatlantic.com/international/archive/2013/09/why-scandinavian-prisons-are-superior/279949/ [https://perma.cc/4AWS-65MW].

133. *See* sources cited *supra* note 132 (discussing the way the structures of prisons in Scandinavia, Germany, and the Netherlands are geared towards rehabilitation).

134. SUBRAMANIAM & SHAMES, *supra* note 132, at 13.

135. *See* sources cited *supra* note 132. Prison administrators implemented measures such as reducing isolation; offering "opportunities for work, education, and special programming to increase social ties and skills"; using small, stable housing units; providing mental health care; and increasing the opportunity for exercise, phone calls, and contact visits. Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, at 36, 43–44.

136. Gawande, *supra* note 135, at 44.

137. *See* Bassett, *supra* note 2, at 411–12 (discussing the disproportionate representation of the mentally ill in the U.S. prison population and solitary confinement and their vulnerability to negative effects); Dillon, *supra* note 30, at 267 ("The medical and scientific communities are in overwhelming agreement: prolonged solitary confinement has devastating effects on persons suffering from mental illness.").

torture as it leads the prisoner to commit future acts of self-harm.[138]

Prisoners housed in solitary confinement often do not receive adequate mental health treatment.[139] A large number of mentally ill prisoners are placed in solitary confinement because their mental illness or other variables inhibit their ability to successfully conform to prison rules.[140] Their behaviors are viewed as disciplinary problems rather than symptoms of mental illness.[141] To the extent that prisoners with mental illness do receive treatment, they are usually not evaluated confidentially or out of earshot of other prisoners and staff.[142] For example, Gay's treatment often consisted of a counselor questioning him through a small, barred window.[143]

Moreover, a study of isolation of adults and children in psychiatric hospitals found that the use of seclusion or isolation may cause additional trauma and harm to the patient.[144] Professor Craig Haney, a researcher on the Stanford Prison Experiment, conducted a study establishing that the psychological effects of solitary confinement on prisoners ranged in severity, but caused harm even for prisoners who did not previously suffer from mental illness.[145] Prisoners suffered clinically significant symptoms, including hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and

138. Scarver v. Litscher, 371 F. Supp. 2d 986, 1003 (W.D. Wis. 2005), *aff'd*, 434 F.3d 972 (7th Cir. 2006) (finding the record demonstrated that the placement of the prisoner in inhumane conditions of isolated confinement caused marked increase in acts of self-harm); MICHAEL B. MUSHLIN, 1 RIGHTS OF PRISONERS § 3:29 (5th ed. 2019).

139. Further, a disproportionate number of prisoners with mental illness are housed in solitary confinement, and such confinement both exacerbates and causes mental illness. Gordon, *supra* note 19, at 503 (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 132 (2003)); Hanna, *Constitutional Status*, *supra* note 45, at 9–10.

140. Gordon, *supra* note 19, at 503–04. A Washington State study found that mentally ill prisoners were more than four times more likely than other prisoners to have been held in solitary confinement. David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQUENCY 633, 642 (2007). A separate study found that 26% of prisoners held in Arizona's supermax prisoners were mentally ill, compared to 16.8% of the state's general prison population. MATTHEW LOWEN & CAROLINE ISAACS, AM. FRIENDS SERV. COMM., LIFETIME LOCKDOWN: HOW ISOLATION CONDITIONS IMPACT PRISONER REENTRY 8 (2012). The study explained that the findings reflect the "higher likelihood of prisoners with untreated mental illness receiving disciplinary write-ups for behaviors associated with their symptoms." *Id.*

141. Gordon, *supra* note 19, at 504.

142. *Id.*; Terry A. Kupers, *What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005, 1010 (2008).

143. *See Gay* Complaint, *supra* note 11, at 13.

144. *See* Linda M. Finke, *The Use of Seclusion Is Not Evidence-Based Practice*, 14 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 186, 189 (2001) (finding that seclusion did not add to therapeutic goals and was a method to control the environment instead of a therapeutic intervention).

145. Haney, *supra* note 139, at 132. *See* Kupers, *supra* note 142, at 1005–06 ("[I]t is very clear . . . that for just about all prisoners, being held in isolated confinement for longer than 3 months causes lasting emotional damage is not full-blown psychosis and functional disability.").

behavior.[146] Haney identified various social pathologies caused by solitary confinement and concluded that all the adaptations are dysfunctional and problematic.[147] Some of these effects of the pathologies were the prisoner's experience of chronic apathy, lethargy, depression, and despair;[148] loss of identity and loss of connection to a larger social world;[149] disorientation and fear of social contact and interaction;[150] and anger and uncontrollable, sudden bursts of rage.[151]

Further, Dr. Stuart Grassian, a psychiatrist who previously served on the faculty of Harvard Medical School, evaluated the psychiatric effects of solitary confinement in over two hundred prisoners in various state and federal penitentiaries.[152] The specific psychiatric effects associated with solitary confinement included hyperresponsivity to external stimuli; perceptual distortions, illusions, and hallucinations; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts and the emergence of primitive aggressive ruminations; overt paranoia; and problems with impulse control.[153] These documented effects show that solitary confinement underlies mental illness in all prisoners and especially exacerbates symptoms in prisoners

146. Haney, *supra* note 139, at 132.

147. Gordon, *supra* note 19, at 505. "The 'unprecedented totality of control' in solitary confinement forces prisoners to become completely dependent on the prison for all aspects of their lives." *Id.* "Prisoners then become unable to 'initiate or to control their own behavior, or to organize their own lives.'" *Id.* The lack of opportunities for activity cause prisoners to be unable to structure their lives around activity and purpose. *Id.*

148. Haney, *supra* note 139, at 132.

149. *Id.*

150. *Id.*; Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 503 (1997) ("[W]e look to others and in them see identity-forming reflections of ourselves.").

151. Haney & Lynch, *supra* note 150, at 512–13.

152. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 333 (2006). The article is based upon the clinical observations Dr. Grassian made in the course of his involvement in a class action lawsuit in Massachusetts, which challenged conditions in solitary confinement at the maximum state penitentiary in Walpole, Massachusetts, and his research into the medical literature concerning the issue. *Id.* at 333–34.

153. *Id.* at 335–36. More than half of the prisoners reported a progressive inability to tolerate ordinary stimuli. *Id.* at 335. Almost a third of the prisoners described hearing voices, often in whispers and often saying frightening things to them. *Id.* There were also reports of noises taking on increasing meaning and frightening significance. *Id.* Well over half of the inmates interviewed described severe panic attacks while in solitary confinement. *Id.* Many reported symptoms of difficulty in concentration and memory. *Id.* In some cases, the problem was more severe leading to acute psychotic, confessional states. *Id.* One prisoner had slashed his wrists during such a state and his confusion and disorientation had actually been noted in his medical record. *Id.* Almost half of the prisoners reported the emergence of primitive aggressive fantasies of revenge, torture, and mutilation of the prison guards. *Id.* at 336. Almost half of the prisoners interviewed reported paranoid and persecutory fears. *Id.* Some of the persecutory fears were short of overt psychotic disorganization. *Id.* Slightly less than half of the prisoners reported episodes of loss of impulse control with random violence. *Id.*

who suffered from mental illnesses prior to incarceration.

C. Solitary Confinement in Illinois

Illinois has long been one of the lowest ranking states for spending per inmate on prison health care, spending only $3,619 per inmate in 2015.[154] However, in 2015, when John Baldwin started as Director of the IDOC (hence why he was ultimately named in Gay's lawsuit), the IDOC hired more mental health staff and provided training to employees on how to engage with prisoners with mental illness.[155] About 765 of the inmates whose illnesses are the most severe have been transferred to new residential treatment facilities, but that is a small fraction of the over 12,000 Illinois inmates who are mentally ill.[156] Ultimately, these improvements in the treatments of prisoners' mental illness do not provide protections for prisoners with serious mental illnesses who are placed in prolonged solitary confinement.

Of the prison and jail population across the country, nearly 20% of prison inmates and 18% of jail inmates spent time in solitary confinement within twelve months prior to entering the facility.[157] Further, the use of solitary confinement is linked to mental illness.[158] About 29% of prison inmates and 22% of jail inmates with current symptoms of serious psychological distress had spent time in restrictive housing units in the past twelve months.[159] Notably, this figure is nearly a decade old.[160]

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154. The median per-inmate state spending of FY 2015 was $5,720; Illinois ranked 41 out 49 states in the Pew study on prison health care costs and quality. PEW CHARITABLE TRUSTS, PRISON HEALTH CARE: COSTS AND QUALITY 8 (2017) https://www.pewtrusts.org/-/media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf [https://perma.cc/2A98-FJRG] Stephanie Goldberg, *Illinois Comes Up Short in Another Area: Prison Health Care*, CRAIN'S CHI. BUS. (Feb. 14, 2020, 4:06 PM), https://www.chicagobusiness.com/health-care/illinois-comes-short-another-area-prison-health-care [https://perma.cc/ZV7Y-EPBV]; Christine Herman, *Most Inmates with Mental Illness Still Wait for Decent Care*, NPR (Feb. 3, 2019, 7:00 AM), https://www.npr.org/sections/health-shots/2019/02/03/690872394/most-inmates-with-mental-illness-still-wait-for-decent-care [https://perma.cc/RV7H-G7XM].

155. Herman, *supra* note 154. Most inmates now receive eight hours of out of cell exercise and see a therapist once a month. *Id.*

156. *Id.*

157. BECK, *supra* note 37, at 4.

158. *Id.* at 6. Inmates were asked whether they had ever been told by a mental health professional that they had a mental health disorder, or if because of a mental health problem they had stayed overnight in a hospital or other facility, used prescription medicine, or received counseling or treatment from a trained professional. *Id.* On every measure of past mental health problems, inmates who reported a problem were also more likely than other inmates to report that they had spent time in restrictive housing in the past twelve months or since coming to the facility. *Id.* Lower percentages of inmates without a mental health problem had spent time in restrictive housing. *Id.*

159. *Id.*

160. The National Inmate Survey was last conducted between February of 2011 and May of 2012. *Id.* at 14. It was administered to 91,177 inmates age eighteen or older, including 38,251

There is no Illinois or federal reporting system that tracks how many people are placed in solitary confinement at any given time. While some private organizations have collected jurisdiction-specific data, such data is based upon jurisdictions self-reporting how many individuals are kept in restrictive housing, and not all jurisdictions reported their data using the same definitions.[161] Moreover, jurisdictions retain discretion over which data to accumulate and report, and which to withhold.[162]

The Association of State Correctional Administrators (ASCA) and the Liman Center at Yale Law School conducted a fifty-state survey of correctional departments' policies on solitary confinement.[163] However, the data in the ASCA report has a caveat, as it is self-reported and not all states responded to the survey in full or answered the survey using consistent definitions of their practices.[164]

Legislation is currently pending in Illinois amid the United States' broader rethinking of solitary confinement.[165] In March 2021, the

inmates in 233 state and federal prisons and 52,926 inmates in 357 jails. *Id.* The results are nationally representative of prison and jail inmates at the time of the survey. *Id.* A sample of 241 state and federal prisons was drawn to produce a sample representing the 1,158 state and 194 federal adult confinement facilities identified in the 2005 Census of State and Federal Adult Correctional Facilities, which was supplemented with updated information from websites maintained by each state department of corrections (DOC) and the federal Bureau of Prisons (BOP). *Id.* A sample of 393 jails was drawn to represent the 2,957 jail facilities identified in the 2005 Census of Jail Inmates, which was supplemented with information obtained from inmate surveys (NIS-1 and NIS-2) conducted in 2007 and 2008–09. *Id.* The 2005 census was a complete enumeration of all jail jurisdictions, including all publicly operated and privately-operated facilities under contract to jail authorities. *Id.* The NIS-3 was limited to jails that held six or more inmates on June 30, 2005. *Id.* These jails held an estimated 720,171 inmates age 18 or older on June 30, 2011. *Id.*

161. LIMAN, *Reforming Restrictive Housing*, supra note 128, at 9. *See also* Steinbuch, *supra* note 4, at 505–06 (stating that states follow different administrative procedures in assigning inmates to solitary confinement in non-supermax facilities, making it difficult to keep track of the exact numbers of inmates on a nationwide basis).

162. *See* LIMAN, *Reforming Restrictive Housing*, supra note 128, at 9 (noting that the study is based on self-reporting from each jurisdiction).

163. *Id.* at 7–8. Restrictive housing is defined in the report as placing individuals in cells for an average of twenty-two hours or more per day for fifteen continuous days or more. *Id.* Forty-six jurisdictions responded to the survey, and forty-three jurisdictions provided data on both the total custodial population and the numbers of prisoners in restrictive housing. *Id.* at 8. Total custodial population refers to the number of people under each system's direct control and for whom the jurisdiction provided 2017 restrictive housing data. *Id.* at 10. For facilities reporting restrictive housing data, Illinois's total custodial population was 42,177 and the total population held in restrictive housing was 921. *Id.* at 12. The average percentage of the population held in restrictive housing among all responding jurisdictions was 4.5%. *Id.* at 13.

164. *Id.* at 110–11 n.43, 46. ("Illinois reported 921 people in restrictive housing and 1,098 people in restrictive housing by length of time. . . . Illinois reported . . . 1,560 prisoners in the restrictive housing population by gender. This discrepancy may be a result of counting people in isolation from one to 14 days.").

165. *See* Isolated Confinement Restriction Act (Anthony Gay Law), H.B. 3564, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021) (proposing restricting isolated confinement to a maximum of ten consecutive days and ten days total in a 180-day period).

"Anthony Gay Law," sponsored by Representative LaShawn Ford, cleared the Illinois House Judiciary-Criminal Committee and is ready for a full vote.[166] The legislation would bar the IDOC from placing an inmate in isolation for more than ten days in a 180-day period and would require the IDOC to give isolated inmates access to psychological therapy, medical appointments, meals, education programming, job assignments, and exercise outside of their cells.[167] This bill and the *Gay* court's decision will bear productively on solitary confinement reform in Illinois.

III. GAY V. BALDWIN: A PROPOSED HOLDING

In October 2022, the Central District of Illinois will hear *Gay v. Baldwin* in which Gay claims a violation of his Eighth and Fourteenth Amendment rights for his placement in extended solitary confinement, in addition to its obvious, devastating impact on his mental health.[168] Typically, the Seventh Circuit requires a physical injury to accompany the psychological claim or an extreme and officially sanctioned psychological harm to allege a sufficiently serious injury.[169] Because Gay's claimed psychological reaction to solitary confinement manifested as severe forms of physical harm through self-mutilation, his case is a novel one, explicitly dealing with the psychological effects of solitary confinement.

166. *See* House Judiciary-Criminal Committee Vote on H.B. 3564 (Mar. 19, 2021). In March 2020, a personal injury law firm, Romanucci & Blandin, and Illinois District Representative LaShawn Ford announced a proposal, the Anthony Gay Isolated Confinement Restriction Act, to reform the IDOC's practice of solitary confinement for inmates. H.B. 182, 101st Gen. Assemb., Reg. Sess. (Ill. 2020); *Proposed Law Named for Ex-Inmate from Rock Island Limits Isolation in Prisons*, KWQC (Mar. 10, 2020, 8:21 PM), https://www.kwqc.com/content/news/Proposed-law-named-for-ex-inmate-from-Rock-Island-limits-isolation-in-prisons-568686351.html [https://perma.cc/2A5F-GQ8S]. Bill 182 was reintroduced as the Isolated Confinement Restriction Act, Illinois House Bill 3564, in February of 2021. *See Bill Status of HB3564*, ILL. GEN. ASSEMB., https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3564&GAID=16&DocTypeID=HB&SessionID=110&GA=102 [https://perma.cc/JUH2-87GH] (last visited Apr. 18, 2021) (offering dates of filing and other recent actions on the bill); *Illinois' Anthony Gay Isolated Confinement Reform Bill Passes Committee*, ROMANUCCI & BLANDIN LAW (Mar. 22, 2021), https://rblaw.net/illinois-anthony-gay-isolated-confinement-reform-bill-passes-committee/ [https://perma.cc/9F5T-QC4G].

167. H.B. 3564, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021).

168. *Gay* Complaint, *supra* note 11, at 4; Text Order, *supra* note 10.

169. Doe v. Welborn, 110 F.3d 520, 524 (7th Cir. 1997) (holding that the fear of assault, unaccompanied by physical injury does not reflect the deprivation of the minimal measures of life's necessities) (citing Rhodes v. Chapman, 452 U.S. 337, 349 (1981)); Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996) ("[I]t is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment.").

A. Facts of Gay v. Baldwin

When Gay was a teenager, he got into a fight with another teen who had insulted his sister.[170] The other teen claimed that Gay stole his hat and a $1 bill in the process, and as a result Gay was charged with robbery.[171] Gay pled guilty, received a suspended prison sentence, and was placed on probation.[172] In another youthful error, Gay violated his probation by driving a vehicle without a license.[173] In 1994, twenty-year-old Gay was imprisoned by the IDOC and was supposed to be released in three and a half years with good behavior.[174] However, Gay suffers from borderline personality disorder.[175] The symptoms of Gay's mental illness manifested in prison and Gay began to act out.[176] Instead of providing mental health treatment to Gay, the IDOC cited him for various violations.[177] In 1998, the IDOC placed Gay in solitary confinement, where he remained for the next twenty years.[178] Gay was kept in a small, bare, stifling cell and deprived of human contact for close to twenty-four hours a day throughout the twenty-year period.[179]

Gay's mental health severely deteriorated in solitary confinement, and he began to engage in acts of self-mutilation.[180] The self-mutilation

170. *Gay* Complaint, *supra* note 11, at 1.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* Individuals who have borderline personality disorder have an impoverished or unstable self-structure and a self-concept that is easily disrupted under stress, and often associated with the experience of a lack of identity or chronic feelings of emptiness. Cognitive functioning in those who have borderline personality disorder may become impaired at times of interpersonal stress, leading to concrete, black-and-white, all-or-nothing thinking, and sometimes to quasi- psychotic reactions, including paranoia and dissociation. In addition, anger in those with borderline personality disorder may lead to acts of aggression toward self and others. Intense distress and characteristic impulsivity may also prompt other risky behaviors, including substance misuse, reckless driving, binge eating, or dangerous sexual encounters. *See* Andrew E. Skodol et al., *Personality Disorder Types Proposed for DSM-5*, 25 J. PERSONALITY DISORDERS 136, 159 (2011), https://guilfordjournals.com/doi/pdf/10.1521/pedi.2011.25.2.136 [https://perma.cc/6GCT-55CX] (describing the types of personality disorders in a narrative format that combines typical deficits in self and interpersonal functioning and particular configurations of traits and behaviors).

176. *Gay* Complaint, *supra* note 11, at 1. Defendants stated that they lack sufficient knowledge regarding the truth of the allegation. Defendants' Answer to Plaintiff's Complaint at 12, Gay v. Baldwin, No. 19-01133 (N.D. Ill. Sept. 30, 2019); Defendants' Amended Answer and Affirmative Defenses to Plaintiff's Complaint at 15, *Gay*, No. 19-01133 (N.D. Ill. Mar. 8, 2019).

177. *Gay* Complaint, *supra* note 11, at 1–2. Defendants neither denied nor confirmed the allegation. Defendants' Answer to Plaintiff's Complaint, *supra* note 176, at 12, Defendants' Amended Answer and Affirmative Defenses to Plaintiff's Complaint, *supra* note 176, at 16.

178. *Gay* Complaint, *supra* note 11, at 2.

179. *Id.*

180. *Id.* Borderline personality disorder commonly manifests through recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior. DIAGNOSTIC AND STATISTICAL MANUAL OF

included cutting his forearm and neck, cutting his left inner thigh and weaving the wound together with strips of blanket, cutting his genitals and embedding foreign objects into the wounds, cutting off a testicle and hanging it on his cell door, sticking a pen into his eyelid, and stabbing his thigh with a spoon so deep that it had to be surgically removed.[181] The documented acts of self-mutilation numbered in the dozens and continued throughout the entirety of his placement in solitary confinement.[182] Another manifestation of Gay's mental illness was irrational "assaults" on prison staff, in which Gay would do things like throw his body fluids at prison guards.[183]

Gay was in desperate need of appropriate mental healthcare, and it was obvious that solitary confinement was ravaging his mind in isolation.[184] Nevertheless, the prison extended his isolation and continued to deprive Gay of access to human contact, programming, mental health care, and activities for twenty years.[185] Further, Gay was punished for the manifestations of his mental illness with "tickets" of consecutive sentences of solitary confinement until the year 2152.[186] Gay was also criminally charged for his "attacks" on prison staff, which ultimately extended his actual prison sentence by approximately fifteen years; he was ordered to serve all but a few weeks of the sentence in solitary confinement.[187] Even while IDOC, in *Rasho v. Walker*, simultaneously acknowledged that there were IDOC prisoners so mentally ill they required acute inpatient psychiatric care, Gay—a seriously mentally ill

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MENTAL DISORDERS 664 (American Psychiatric Association eds., 5th Ed. 2013) [hereinafter DSM-5]. In their pleadings, the defendants admitted Gay engaged in various acts of self-mutilation, although they lacked sufficient knowledge or information to admit or deny the specific acts alleged. *See* Defendants' Answer to Plaintiff's Complaint, *supra* note 176, at 14; Defendants' Amended Answer and Affirmative Defenses to Plaintiff's Complaint, *supra* note 176, at 17.

181. *Gay* Complaint, *supra* note 11, at 2. These kinds of self-destructive acts are usually precipitated by threats of separation, rejection, or by expectation that the individual assumes increased responsibility. Self-mutilation often occurs during dissociative experiences and often brings relief to the individual by reaffirming the ability to feel. DSM-5, *supra* note 180, at 664.

182. *Gay* Complaint, *supra* note 11, at 2.

183. *Id.* Individuals with borderline personality disorder may make frantic efforts to avoid real or imagine abandonment, and are very sensitive to environmental circumstances. These individuals react to abandonment with feelings of emotional, rage, and demands. The goal of the manipulative behavior in individuals with borderline personality disorder is directed toward gaining the concern of caretakers. DSM-5, *supra* note 180, at 663, 666.

184. *Gay* Complaint, *supra* note 11, at 2.

185. *Id.*

186. *Id.* at 2–3. Solitary confinement is more often than not a control strategy of first resort rather than a last resort measure reserved for the "worst of the worst." Many inmates remain in solitary confinement for extended periods of time because they "have untreated mental illnesses, . . . or report . . . abuse by prison officials." Monique Peterkin, *"I'm on Fire": A Call to Eradicate Excessive Solitary Confinement Sentences for Nonviolent Offenses*, 60 HOW. L.J. 817, 822 (2017).

187. *Gay* Complaint, *supra* note 11, at 3.

prisoner—was kept in solitary confinement.[188]

The IDOC refused to provide this care and continued to hold him in extreme isolation, the devasting impact being Gay's continued engagement in self-mutilation.[189] In total, Gay spent nearly two decades in solitary confinement in a state of acute mental decompensation.[190] By the time Gay was released from prison in 2018, he had mutilated his body hundreds of times and attempted suicide multiple times.[191]

B. Procedural Posture of Gay v. Baldwin

Gay asserted claims against the IDOC and other defendants for violation of the Eighth Amendment,[192] Fourteenth Amendment,[193] and the Americans with Disabilities Act and Rehabilitation Act.[194] The defendants moved to transfer venue to the Central District of Illinois,

188. *Id.* at 3. In the class action lawsuit, *Rasho v. Walker*, Judge Michael M. Mihm issued an opinion that IDOC's failure to provide mental health care to prisoners who are on "crisis watch" and in segregation constituted cruel and unusual punishment in violation of the U.S. Constitution. Rasho v. Walker, No. 07-1298, 2018 WL 2392847, at *17 (C.D. Ill. May 25, 2018). The IDOC's Chief of Mental Health admitted in testimony that mentally ill prisoners in segregation are "across the board" getting worse without proper mental health treatment and out-of-cell time that they needed. *Id.* at 8–9. At a hearing, the judge reprimanded the state for its failure to address the problems, noting that the IDOC had long known about the mentally ill prisoners being harmed. *See* Antholt et al., *supra* note 17.

189. *Gay* Complaint, *supra* note 11, at 3.

190. In psychology, the terms decompensation refers to an individual's loss of healthy coping strategies in response to stress which results in personality disturbance or psychological imbalance. CAROL D. TAMPARO & MARCIA A. LEWIS, DISEASES OF THE HUMAN BODY 527 (5th ed. 2011). Gay's state of acute mental decompensation was his mental health crisis and psychological decline which began in the manifestation of his symptoms of borderline personality disorder and the continued acts of self-mutilation while held in solitary confinement. *Gay* Complaint, *supra* note 11, at 3.

191. *Gay* Complaint, *supra* note 11, at 3.

192. Count One:

> By placing Anthony in extended solitary confinement notwithstanding its obvious, devastating impact on his mental health, the Defendants inflicted cruel and unusual punishment on Anthony, exhibited deliberate indifference to his serious medical needs, and inflicted punishment on him for no legitimate penological purpose. This cause extreme mental anguish, suffering, and multiple physical injuries, in violation of his right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

Id. at 4.

193. Count Four:

> Under the Due Process Clause, Anthony had a right to meaningfully challenge his placement in solitary confinement and show that he should not have been there. Had the Defendants provided this right, Anthony could have shown that his placement in solitary was improper, since it flowed from irrational acts arising from his mental illness, which was triggered by his confinement in solitary. The Defendants never afforded Anthony this opportunity, however, causing him to suffer the injuries described in this Complaint.

Id. at 5.

194. *Id.* at 4–5. *See* 42 U.S.C. § 12132; 29 U.S.C. § 701. For the purposes of this Comment, the analysis will only focus on the Eighth Amendment and Fourteenth Amendment claims.

which the court granted.[195] The defendants then moved to dismiss Gay's complaint.[196] Based on Gay's alleged facts, the court found that a jury could reasonably find that the defendants knew of the alleged systemic deficiency and that Gay stated an Eighth Amendment deliberate indifference claim against the defendants.[197] The lawsuit is pending in federal court and has a tentative October 2022 trial date.[198]

C. Proposed Holding for Gay v. Baldwin

Gay suffered twenty years of mental decompensation which manifested through so many acts of self-mutilation that another court found Gay to need acute, inpatient psychiatric care.[199] Another district court judge noted that subjecting a mentally ill prisoner to solitary confinement might amount to psychological torture as it leads the prisoner to commit future acts of self-harm.[200] In mind of these holdings and public opinion moving in opposition to solitary confinement, the Central District of Illinois should hold the defendants liable for violating Gay's constitutional rights to be free from "cruel and unusual punishment" based on their deliberate indifference to Gay's physical and psychological health and to not be deprived of life, liberty, or property without due process of law.[201]

This section first establishes that the IDOC's treatment of Gay—holding him in prolonged solitary confinement—violated the evolving standards of decency standard because the practice does not conform with the standards set by the leading correctional bodies in the United States. Next, it demonstrates that the IDOC's holding of Gay in prolonged

195. Defendants' Motion to Transfer Venue Pursuant to 28 U.S.C.S. § 1404 at 1, Gay v. Baldwin, No. 19-01133 (N.D. Ill. Jan. 25, 2019).

196. Defendants' moved to dismiss Gay's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. *See* Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), at 1, Gay v. Baldwin, No. 13-01133 (N.D. Ill. Feb. 22, 2019).

197. Order at 6–7, Gay v. Baldwin, No. 19-01133 (C.D. Ill. Sept. 16, 2019). The Eighth Amendment claim was limited to Defendants Baldwin, Butler, Chess, Hinton, Reister, and Sims. *Id.* at 3. The Eighth Amendment deliberate indifference claim against the State of Illinois was dismissed. *Id.* at 12–13.

198. Text Order, *supra* note 10 (setting the jury trial for October 18, 2022); Stacy St. Clair, *Anthony Gay's Decades in Solitary Confinement Led to Self-Mutilation. Now a Proposed Law to Limit Prisoner Isolation in Illinois Is Named in His Honor*, CHI. TRIB. (Mar. 10, 2020, 7:24 PM), https://www.chicagotribune.com/news/breaking/ct-solitary-confinement-illinois-prison-law-20200310-sjujwdcklrbitotj72ywrxpbfa-story.html [https://perma.cc/648G-CMJY].

199. *See* sources cited *supra* note 188 (discussing the class action lawsuit of *Rasho v. Walker*).

200. *See* sources cited *supra* note 138.

201. Both doctrines can be applied to solitary confinement, providing two independent routes to a potential holding that a practice is "per se" unconstitutional. *See* Hanna, *Constitutional Status*, *supra* note 45, at 3 (detailing the "Evolving Standards of Decency" doctrine and the "Deliberate Indifference Doctrine").

solitary confinement showed deliberate indifference to his physical and psychological health, constituting a violation of the Eighth Amendment. Ultimately, this section explains that in *Gay v. Baldwin*, Illinois courts have the opportunity to move forward in a progressive direction to increase restrictions on the practice of solitary confinement.

1. The Evolving Standards of Decency Doctrine

The evolving standards of decency standard is applied to general types of punishment and considers several factors in determining whether the punishment violated the doctrine: opinions of relevant professional organizations, international norms, the historical use of the practice, and the actions of state legislatures.[202]

Beginning with the first factor, today's standards of decency, as reported by leading correctional standard-setting bodies,[203] reveal that prolonged solitary confinement should not be used as a practice for prisoners with mental illness.[204] The National Commission on

202. *Id.*

203. AM. B. ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 23-2.2 (3d ed. 2011) [hereinafter ABA, TREATMENT OF PRISONERS] ("[C]correctional officials should: (a) implement an objective classification system that . . . assesses the prisoner's needs, and assists in making appropriate housing, work, and program assignments . . . (c) ensure that classification and housing decisions . . . take account of a prisoner's . . . mental health, and special needs . . . ."); *id.* at 23-2.6(a) ("Segregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner."); *id.* at 23-2.8 ("If the assessment [of the prisoner in segregated housing] indicates the presence of a serious mental illness, or a history of serious mental illness and decompensation in segregated settings, the prisoner should be placed in an environment where appropriate treatment can occur."); *id.* at 23-4.3(b) ("[N]o placement in disciplinary housing should exceed one year."); *id.* at 23-6.11(d) ("[P]risoners diagnosed with serious mental illness should not be housed in settings that may exacerbate their mental illness or suicide risk, particularly in settings involving sensory deprivation or isolation."); NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, STANDARDS FOR MENTAL HEALTH SERVICES IN CORRECTIONAL FACILITIES app. E (2008) (Inmates with serious mental illnesses and developmentally delayed inmates are usually excluded from admission to extreme isolation housing unless a specialized mental health program exists within the institution similar to residential treatment programs for general population inmates with serious mental illnesses); AM. PSYCH. ASS'N, PSYCHIATRIC SERVICES IN CORRECTIONAL FACILITIES 65 (3d ed. 2000) ("Inmates in segregation who decompensate and experience a psychiatric crisis, including but not limited to acute psychosis and significant depression with suicidal ideation, should be removed from segregation and transferred to an acute psychiatric treatment setting (e.g., a hospital or an infirmary). If they are returned to segregation, it should be in a unit that provides adequate structured and unstructured activities . . . ."); AM. CORRECTIONAL ASS'N, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (4th ed. 2003, as updated by the 2010 Standards Supplement).

204. It is widely recognized that isolation and solitary confinement for any significant period of time is likely to make a person suffering from mental illness worse and create a substantial risk of harm to person. Further, the mental impact of solitary confinement is cumulative and can indeed cause mental illness. *See, e.g.*, Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCH & L. ONLINE 104 (2010); *Gay* Complaint, *supra* note 11, at 14.

Correctional Health Care Standards for Mental Health Services in Correctional Facilities, an independent expert board dedicated to improvements in correctional healthcare, states that inmates who are seriously mentally ill should not be confined under conditions of extreme isolation.[205] The American Correctional Association, a private, nonprofit organization composed mostly of current and former corrections officials which provides accreditation to prisons, jails and other detention facilities, concluded that seriously mentally ill prisoners should not be placed in solitary confinement for more than thirty days.[206] The Association of State Correctional Administrators, an association of state correctional leaders throughout the United States, believes that prolonged solitary confinement manufactures or increases mental illness.[207] The American Bar Association Criminal Justice Standards Committee advises similarly in their published standards for the treatment of prisoners.[208] Taken together, the prevailing opinion among professional organizations involved in incarceration clearly counsels against the use of prolonged solitary confinement.

Similarly, international norms and the historical use of the practice would also support the prohibition on solitary confinement for individuals with mental illnesses. The UN has expressly disavowed the practice,[209] and practically no other country uses prisoner isolation strategies to the extent that the United States does.[210] While the use of solitary confinement is currently widespread in the United States, its history as a punitive and administrative tool, the practice has been criticized for over a century, with the practice repeatedly coming under scrutiny for the harm it causes.[211]

The final factor, legislative and other state action, also counsels against the use of prolonged solitary confinement for mentally ill individuals. Solitary confinement has been chipped away by both governmental administrative bodies and the courts.[212] Mental health concerns within the criminal justice system and solitary confinement are more frequently

205. NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, *supra* note 203, at app. E.

206. NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, *supra* note 203.

207. AM. CORRECTIONAL ASS'N, *supra* note 203.

208. ABA, TREATMENT OF PRISONERS, *supra* note 203, at 23-6.11(d). The *ABA Treatment of Prisoner Standards* advised that "[p]risoners diagnosed with serious mental illness should not be housed in settings that exacerbate their mental illness or suicide risk, particularly in settings involving sensory deprivation or isolation." *Id.*; *see also Gay* Complaint, *supra* note 11, at 14–15 (citing the ABA standards).

209. *See supra* notes 124–129 and accompanying text (discussing in depth the opinion of the UN).

210. *See supra* notes 129–132 and accompanying text (examining other countries' practices).

211. *See supra* notes 56–66 and accompanying text (discussing the Supreme Court's precedent on solitary confinement).

212. Hanna, *Constitutional Status*, *supra* note 45, at 10.

talked about in public discourse. The treatment of mentally ill prisoners is being reevaluated in many states. Aside from treatment of mentally ill prisoners, solitary confinement for juveniles came under fire and bans on the practice were enacted at the state and federal level.

The national catalyst for this change was the 2014 case of Kalief Browder.[213] Browder was arrested and charged with robbery for allegedly stealing a backpack, and then spent seventeen months in solitary confinement on Rikers Island while awaiting his trial.[214] In an interview with a journalist in 2014, Browder stated that "being home is way better than being in jail, but in my mind right now I feel like I'm still in jail, because I'm still feeling the side effects from what happened in there."[215] Ultimately, Browder committed suicide.[216] Consequently, then-President Barack Obama announced a ban on solitary confinement for juvenile offenders in the federal prison system.[217] While Obama's reform applied broadly to the roughly 10,000 federal inmates in solitary confinement, it's impact was minimal, given that only a handful of those inmates were juveniles.[218]

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213. *Id.* at 10–11. Browder spent a total of three years on Riker's Island awaiting trial. Jennifer Gonnerman, *Before the Law*, NEW YORKER, Oct. 6, 2014, at 26.

214. Browder could not recall the exact number of days he spent in solitary confinement, and recounted "about seven hundred, eight hundred" days. Browder's case never actually went to trial because the assistant district attorney filed a memorandum explaining that the complainant had moved out of the United States back to Mexico and the District Attorney's office had lost contact with the complainant. Gonnerman, *supra* note 213, at 32.

215. *Id.*

216. Hanna, *Constitutional Status*, *supra* note 45, at 11 (citing Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html).

217. *Fact Sheet: Department of Justice Review of Solitary Confinement*, OFF. OF THE PRESS SECRETARY (January 25, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement [https://perma.cc/8EKN-P3VF]; *Presidential Memorandum—Limiting the Use of Restrictive Housing by the Federal Government*, OFF. OF THE PRESS SECRETARY (March 1, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/03/01/presidential-memorandum-limiting-use-restrictive-housing-federal [https://perma.cc/K2XV-FHBJ]; Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html [https://perma.cc/4GKY-LVAV]. Former President Obama cites research suggesting that solitary confinement has the potential to lead to devastating, lasting, psychological consequences. Barack Obama, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html [https://perma.cc/R8KT-DGM9].

218. Obama, *supra* note 217.

Many states have also passed laws limiting the use of solitary confinement of juveniles.[219] Twenty-six states prohibit punitive solitary confinement of juveniles, while fifteen states limit the time a juvenile may spend in solitary confinement.[220] More district courts are approaching the issue of solitary confinement of juveniles, resulting in settlement or judgments limiting the use of the practice.[221] In 2017, a district court in New York held that the juvenile inmates had properly stated a claim that punitive solitary confinement is cruel and unusual punishment under the Eighth Amendment, and two preliminary injunctions in Tennessee and Wisconsin banned the practice for juveniles in those state prisons.[222]

Courts have also begun to recognize the unique harm incurred by mentally ill individuals placed in solitary confinement.[223] In 2014, the

219. *See* Amy Fettig, *The Movement to Stop Youth Solitary Confinement: Drivers of Success & Remaining Challenges*, 62 S.D. L. REV. 776, 786 (2017) (Alaska, Connecticut, Main, Nevada, Oklahoma, and West Virginia limited the use of solitary confinement by statute in juvenile detention facilities) (citing Okla. Admin. Code § 377:3–13-144(l)(1)(A) (2017) (stating that room confinement of youth is a "serious and extreme measure to be imposed only in emergency situations"); W.Va. Code Ann. § 49-4-721(a)(1)(3) (West 2017) (declaring that a juvenile shall not be locked in a room alone unless he or she is "not amenable to reasonable direction and control."); Nev. Rev. Stat. Ann. § 62B.215 (1)-(8) (West 2017) (youth shall only be put in room confinement when all other less-restrictive options are exhausted and only for listed purposes and it may not exceed seventy-two hours); Conn. Gen. Stat. Ann. § 46b-133 (e) (West 2017) (stating that juveniles shall not be put in "solitary confinement" but not defining "solitary confinement"); Conn. Agencies Regs. § 17a-16-11 (West 2017) (juveniles may be secluded but must be checked every thirty minutes); Me. Rev. Stat. Ann. tit. 34-A § 3032 (5)(A) (West 2017) (allowing seclusion for adults and not listing it for children). *But see* 03-201-12 (15.3) Me. Code. R. § VI (6) (West 2017) (allowing "room restriction" for juveniles, even for minor rule violations)). California, in 2016, declared that a juvenile can only be in "room confinement" for four hours unless documentation shows reasons for four more hours to be added. 2016 Cal. Legis. Serv. 4995–96 (West 2017). Texas is continuing to review the practice of solitary confinement of juveniles. *See* 2013 Tex. Sess. Law Serv. 2960–61 (West 2017)); Deborah Paruch, *Banishing Juvenile Solitary Confinement: A Call to Reform Michigan's Practices*, MICH. B.J., Nov. 2019, at 40, 42.

220. Paruch, *supra* note 219, at 42 (citing Andrew Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, *Figures and Data*, 45 J. AM. ACAD. PSYCH. LAW ONLINE 350 (2017), http://jaapl.org/content/45/3/350/tab-figures-data [https://perma.cc/96EP-C3K6]).

221. *See* Fettig, *supra* note 219, at 787–88 (noting that civil rights litigation is simultaneously driving systems reform and exposing the harms solitary confinement wreaks on incarcerated people); Paruch, *supra* note 219, at 42 (citing Abigail Q. Cooper, *Beyond the Reach of the Constitution: A New Approach to Juvenile Solitary Confinement Reform*, 50 COLUM. J.L. & SOC. PROBLEMS 343, 355–57 (2017)).

222. Hanna, *Constitutional Status*, *supra* note 45, at 10 (citing V.W. *ex rel.* Williams v. Conway, 236 F. Supp. 3d 554, 583–85 (N.D.N.Y. 2017); Doe v. Hommrich, No. 3-16-0799, 2017 WL 1091864 (M.D. Tenn. Mar. 22, 2017); J.J. v. Litscher, No. 17-cv-47 (W.D. Wis. July 11, 2017); A.T. v. Harder, 298 F. Supp. 3d 391 (N.D.N.Y. 2018)).

223. Hanna, *Constitutional Status*, *supra* note 45, at 8; Dillon, *supra* note 30, at 275 (citing Palakovic v. Wetzel, 854 F.3d 209, 233 (3d Cir. 2017); Scarver v. Litscher, 434 F.3d 972, 977 (7th Cir. 2006); Jones'El v. Berge, 164 F. Supp. 2d 1096, 1101–02 (W.D. Wis. 2001); Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd sub nom.* Ruiz v. United States, 37 F.3d 941 (5th Cir. 2001)).

Northern District of New York noted that "available evidence suggests that contemporary values are moving away from placement of seriously mentally ill prisoners in segregated housing."[224] Following prisoner hunger strikes at Pelican Bay State Prison, the Ninth Circuit likewise held that segregating prisoners with serious mental illness in conditions that were "very likely to . . . seriously exacerbate an existing mental illness" could not be "squared with evolving standards of humanity or decency."[225] There is also rising trend of courts granting preliminary injunctions and settlement agreements in favor of inmates contesting solitary confinement.[226]

Taken together, all the evolving standards of decency factors weigh against the constitutionality of Gay's treatment. Gay's treatment violated all of the standards set by the aforementioned leading correctional bodies and was contrary to international norms. While these bodies conclude that solitary confinement should not be used at all or for longer than thirty days, Gay's prolonged solitary confinement lasted over twenty years.[227] Gay's prolonged solitary confinement exacerbated the symptoms of Gay's borderline personality disorder.[228] Further, international norms and the troubling history of the practice, coupled with actions by state legislatures, suggest that Gay's treatment would not fall under today's evolving standards of decency and was thus violative of the Eighth Amendment.[229]

2. The Deliberate Indifference Doctrine

The deliberate indifference standard is a two-pronged test courts apply to specific prison conditions to determine whether the specific conditions to which a prisoner is subjected to during their confinement violate the

224. Coleman v. Brown, 28 F. Supp. 3d 1068, 1105–06, n.49 (E.D. Cal. 2014).

225. Madrid v. Gomez, 889 F. Supp. 1146, 1266 (N.D. Cal. 1995).

226. Rasho v. Walker, No. 07-1298, 2018 WL 2392847, at *12–15 (C.D. Ill. May 25, 2018); Hanna, *Constitutional Status*, *supra* note 45, at 8–9 (citing Summary of Settlement Agreement, Cmty. Legal Aid Soc'y, Inc. v. Coup, No. 15-688 (D. Del. 2016) (https://www.declasi.org/wp-content/uploads/2016//09/06-CLASI-v-Coup-Summary-Sheet.pdf); Settlement Agreement, Disability Law Ctr. V. Mass. Dep't of Corr., No. 07-10463 (D. Mass. 2007), https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf; *Justice Department Closes Investigation After Pennsylvania Department of Corrections Takes Significant Steps to Reform Its Use of Solitary Confinement*, U.S. DEP'T JUST. (Apr. 14, 2016), (https://www.justice.gov/opa/pr/justice-department-closes-investigation-after-pennsylvania-department-of-corrections-takes (describing the DOJ's decision to close its investigation into the Pennsylvania Department of Corrections "following significant improvements made by PDOC to its policies and practices that are intended to protect prisoners with serious mental illness and intellectual disabilities from the harmful effects of solitary confinement.")).

227. *Supra* notes 204–65.

228. *Gay* Complaint, *supra* note 11, at 12–13.

229. *See infra* notes 234–79.

Eighth Amendment.[230] The two prongs of the deliberate indifference standard are (1) whether the institution maintained conditions that inflicted harm that is "sufficiently serious" or exposed inmates to a "substantial risk of serious harm" and (2) whether the institution's officials acted with "deliberate indifference"[231] to inmate health or safety.[232]

The conditions of solitary confinement, as maintained by the IDOC, exposed Gay to a substantial risk of serious harm—his self-mutilation—thereby satisfying the first deliberate indifference prong. Gay alleges in his complaint that holding him in prolonged solitary confinement amounted to torture and as such the IDOC showed a deliberate indifference toward his health.[233] Gay's primary manifestation of mental decompensation in solitary confinement was repeated, severe self-mutilation and lashing out at others, which began shortly after he was placed in solitary confinement.[234] The IDOC was aware of the devastating impact solitary confinement has on persons with mental illness through the prisoners obvious continued suffering and court orders from other cases such as *Rasho v. Walker*,[235] and they knew of its catastrophic impact on Gay in particular.[236] Instead of administering the appropriate mental health care, the IDOC referred each act to the local prosecutor and Gay was be criminally charged for his actions, which were attributable to his borderline personality disorder.[237] As a result of the

230. *Gay* Complaint, *supra* note 11, at 3–4.

231. The requisite knowledge to meet this prong for plaintiffs is recklessness—"somewhere between negligence and purpose of knowledge: namely, recklessness of the subjective type used in criminal law." Hanna, *supra* note 45, at 4 (citing Brice v. Virginia Beach Corr. Ctr., 58 F.3d 101, 105 (4th Cir. 1995)). A prisoner-plaintiff must show evidence that the official was actually aware of a prisoner's serious need and chose to ignore it. Gordon, *supra* note 19, at 511 (citing Farmer v. Brennan, 511 U.S. 825, 839 (1994)).

232. Hanna, *Constitutional Status*, *supra* note 45, at 4; Gordon, *supra* note 19, at 511.

233. Gay was housed in a cell roughly the size of half a parking space, he was typically not allowed outside of the cell, and his cell doors made is "virtually impossible" for him to see outside. *Gay* Complaint, *supra* note 11, at 10.

234. *Gay* Complaint, *supra* note 11, at 11.

235. In 2018, a judge in the Central District of Illinois issued a permanent injunction against the IDOC for poor treatment of its mentally ill prisoners. Rasho v. Walker, No. 07-1298, 2018 WL 10646910, at *25 (C.D. Ill. Oct. 30, 2018).

236. Gay's complaint lists events of self-mutilation between August 2016 and May 2018, and states that the defendants meticulously recorded Gay's self-mutilation in his medical records. Gay's mental illness caused him to lash out at others by throwing his own body fluids through the heavy steel door of his isolation cell. This type of behavior was a well-recognized symptom of mental illness. *Gay* Complaint, *supra* note 11, at 12–13. Additionally, the defendants admit that Gay engaged in self-harm. *See* Defendants' Amended Answer and Affirmative Defenses to Plaintiff's Complaint, *supra* note 176, at 15.

237. The criminal conviction Gay received for the behaviors caused by his mental illness added an additional ninety-two years to Gay's original seven-year sentence and racked up Gay more than 150 years of "solitary time" by the IDOC as a result of his disciplinary infractions. *Gay* Complaint, *supra* note 11, at 13–14.

criminal convictions, Gay was sentenced to serve the rest of his life in solitary confinement.[238]

Early on in Gay's confinement, prison staff examined him and confirmed that he suffered from an acute mental health crisis and was at severe risk of self-harm.[239] The state also identified him in court papers from *Rasho v. Walker* as one of only a few dozen prisoners within the IDOC whose mental illnesses were so acute and dangerous that he required full inpatient care.[240] However, while the IDOC lacked the facilities and services to provide such care, it was capable of providing the care outside of the IDOC at one of the multiple Illinois Department of Health Services (IDHS) mental health centers and still failed to do so.[241] Such failure constitutes deliberate indifference by the prison officials, as they had the requisite knowledge but consciously chose not to act, satisfying the second deliberate indifference prong.

By maintaining Gay's placement in solitary confinement despite many instances of severe self-mutilation, the IDOC objectively exposed Gay to a "substantial risk of serious harm," which he incurred through both psychological decompensation he experienced and the physical harm that manifested as self-mutilation, a symptom of his borderline personality disorder.[242] Gay's serious medical needs were not met by the IDOC, yet the IDOC did not transfer him out of solitary confinement to a facility where he could receive appropriate medical treatment.[243] IDOC officials took steps to prolong Gay's time spent in solitary confinement through tickets prolonging his sentence in solitary confinement, and in doing so, they showed "deliberate indifference" to his care, constituting a violation of the Eighth Amendment.[244]

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238. *Gay* Complaint, *supra* note 11, at 14.

239. *Gay* Complaint, *supra* note 11, at 15.

240. Rasho v. Walker, No. 07-1298, 2018 WL 10646910, at *11 (C.D. Ill. Oct. 30, 2018).

241. Illinois law empowers the director of IDOC to have a prisoner needing intensive psychiatric care to be transferred to the custody of IDHS during the prisoners' sentence. *See* 730 ILCS 5/3-8-5 (2021). IDHS operates multiple mental health centers for treating such persons. Press Release, Illinois Department of Corrections, IDOC and IDHS Partner to Improve Care for Mentally Ill Offenders (Sept. 9, 2016), https://www.illinois.gov/IISNews/16-0701-IDOC_and_IDHS_Partner_to_Improve_Care_for_Mentally_Ill_Offenders.pdf [https://perma.cc/KZV4-M8V9].

242. *Gay* Complaint, *supra* note 11, at 18; *see* DSM-5, *supra* note 180, at 664 (explaining that self-mutilation is a common manifestation of borderline personality disorder).

243. *Gay* Complaint, *supra* note 11, at 17–18.

244. Deliberate indifference means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires a finding that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825, 835 (1994). It is argued that IDOC officials acted in reckless disregard by not removing Gay from the conditions of solitary confinement for twenty years and instead extended his placement. *Gay* Complaint, *supra* note 11, at 15.

3. The Direction Forward

To guide its holding in *Gay*, the Central District should look to its recent decision in *Rasho v. Walker*. In *Rasho v. Walker*, a judge in the Central District of Illinois issued a permanent injunction against the IDOC for poor treatment of its mentally ill prisoners, citing the "irreparable injury" the inmates would suffer but for the injunction.[245] The court found the IDOC was deliberately indifferent to the medical needs of the prisoners, specifically regarding medication management and mental health treatment,[246] violating the Eighth Amendment.[247]

Additionally, the Seventh Circuit has been receptive toward the idea that exacerbation of mental illness leading to a high chance of self-harm or suicide can satisfy the imminent danger of serious bodily injury requirement for a three-strikes prisoner.[248] As such, the *Gay* court has strong legal precedent to find in favor of Gay, and would likely be affirmed on appeal.

Moreover, the IDOC's placement of Gay in prolonged solitary confinement violated the evolving standards of decency standard because the practice does not conform with standards set by leading correctional bodies in the United States, international norms, and recent state legislative actions. The extended period of time that Gay was held in solitary confinement inflicted immense psychological harm through Gay's borderline personality disorder state of mental decompensation. The manifestation of the psychological harm inflicted created physical harm to Gay through the repeated acts of self-mutilation. Despite years of knowledge of these acts, the IDOC never removed Gay from solitary confinement or provided Gay with inpatient psychiatric care that was necessary to protect Gay's psychological and physical safety. The IDOC's lack of concern for Gay's health by continuing to hold Gay in prolonged solitary confinement showed deliberate indifference to his physical and psychological health, constituting a violation of the Eighth Amendment.

Nevertheless, Illinois courts, bolstered by favorable rulings in the

245. *See supra* note 188. The judge stated that the public interest weighed heavily in favor of the plaintiffs. Rasho v. Walker, No. 07-1298, 2018 WL 10646910, at *25 (C.D. Ill. Oct. 30, 2018); Andrew Maloney, *Judge Says IDOC Must Fix Treatment for Mentally Ill*, CHI. DAILY L. BULL. (Nov. 2, 2018 11:17 AM), https://www.chicagolawbulletin.com/judge-says-idoc-must-fix-treatment-for-mentally-ill-20181102 [https://perma.cc/M9ZV-CWAA].

246. Mental Health treatment including the following, "mental health treatment in segregation, mental health treatment on crisis watch, mental health evaluations, and mental health treatment plans within the meaning of the Eighth Amendment." *Rasho*, 2018 WL 10646910, at *25.

247. *Id.*

248. *See, e.g.*, Wallace v. Baldwin, 895 F.3d. 481, 484–85 (7th Cir. 2018); Sanders v. Melvin, 873 F.3d. 957, 960–61 (7th Cir. 2017); Gilbert-Mitchell v. Lappin, No. 06-741-MJR, 2008 WL 4545343, at *3 (S.D. Ill. Oct. 10, 2008); Dillon, *supra* note 30, at 288.

Central District and Seventh Circuit, now have the opportunity to move forward in a positive direction by holding that IDOC violated Gay's Eighth Amendment rights, recognizing the needs and dignity of mentally ill inmates and increasing restrictions on the practice of solitary confinement.

IV. IMPACT OF THE GAY V. BALDWIN HOLDING

Gay v. Baldwin presents a narrow issue and a sympathetic plaintiff: a man with severe mental health issues with an exceptionally elongated sentence as a result of his mental illness. The Seventh Circuit has previously required psychological harm claims be accompanied by a physical injury or an extreme and officially sanctioned psychological harm for a prisoner's alleged injury to be "sufficiently serious" to hold a prison official liable under the Eighth Amendment.[249] Gay's psychological harm was accompanied by extreme physical injury, which occurred repeatedly over the course of twenty years. As such, Gay would likely meet the Seventh Circuit's physical injury requirement, allowing him to succeed on an Eighth Amendment claim against the prison and its officials. In fact, a judge for the Central District of Illinois has already ruled against the IDOC by issuing a permanent injunction against it for poor treatment of its mentally ill prisoners, and Gay was included in the class.[250]

Additionally, the Seventh Circuit has been receptive to the notion that exacerbation of mental illness leading to a high probability of self-harm or suicide can satisfy the imminent danger of serious bodily injury requirement for a three-strikes prisoner.[251] The facts surrounding *Gay v. Baldwin* increase the likelihood of a ruling providing that prolonged solitary confinement for prisoners with serious mental illnesses is an Eighth Amendment violation. Gay was held in solitary confinement for twenty years, almost twice as long as the inmate in *Wallace v. Baldwin*.[252] Further, while most cases implicating the "imminent danger or serious bodily injury" requirement include some incidents or self-mutilation or

249. Doe v. Welborn, 110 F.3d 520, 524 (7th Cir. 1997) (holding that the fear of assault, unaccompanied by physical injury does not reflect the deprivation of the "minimal civilized measures of life's necessities" (citing Rhodes v. Chapman, 452 U.S. 337, 349 (1981)); Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996) (claiming that rather than any fear of assault, it is the reasonably preventable assault itself, that gives rise to a claim under the Eighth Amendment).

250. The judge stated that the public interest weighed heavily in favor of the plaintiffs. *Rasho*, 2018 WL 10646910, at *25; Maloney, *supra* note 245.

251. Wallace v. Baldwin, 895 F.3d. 481, 484–85 (7th Cir. 2018); Sanders v. Melvin, 873 F.3d. 957, 960–61 (7th Cir. 2017); Gilbert-Mitchell v. Lappin, No. 06-741-MJR, 2008 WL 4545343, at *3 (S.D. Ill. Oct. 10, 2008).

252. Wallace was sentenced in 2006 and the Seventh Circuit published their decision in 2018. *Wallace*, 895 F.3d. at 482.

suicide attempts, Gay had over a hundred reported incidents of self-harm documented in graphic detail.[253]

A decision holding that Gay's constitutional rights were violated could elevate the Central District of Illinois and Seventh Circuit to the forefront of this legal issue and advance protections for prisoners with mental illnesses. The Seventh's Circuit decision could create real change by allowing more prisoners who have suffered serious harm through placement in solitary confinement to pursue claims against state departments of corrections. Solitary confinement would no longer be an option for placement of inmates with mental illness and would force institutional change in prisons by forcing department of corrections to provide appropriate mental health care for their populations.

Further, more Illinois and Seventh Circuit decisions will put pressure on increased prison reform in Illinois regarding solitary confinement and proper treatment for prisoners with serious mental illness. Representative Ford's "Anthony Gay Law" will soon be headed for a full vote in the Illinois Legislature.[254] Public opinion is in support of the Anthony Gay Law, and Gay himself has been a strong advocate for this legislation.[255] Coupled together, legislation and a court decision further restricting solitary confinement will align policy with public opinion in the state.

CONCLUSION

The Central District of Illinois should adopt a new Eighth Amendment standard in *Gay v. Baldwin* and hold that the use of solitary confinement as punishment for prisoners with serious mental illness per se constitutes a deliberate indifference for the prisoner's health, for which prison officials may be held liable. The Seventh Circuit previously required psychological harm claims be accompanied by a physical injury or an extreme and officially sanctioned psychological harm to exist for a prisoner to allege an injury "sufficiently serious" to hold a prison official liable for the violation of the Eighth Amendment. However, *Gay v. Baldwin* is a unique case because Gay's psychological harm manifested through severe forms of physical harm through self-mutilation, thereby satisfying the aforementioned judicial requirements. A decision holding that Gay's constitutional rights were violated could reshape Seventh Circuit jurisprudence, enhancing protections for prisoners with mental illnesses and driving change at both the state and national level.

253. *See Gay* Complaint, *supra* note 11, at 3, 12.

254. H.B. 3564, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021) (As of publication, the session has ended without the bill going forward.); *see also supra* note 167.

255. *See* St. Clair, *supra* note 198 ("Anthony's story has touched many people in Springfield. It [the proposed legislation] has new life because there's now a real face to this issue. These are the stories that help get legislation passed.").