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# Banning Solitary for Prisoners with Mental Illness: The Blurred Line Between Physical and Psychological Harm

Rosalind Dillon

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# **Banning Solitary for Prisoners with Mental Illness: The Blurred Line Between Physical and Psychological Harm**

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INTRODUCTION .....267

I. WHAT IS SOLITARY CONFINEMENT? .....269

    A. *Brief History and Mounting Concern Over the Effects of Solitary Confinement*.....269

    B. *“Typical” Conditions of Confinement* .....270

    C. *Who is Kept in Solitary Confinement?* .....272

II. EFFECTS OF SOLITARY CONFINEMENT ON PEOPLE WITH MENTAL ILLNESS .....274

    A. *Prolonged Solitary Confinement for Mentally Ill Prisoners Causes Serious Psychological Harm*.....274

    B. *Isolating Mentally Ill Prisoners in Prolonged Solitary Confinement Can Cause Serious Physical Harm*.....276

        1. *Suicide and Self-Harm*.....277

        2. *Other Kinds of Physical Harm Suffered in Solitary Confinement*.....279

III. BLURRING THE LINE BETWEEN PHYSICAL AND PSYCHOLOGICAL HARM .....280

IV. LEGAL CONSEQUENCES: WHY DOES IT MATTER? .....282

    A. *The Eighth Amendment Prohibition on Cruel and Unusual Punishment* .283

    B. *The Prison Litigation Reform Act* .....285

        1. *Three Strikes Litigation* .....285

        2. *The Exception to the Three Strikes Provision* .....287

        3. *The Physical Injury Requirement* .....288

    C. *No Relief for Prisoners in Solitary Confinement Suffering from Mental Illness*.....289

CONCLUSION.....291

## INTRODUCTION

The Hole. Segregation. Isolation. Supermax. Lockdown. Special Housing Unit. Restrictive Housing Unit. These are terms used to describe the practice referred to in this Comment as solitary confinement, each evoking a slightly different idea of what it means to lock someone alone in a concrete or steel box for days, weeks, months, years, and sometimes decades on end. “The Hole” paints a grim picture of a dark and lonely place without a chance for escape. “Special Housing Unit” is vague, but ultimately puts a prettier gloss on the practice of extreme isolation. While each term may elicit slightly different feelings among those unfamiliar with what happens inside jail and prison walls, the horrific effects of prolonged and extreme isolation<sup>1</sup> on persons with mental illness<sup>2</sup> are hauntingly consistent.

The medical and scientific communities are in overwhelming agreement: prolonged solitary confinement has devastating effects on persons suffering from mental illness.<sup>3</sup> Indeed, the practice has devastating effects on those who are not afflicted by mental illness. Why then, in a country as developed as the United States, is the practice of placing mentally ill prisoners in extreme and prolonged isolation so pervasive? The reasons are many, but this Comment focuses on the idea of “harm” and how the failure to treat psychological harm as seriously as physical harm erects barriers, which prevent mentally ill persons from getting relief from the torture of solitary confinement.

Every year prisons throw people, many of whom suffer from debilitating mental illness, into the hole and never look back. According to the Eighth Amendment, “[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*”<sup>4</sup> Prisoners attempting to challenge their solitary confinement via the Eighth Amendment must meet a two part test: (1) the conditions of confinement must be objectively serious or prisoners must allege they have a sufficiently serious medical need; and (2) prison officials must be deliberately indifferent to the harm, or potential future harm, caused by that condition or medical need.<sup>5</sup> The failure to treat

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<sup>1</sup> For the sake of this Comment, “prolonged” solitary confinement refers to the practice of confining anyone in extreme isolation for a period longer than fifteen days. “Extreme isolation” refers to the denial of meaningful contact with other human beings and sensory deprivation that prisoners housed in solitary confinement experience between twenty-two and twenty-four hours per day.

<sup>2</sup> When it comes to prisoners suffering from mental illness, I use the broad definition from the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act. Under the PAIMI Act, an “individual with mental illness” is an individual “who has a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State . . .” 42 U.S.C. § 10802(4)(A) (2012). “Significant mental illness” and “emotional impairment” are not further defined in the PAIMI Act or its implementing regulations. However, courts have generally favored a broad definition of these terms. *See Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 355 F. Supp.2d 649, 655 (D. Conn. 2005), *aff’d*, 464 F.3d 229 (2d Cir. 2006); ANNA GUY, AVID PRISON PROJECT, LOCKED UP AND LOCKED DOWN: SEGREGATION OF INMATES WITH MENTAL ILLNESS 5 n.5 (2016).

<sup>3</sup> *See infra* Part II.

<sup>4</sup> U.S. CONST. amend. VIII (emphasis added).

<sup>5</sup> *Farmer v. Brennan*, 511 U.S. 825, 825–26 (1970). Prisoners may also challenge their placement in solitary confinement through the Fourteenth Amendment, but this Comment focuses on the Eight Amendment. *See, e.g., Sandin v. Conner*, 515 U.S. 472, 476 (1995) (procedural due process challenge to solitary confinement).

psychological pain in the same manner as physical pain—for example, by determining prisoners are feigning mental illness or are malingering when they commit acts of self-harm—has made it more difficult for prisoners suffering from mental illness to bring successful Eighth Amendment claims.

Various provisions of the Prison Litigation Reform Act (PLRA) further serve to hinder successful challenges to solitary confinement. Under the Act, even if a prisoner with mental illness could otherwise bring a successful Eighth Amendment claim, he or she is sometimes barred from doing so by the three strikes provision.<sup>6</sup> The three strikes provision of the PLRA requires prisoners who have filed three or more claims deemed frivolous, malicious, or failing to state a claim to prove an “imminent danger of serious physical injury” in order to proceed *in forma pauperis* (IFP) in federal court.<sup>7</sup> This forces prisoners to advocate that their psychological pain and manifestations of mental illness constitute serious physical injury. Further, prisoner litigants alleging mental injury are barred from recovering compensatory damages, leaving limited avenues for relief and frustrating the ability of prisoners to retain counsel because of limitations on attorney fee awards.<sup>8</sup> As this Comment will demonstrate, consensus in the scientific community suggests the distinction between serious psychological and physical harm is blurry at best. Therefore, a bright line cannot and should not be drawn.

There is a strong argument, with growing support, that the practice of prolonged solitary confinement of *any* prisoner should be abolished as a violation of the Eighth Amendment’s prohibition of cruel and unusual punishment.<sup>9</sup> While the movement to abolish solitary confinement is an important initiative, the scope of this Comment is limited to the argument that the practice of solitary confinement is categorically inappropriate for people suffering from mental illness. This argument is consistent with research that overwhelmingly supports the conclusion that placing a person with mental illness in solitary confinement causes consistent, and sometimes irreversible, psychological and physical harm.<sup>10</sup>

This Comment analyzes the failure of the judiciary to treat psychological and physical harm with the same level of seriousness, which has precluded prisoners from making successful Eighth Amendment claims, especially “three strikes” prisoners. Part I provides a historical background and general overview of the conditions and the population of prisoners found in solitary confinement. Part II analyzes the physiological and psychological effects of solitary confinement on people with mental illness. Part III reveals that there is a blurred line between physical and psychological harm, and, therefore, argues that courts should treat them as similarly serious. Part IV outlines the legal framework in which challenges to solitary confinement operate and the legal consequences of treating psychological harm differently than physical harm. Ultimately, I

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<sup>6</sup> 28 U.S.C. § 1915(g) (2012).

<sup>7</sup> § 1915(g).

<sup>8</sup> 42 U.S.C. § 1997e(d)–(e) (2012).

<sup>9</sup> See Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 745 (2015).

<sup>10</sup> See generally Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 130 (2003) [hereinafter Haney, *Mental Health Issues in Long-Term Solitary Confinement*]; Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 299–301 (2018) [hereinafter Haney, *Restricting Solitary Confinement*].

conclude that placing people who suffer from mental illness in solitary confinement cannot be squared with the Eighth Amendment. I also argue that, at minimum, the way in which courts treat physical harm as more serious than psychological harm must change to offer greater protection of prisoners' right to humane conditions of confinement.

## I. WHAT IS SOLITARY CONFINEMENT?

### A. *Brief History and Mounting Concern Over the Effects of Solitary Confinement*

The horrific reality of solitary confinement's effects on human beings is well documented. Solitary confinement in the United States is traceable to the late seventeenth century when the Walnut Street Jail<sup>11</sup> attempted to apply a new theory of punishment which placed the "worst type of felons" in solitary cells.<sup>12</sup> The idea to experiment with solitary confinement stemmed from the Quaker belief that prisoners isolated in cells with only a Bible could use that time to reflect, repent, pray, and eventually reform.<sup>13</sup> While the practice was a failure at Walnut Street, at least in part due to overcrowding,<sup>14</sup> the Eastern State Penitentiary in Philadelphia revived the practice in 1829.<sup>15</sup> In 1842, Charles Dickens toured the Eastern State Penitentiary and wrote:

In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers.<sup>16</sup>

The practice was slowly abandoned in subsequent decades due to the number of prisoners who went insane, committed suicide, or were no longer able to function in society.<sup>17</sup> By 1890 the Supreme Court recognized the "serious objections" to extended solitary confinement, understanding the effects on prisoners were grave, including "violent insanity" and suicide, and that "in most cases [prisoners] did not recover sufficient mental activity to be of any subsequent service to the community."<sup>18</sup>

Today, concern about the effects of prolonged solitary confinement continues to grow. Activists and organizations against solitary confinement urge that the practice

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<sup>11</sup> Walnut Street Jail, located across the street from Independence Hall in Philadelphia, was Pennsylvania's first penitentiary. LeRoy B. DePuy, *The Walnut Street Prison: Pennsylvania's First Penitentiary*, 18 PA. HIST. 130, 130 (1951).

<sup>12</sup> Harry Elmer Barnes, *Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 48 (1921).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NPR (July 26, 2006, 7:52 PM), <https://www.npr.org/templates/story/story.php?storyId=5579901>.

<sup>16</sup> CHARLES DICKENS, *Philadelphia, and Its Solitary Prison*, in THE WORKS OF CHARLES DICKENS: AMERICAN NOTES 96, 98 (1911).

<sup>17</sup> Sullivan, *supra* note 15.

<sup>18</sup> *In re Medley*, 134 U.S. 160, 168 (1890).

amounts to torture and should be abolished.<sup>19</sup> The concern is global—the UN Special Rapporteur on Torture specifically condemned solitary confinement as torture and urged an absolute prohibition on the practice in excess of fifteen days.<sup>20</sup> Former Justice Kennedy, concurring in *Davis v. Ayala*, asserted that research describing the side-effects of solitary confinement—“anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors—confirmed “what [the Supreme] Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.”<sup>21</sup> Following former Justice Kennedy’s lead, Justice Breyer, writing in his dissent in *Glossip v. Gross*, referenced peer-reviewed material documenting that “prolonged solitary confinement produces numerous deleterious harms,” both physical and psychological.<sup>22</sup> Most recently, Justice Sotomayor wrote of the well-known harms of solitary, urging courts and corrections officials to “remain alert to the clear constitutional problems raised by keeping prisoners in solitary confinement,” and describing solitary as a “penal tomb.”<sup>23</sup> Although concern is mounting, this concern, absent concrete and meaningful action, means little for those suffering from mental illness trapped in solitary confinement across the country.

### B. “Typical” Conditions of Confinement

Solitary confinement refers to “the housing of an adult or juvenile with minimal to rare meaningful contact with other individuals.”<sup>24</sup> The actual conditions of solitary confinement vary by institution. However, every solitary confinement regime maintains certain consistent features—small spaces, minimal and meaningless human interaction, and overexposure to negative stimuli such as noxious smells from feces, urine and blood; loud banging; and the screaming and echoing of other prisoners in solitary.<sup>25</sup>

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<sup>19</sup> See generally SCARLET KIM ET AL., N.Y. CIVIL LIBERTIES UNION, *BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK’S PRISONS* (2012), [https://www.nyclu.org/sites/default/files/publications/nyclu\\_boxedin\\_FINAL.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_boxedin_FINAL.pdf); *Stop Solitary: No Time to Lose*, ACLU, <https://www.aclu.org/issues/prisoners-rights/solitary-confinement/we-can-stop-solitary?redirect=stop-solitary-dangerous-overuse-solitary-confinement-united-states-0> (last visited Feb. 10, 2018); *Stop Torture Campaign*, AMNESTY INT’L, <https://www.amnesty.org/en/get-involved/stop-torture/> (last visited Feb. 10, 2018); *Torture in U.S. Prisons*, NAT’L RELIGIOUS CAMPAIGN AGAINST TORTURE, <http://www.nrcat.org/> (last visited Feb. 10, 2018); N.Y. CAMPAIGN FOR ALTERNATIVES TO ISOLATED CONFINEMENT, <http://nycaic.org/> (last visited Feb. 10, 2018).

<sup>20</sup> U.N. SECRETARY-GENERAL, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 23, U.N. Doc. A/66/268 (August 5, 2011), available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/66/268](http://www.un.org/ga/search/view_doc.asp?symbol=A/66/268).

<sup>21</sup> 135 S. Ct. 2187, 2210 (2015) (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006)).

<sup>22</sup> 135 S. Ct. 2726, 2765 (2015).

<sup>23</sup> *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018).

<sup>24</sup> *Solitary Confinement (Isolation): Definition*, NAT’L COMM’N ON CORR. HEALTH CARE, <http://www.ncchc.org/solitary-confinement> (last visited Nov. 18, 2017).

<sup>25</sup> 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. L. REV. 1, 39 n.217 (2012); Nathaniel Penn, *Buried Alive: Stories From Inside Solitary Confinement*, GQ (Mar. 2, 2017), <https://www.gq.com/story/buried-alive-solitary-confinement>.

Solitary confinement cells are typically designed to isolate prisoners from virtually all human contact.<sup>26</sup> Prisoners are confined to their cells with almost nothing to occupy their time between twenty-two and twenty-four hours a day.<sup>27</sup> Cells generally range in size from sixty to eighty square feet—about the size of a parking space—and many do not have windows.<sup>28</sup> Prison staff serve meals through a slot or “chuck hole” in the door to minimize human interaction.<sup>29</sup> The few opportunities prisoners have outside of their cells do not offer the opportunity for meaningful human interaction or exposure to environmental stimuli.<sup>30</sup> Further, to take advantage of these few opportunities outside of their cell, many prisoners must submit to an invasive cavity strip-search—*every single time* these prisoners exit their cell, they are strip-searched.<sup>31</sup> Sometimes prisoners are escorted from their cell for an hour of exercise, usually only on weekdays, if at all, in a fenced or walled yard segregated from other prisoners.<sup>32</sup> Other institutions have exercise “cages” adjoining the cells that can be opened remotely by prison staff.<sup>33</sup> Some prisoners in solitary may be allowed to have visitors, but generally may only communicate through a Plexiglas barrier to prevent any physical contact.<sup>34</sup> Most prisons allow some books and legal papers in the cell, and some permit prisoners to send and receive letters, but often with restrictions.<sup>35</sup> Some prisons also allow for the cells to have radios or televisions.<sup>36</sup> Finally, solitary confinement units overexpose prisoners to negative stimuli, including officers and prisoners shouting, slamming doors, foul smells and sights such as urine, feces, blood, garbage, and constant fluorescent lighting.<sup>37</sup> The period of time that prisoners are kept in such extreme isolation and in these grim conditions ranges from days to decades.<sup>38</sup>

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<sup>26</sup> Jean Casella & Sal Rodriguez, *What Is Solitary Confinement?*, GUARDIAN (N.Y.) (Apr. 27, 2016), <https://www.theguardian.com/world/2016/apr/27/what-is-solitary-confinement>.

<sup>27</sup> See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 213–14, 223–24 (2005); Haney, *Restricting Solitary Confinement*, *supra* note 10, at 304.

<sup>28</sup> Haney, *Mental Health Issues in Long-Term Solitary Confinement*, *supra* note 10, at 127.

<sup>29</sup> David H. Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 20 (2015).

<sup>30</sup> Peter Scharf Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 448–49 (2006).

<sup>31</sup> See e.g., Lewis Beale, *The Agony of Solitary Confinement: It’s Like Being ‘Buried Alive,’ Prisoners Say*, DAILY BEAST (April 13, 2016), <https://www.thedailybeast.com/the-agony-of-solitary-confinement-its-like-being-buried-alive-prisoners-say>; Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>; Mark Joseph Stern, *Solitary Confinement Is a Great American Shame*, SLATE (Feb. 10, 2017), <https://slate.com/news-and-politics/2017/02/the-time-is-right-for-the-supreme-court-to-rein-in-solitary-confinement.html>.

<sup>32</sup> HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT 7 (Jean Casella et al. eds., 2016).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Cloud et al., *supra* note 29, at 22; Hafemeister & George, *supra* note 25, at 39 n.217.

<sup>38</sup> Casella & Rodriguez, *supra* note 26.



### C. *Who is Kept in Solitary Confinement?*

People with mental illness are dramatically overrepresented in United States prisons and jails.<sup>39</sup> In the wake of deinstitutionalization,<sup>40</sup> prisons and jails have become the nation's largest inpatient psychiatric centers.<sup>41</sup> In 2012, the Treatment Advocacy Center estimated that more than 350,000 people with a serious mental illness were housed in prisons and jails, while a tenth of this population (about 35,000) were in state mental hospitals.<sup>42</sup> Many people suffering from mental illness find their way into prisons on relatively minor charges; however, once incarcerated, they rack up additional charges "as they act out because of untreated illness, and end up spending a lifetime of cycling in and out of jail."<sup>43</sup>

The number of people held in solitary confinement in the United States is difficult to determine.<sup>44</sup> Estimates suggest that between 80,000 to 100,000 people in U.S. prisons were held in restrictive housing in 2014,<sup>45</sup> which does not include people held in local jails, juvenile facilities, or military and immigration detention centers.<sup>46</sup> Human Rights Watch estimated, based on available state data, that one-third to one-half of people held in isolation had some form of mental illness.<sup>47</sup> Even under conservative estimates, solitary confinement cells are used to warehouse tens of thousands of people with mental illness.<sup>48</sup>

It is not surprising that those with mental illness are disproportionately confined to solitary confinement. Once in prison, many prisoners suffering from mental illness have difficulty conforming their conduct to the many disciplinary rules and to the restrictive prison environment.<sup>49</sup> Additionally, the decision to send prisoners to solitary confinement

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<sup>39</sup> Rebecca Vallas, *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons*, CTR. FOR AM. PROGRESS (July 18, 2016, 12:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/>.

<sup>40</sup> Dae-Young Kim, *Psychiatric Deinstitutionalization and Prison Population Growth: A Critical Literature Review and Its Implications*, 27 CRIM. JUST. POL'Y REV. 3, 6 (2016) (explaining that deinstitutionalization is the "process of shifting mental health care for the mentally ill to community-based outpatient facilities, thereby reducing the population of state mental hospitals").

<sup>41</sup> *Id.* at 8.

<sup>42</sup> E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6 (2014), <http://tacreports.org/storage/documents/treatment-behind-bars.pdf>.

<sup>43</sup> HELL IS A VERY SMALL PLACE, *supra* note 32, at 9.

<sup>44</sup> Valerie Kiebal & Sal Rodriguez, *FAQ*, SOLITARY WATCH (2018), <https://solitarywatch.org/facts/faq/>.

<sup>45</sup> Restrictive housing includes administrative segregation, disciplinary segregation, and protective custody, all of which are forms of solitary confinement. ASS'N OF STATE CORR. ADM'RS, YALE LAW SCH., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 1–2 (2015).

<sup>46</sup> *Id.* at 2.

<sup>47</sup> SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 147 (2003).

<sup>48</sup> *Id.*

<sup>49</sup> Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & L. 104, 105 (2010).

is left to the discretion of the prison staff and is open to abuse.<sup>50</sup> Prisoners are often sent to solitary confinement for acts like attempting suicide, failing to obey an order properly, or even “reckless eyeballing.”<sup>51</sup> Consequently, many prisoners with pre-existing mental health conditions find their way into solitary because of behavior associated with their mental illness.<sup>52</sup> Once in solitary, the extreme isolation serves to exacerbate mental health issues, or even bring them out in prisoners who never exhibited them before.<sup>53</sup>

People with mental illness may also find themselves in solitary confinement for non-disciplinary reasons.<sup>54</sup> Protective custody, which often includes solitary confinement-like conditions, theoretically exists to shield vulnerable populations from abuse in general-population settings.<sup>55</sup> While separation from the general-population may be necessary to protect some vulnerable prisoners, it does not justify placement in solitary confinement. The National Prison Rape Elimination Act Resource Center (NPRC)<sup>56</sup> issued a report in 2015 that found “[i]nmates with serious mental illness are among the populations who are often placed in segregated housing for protection . . . in units with the same intensive security procedures, levels of isolation, restricted human interactions, and reduced access to programs” despite having no disciplinary violations or threats to staff or others.<sup>57</sup>

The overrepresentation of prisoners with serious mental illness in solitary confinement should concern courts, legislators, and the general public alike. Solitary confinement is, by design, a particularly cruel form of punishment—the withholding of *all* meaningful human contact and positive environmental stimuli is beyond what most people can comprehend. As the next Part shows, prisoners with mental illness are at a heightened risk of succumbing to the well-documented psychological and physical harms of being confined in such a manner.

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<sup>50</sup> Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 UC IRVINE L. REV. 89, 91 (2015).

<sup>51</sup> See Annalisa Merelli, *These Are Some of the Reasons U.S. Prisoners Wind Up in Solitary Confinement*, QUARTZ (Aug. 15, 2015), <https://qz.com/480015/these-are-some-of-the-reasons-us-prisoners-wind-up-in-solitary-confinement>; Nicholas D. Mirzoeff, *‘Reckless Eyeballing’: Why Freddie Gray Was Killed*, HOW TO SEE THE WORLD (May 20, 2015), <https://wp.nyu.edu/howtoseetheworld/2015/05/30/auto-draft-46/> (“Under slavery, [‘reckless eyeballing’] meant making any eye contact with a person in authority. Under segregation, it referred to any alleged look at a white woman, part of Jim Crow’s terror. Today, it is a tool of the prison-industrial complex, where ‘don’t eyeball me’ is a standard command.”).

<sup>52</sup> ACLU OF NEV. ET AL., UNLOCKING SOLITARY CONFINEMENT: ENDING EXTREME ISOLATION IN NEVADA STATE PRISONS 24 (2017).

<sup>53</sup> *Id.*

<sup>54</sup> ALLISON HASTINGS ET AL., NAT’L PREA RES. CTR., KEEPING VULNERABLE POPULATIONS SAFE UNDER PREA: ALTERNATIVE STRATEGIES TO THE USE OF SEGREGATION IN PRISONS AND JAILS 5 (2015).

<sup>55</sup> Kenneth L. Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. AM. ACAD. PSYCHIATRY & L. 406, 408 (2015).

<sup>56</sup> The NPRC (National PREA (Prison Rape Elimination Act) Resource Center), “a joint project of the federal Bureau of Justice Assistance and the National Council on Crime and Delinquency, issued a report in April 2015.” *Id.* at 407.

<sup>57</sup> HASTINGS ET AL., *supra* note 54, at 5.

## II. EFFECTS OF SOLITARY CONFINEMENT ON PEOPLE WITH MENTAL ILLNESS

The effects of solitary confinement have been recognized by the courts for over a century.<sup>58</sup> Moreover, it is well established among the scientific and medical communities that placing persons suffering from mental illness in solitary confinement exacerbates their illness, typically resulting in serious psychological and physiological harm.<sup>59</sup> Social relationships play a crucial role in maintaining the well-being and health of humans.<sup>60</sup> Since at least the 1970s, an extensive body of research has repeatedly shown the adverse psychological and physiological effects, including increased mortality, of social isolation outside of correctional settings.<sup>61</sup> There is no reason to believe prisoners are immune from these effects.

### A. *Prolonged Solitary Confinement for Mentally Ill Prisoners Causes Serious Psychological Harm*

“Solitary confinement literally drives men mad,” former Justice Kennedy told the House Appropriations Subcommittee on Financial Services and Federal Government in 2015.<sup>62</sup> Indeed, prolonged solitary confinement “may press the outer bounds of what most humans can psychologically tolerate.”<sup>63</sup> The toll solitary confinement takes on mental health is well documented, with research consistently and unequivocally establishing that solitary confinement causes serious psychological harm.<sup>64</sup>

Strikingly consistent psychiatric symptoms among prisoners in isolation include: overwhelming anxiety and depression; hypersensitivity to external stimuli; perceptual distortions, illusions, and hallucinations; severe panic attacks; difficulty in thinking, concentration, and memory; intrusive obsessional (and often violent) thoughts that prisoners resist but cannot block out; overt paranoia; and problems with impulse

<sup>58</sup> See *In re Medley*, 134 U.S. 160, 168 (1890) (recognizing the serious objections to prolonged solitary confinement, the Court wrote that the effects on prisoners were grave, including violent insanity and suicide).

<sup>59</sup> Haney, *Mental Health Issues in Long-Term Solitary Confinement*, *supra* note 10, at 130. There is one controversial study released in 2010, known as the “Colorado Study,” that came to a different conclusion; however, it is widely criticized for its methodology, with two prominent scholars in the field addressing the “fatal flaws” of the study extensively. MAUREEN L. O’KEEFE ET AL., U.S. DEP’T OF JUSTICE, ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION 78 (2010); see also Stuart Grassian & Terry Kupers, *The Colorado Study vs. The Reality of Supermax Confinement*, 13 CORR. MENTAL HEALTH REP. 1, 6–11 (2011) (debunking the Colorado Study and revealing its fatal flaws).

<sup>60</sup> Haney, *Restricting Solitary Confinement*, *supra* note 10, at 296–97; James S. House et al., *Social Relationships and Health*, 241 SCI. 540, 540–45 (1988).

<sup>61</sup> See, e.g., Bennion, *supra* note 9, at 757–59; Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. ABNORMAL PSYCHOL. 54, 54 (1972); Haney, *Mental Health Issues in Long-Term Solitary Confinement*, *supra* note 10, at 130–32; Haney, *Restricting Solitary Confinement*, *supra* note 10, at 288–95; G.D. Scott & Paul Gendreau, *Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison*, 14 CAN. J. PSYCHIATRY 337, 339 (1969).

<sup>62</sup> Jean Casella, *Supreme Court Justice Kennedy: “Solitary Confinement Literally Drives Men Mad,”* SOLITARY WATCH (Mar. 25, 2015), <http://solitarywatch.com/2015/03/25/supreme-court-justice-kennedy-corrections-system-is-broken-and-solitary-confinement-literally-drives-men-mad/>.

<sup>63</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995).

<sup>64</sup> Haney, *Restricting Solitary Confinement*, *supra* note 10, at 298.

control.<sup>65</sup> Furthermore, studies show that without normal and positive environmental interactions, including exposure to natural light, outdoor sounds, and varying colors, certain cognitive functions go underutilized, resulting in a decrease of mental alertness, concentration, and the ability to plan.<sup>66</sup>

While it is abundantly clear that solitary confinement can take a serious mental toll on any prisoner, prisoners with mental illnesses are at greater risk of having their suffering “deepen into something more permanent and disabling.”<sup>67</sup> Psychologist Craig Haney notes:

Empirical research on solitary and supermax-like confinement has consistently and unequivocally documented the harmful consequences of living in these kinds of environments . . . . Evidence of these negative psychological effects come from person accounts, descriptive studies, and systemic research . . . conducted over a period of four decades, by researchers from several different continents.<sup>68</sup>

Some lower courts have recognized that severe psychological harm results from placing mentally ill prisoners in solitary confinement.<sup>69</sup> *Indiana Protection & Advocacy Services Commission v. Commissioner, Indiana Department of Correction* highlighted the very real nature of psychological pain caused by decompensation (an exacerbation of mental illness).<sup>70</sup> The court described psychological pain as “pain and suffering associated with feeling depressed, anxious, having nightmares, memory problems, worries, and anxieties,” asserting that “[p]sychological pain exists. It is real and it results from many of the symptoms which are associated with the mentally ill.”<sup>71</sup> The court explained that psychological “pain produces suffering, and a delay in treating [it] can reduce the chances of a mentally ill prisoner achieving or re-establishing an optimal level of functioning.”<sup>72</sup>

In *Madrid v. Gomez*, the District Court for the Northern District of California wrote that solitary confinement “may press the outer borders of what most humans can psychologically tolerate” and that placing mentally ill or psychologically vulnerable people in such conditions “is the equivalent of putting an asthmatic in a place with little air to breathe.”<sup>73</sup> However, the court also found that, although solitary confinement “will

<sup>65</sup> *Id.* at 295; Grassian, *supra* note 21, at 335–38.

<sup>66</sup> Scott & Gendreau, *supra* note 61, at 337–39. Although these studies focus on social isolation outside of correctional settings, there is no reason to believe that prisoners are immune from such effects.

<sup>67</sup> Haney, *Mental Health Issues in Long-Term Solitary Confinement*, *supra* note 10, at 142.

<sup>68</sup> *Id.* at 130.

<sup>69</sup> *See, e.g.*, 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).

<sup>70</sup> No. 1:08-cv-01317, 2012 WL 6738517, at \*15–16 (S.D. Ind. Dec. 31, 2012).

<sup>71</sup> *Id.* at \*16, \*21.

<sup>72</sup> *Id.* at \*16.

<sup>73</sup> 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995); *see also* Finely v. Huss, 723 F. App’x. 294 (2018) (finding a cognizable Eighth Amendment claim where prison officials placed in solitary a seriously mentally ill prisoner who had swallowed a razor blade and engaged in behavior that required hospitalization more than once); Coleman v. Brown, 28 F. Supp. 3d 1068, 1095 (E.D. Cal. 2014)

likely inflict some degree of psychological trauma upon most prisoners confined there for more than brief periods,” for many of the prisoners the trauma does not appear to “exceed[] the kind of generalized psychological pain that courts have found compatible with the Eighth Amendment standards.”<sup>74</sup>

Even corrections officials have recognized the serious problems with placing persons with mental illness in solitary confinement. In 2014, Rick Raemisch, Colorado’s Chief of Corrections, decided to spend a night in one of Colorado’s solitary confinement cells.<sup>75</sup> Raemisch described his experience:

First thing you notice is that it’s anything but quiet. You’re immersed in a drone of garbled noise—other inmates’ blaring TVs, distant conversations, shouted arguments. I couldn’t make sense of any of it, and was left feeling twitchy and paranoid. I kept waiting for the lights to turn off, to signal the end of the day. But the lights did not shut off. I began to count the small holes carved in the walls. Tiny grooves made by inmates who’d chipped away at the cell as the cell chipped away at them. For a sound mind, those are daunting circumstances. But every prison in America has become a dumping ground for the mentally ill.<sup>76</sup>

The experiment prompted an “urgency for reform,” with Mr. Raemisch explaining that “[i]f we can’t eliminate solitary confinement, at least we can strive greatly to reduce its use” and that “doing anything less would be both counterproductive and inhumane.”<sup>77</sup>

Although severe psychological pain is not always recognized as sufficiently serious to bring an Eighth Amendment claim, it is widely recognized as a side-effect of prolonged solitary confinement and is exacerbated in people suffering from mental illness.<sup>78</sup>

#### B. *Isolating Mentally Ill Prisoners in Prolonged Solitary Confinement Can Cause Serious Physical Harm*

The risk of serious physical harm faced by prisoners with mental illness in solitary confinement is also well established. One scholar explained that:

[a]s a result of . . . [mental illness], such individuals are almost pathologically stimulation seeking and incapable of tolerating stimulus deprivation . . . . Many become floridly psychotic or so agitated that they

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(concluding that the “placement of seriously mentally ill inmates in California’s segregated housing units can and does cause serious psychological harm, including decompensation, exacerbation of mental illness, inducement of psychosis, and increased risk of suicide”); *Ruiz*, 37 F. Supp. 2d at 907 (describing Texas administrative segregation as “incubators of psychoses—seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities”).

<sup>74</sup> *Madrid*, 889 F. Supp. at 1265.

<sup>75</sup> Rick Raemisch, *My Night in Solitary*, N.Y. TIMES (Feb. 20, 2014), <https://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Hafemeister & George, *supra* note 25, at 26–29.

engage in awful, grotesque behaviors. They cover themselves and their cells with feces, they mutilate themselves; try to kill themselves.<sup>79</sup>

In *Scarver v. Litscher*, the court explained “[i]t is a fair inference that conditions at Supermax aggravated the symptoms of [the prisoner’s] mental illness and by doing so inflicted *severe physical* and especially mental suffering.”<sup>80</sup> Physical harm can occur with severity alongside psychological harm where a prisoner is exposed to prolonged solitary confinement.

### 1. Suicide and Self-Harm

Self-harm, suicide attempts, and suicide are horrifically common in solitary confinement units. In *Palakovic v. Wetzel*, the court recognized this, writing that the damage to prisoners is not restricted to mental harm, but that “[p]hysical harm can also result. Studies have documented high rates of suicide and self-mutilation amongst inmates who have been subjected to solitary confinement.”<sup>81</sup>

Many prison suicides and attempted suicides are directly the result of serious mental illness.<sup>82</sup> On average, about half of successful suicides by prisoners occur among those housed in solitary confinement.<sup>83</sup> And the ways prisoners die in solitary are gruesome. One prisoner recounts watching through the crack of his cell door an older man in solitary slit his wrists, fill a Styrofoam cup with the blood, then fling his blood on the glass of his cell door and around his room before he laid down and died.<sup>84</sup> Another prisoner “stood on top of the cement bunk and dove headfirst into the toilet, over and over, until he crushed his skull in.”<sup>85</sup> The amount of self-harm, such as “cutting” or swallowing dangerous objects, is similarly horrific.<sup>86</sup>

<sup>79</sup> *Id.* at 42 (internal citation omitted).

<sup>80</sup> 434 F.3d 972, 975 (7th Cir. 2006) (emphasis added); *see also* Jones‘El v. Berge, 164 F. Supp. 2d 1096, 1101–02 (W.D. Wis. 2001) (concluding that supermax confinement is “known to cause severe psychiatric morbidity, disability, suffering and mortality,” resulting in a high number of suicide attempts).

<sup>81</sup> 854 F.3d 209, 226 (3d Cir. 2017) (quoting *Williams v. Sec’y of the Pa. Dep’t of Corr.*, 848 F.3d 549, 567–68 (3d Cir. 2017)); *see also* *Young v. Martin*, 801 F.3d 172, 184 (3d Cir. 2015) (referencing a DOJ report finding that “the use of solitary confinement on mentally ill prisoners exacerbates their mental illness and leads to serious psychological and physiological harms,” “including psychosis, trauma, and severe depression, serious self-injury, and suicide”) (internal quotation omitted); *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1245 (M.D. Ala. 2017) (“By subjecting mentally ill prisoners to its segregation practices, [the DOC] has placed prisoners with serious mental-health needs at a substantial risk of continued pain and suffering, decompensation, self-injurious behavior, and even death, and the court cannot close its eyes to this overwhelming evidence.”).

<sup>82</sup> *See* TERRY ALLEN KUPERS, *SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT* 102 (2017); Haney, *Restricting Solitary Confinement*, *supra* note 10, at 290, 294; *see also* *Sanville v. McCaughtry*, 266 F.3d 724, 728 (7th Cir. 2001) (alleging that prison officials’ failure to medicate mentally ill prisoner resulted in prisoner’s suicide); *Eng v. Smith*, 849 F.2d 80, 83 (2d Cir. 1988) (affirming injunction based on findings that state prison’s policies for the treatment of mentally ill prisoners were insufficient for prisoners’ protection).

<sup>83</sup> Grassian & Kupers, *supra* note 59, at 1.

<sup>84</sup> Penn, *supra* note 25.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; Haney, *Restricting Solitary Confinement*, *supra* note 10, at 294.

A significant problem is that far too often the actions of mentally ill prisoners are assumed to be volitional by corrections staff and courts alike. Some correctional mental health staff are quick to see a prisoner's actions as malingering or manipulation and thus overlook mental illness.<sup>87</sup> A prisoner housed at Tamms Correctional Center in Illinois before it was closed cut one of his testicles from his body and hung it from a string on his cell door.<sup>88</sup> Rather than determining the prisoner was suffering from mental illness and should be removed from solitary confinement, medical and staff members at the institution labeled the prisoner a “manipulator who cuts himself to get what he wants.”<sup>89</sup> More commonly, these self-harm acts are not voluntary at all. The so-called “manipulation” prisoners accused of exhibiting in solitary confinement, such as self-mutilation, is not inconsistent with mental illness.<sup>90</sup> There are countless stories of isolated prisoners with mental illness inflicting self-harm to escape their cell, even if just for a trip to medical.<sup>91</sup> However, the behavior “can also — and simultaneously — be a symptom of a major psychiatric disorder or a self-reinforcing behavior that requires a psychiatric response.”<sup>92</sup>

The Seventh Circuit case *Sanders v. Melvin*, decided in October 2017, expressly recognized that the determination that volitional harm cannot satisfy the “imminent risk danger of serious . . . injury” standard associated with three strikes litigation is inappropriate.<sup>93</sup> In the case, Sanders suffered from severe mental illness and had been kept in solitary for eight consecutive years, during which time he committed several acts of self-harm and attempted suicide.<sup>94</sup> The court found that the district court incorrectly assumed that volitional harm cannot satisfy the statute, writing: “[I]t does not follow that *no* volitional conduct satisfies the statute . . . . When the prospect of self-harm is a true consequence of the condition that prompted the suit, a court should treat the allegation (if true) as imminent physical injury.”<sup>95</sup>

These anecdotes and court decisions demonstrate the risk of physical harm prisoners in isolation face in the form of suicide, suicidality, and self-harm. These risks cannot be overstated and should be treated seriously by courts.

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<sup>87</sup> ABRAMSKY & FELLNER, *supra* note 47, at 106; Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 618 n.441 (1999).

<sup>88</sup> Jean Casella & James Ridgeway, *Illinois Prisoner Says Years of Solitary Confinement Caused Mental Illness, Self-Mutilation*, SOLITARY WATCH (Sept. 2, 2011), <http://solitarywatch.com/2011/09/02/illinois-inmate-claims-years-of-solitary-confinement-have-led-to-mental-illness-and-self-mutilation/>.

<sup>89</sup> *Id.*

<sup>90</sup> ABRAMSKY & FELLNER, *supra* note 47, at 106.

<sup>91</sup> *See, e.g., id.* at 145 (An evaluation of one prisoner demonstrated that he “insert[s] paper clips completely into his abdomen—to relieve his anxiety and to be removed from his cell for medical treatment.”); *id.* at 174 (“[A] seriously mentally ill inmate in a super-maximum security prison was caught eating his own flesh after having cut open his arm with a shard of glass. He was brought before a disciplinary committee, and was sentenced to a year in the prison’s segregation cells.”); Rebman, *supra* note 87, at 573–74 (“[O]ne inmate ‘removed a screw from his light switch cover and inserted it into his penis just to get out of his cell.’”) (citation omitted).

<sup>92</sup> ABRAMSKY & FELLNER, *supra* note 47, at 106.

<sup>93</sup> 873 F.3d 957, 960 (7th Cir. 2017).

<sup>94</sup> *Id.* at 960.

<sup>95</sup> *Id.* at 961.

## 2. Other Kinds of Physical Harm Suffered in Solitary Confinement

Many prisoners placed in solitary confinement, both prisoners living with mental illness and those who do not suffer from mental illness, experience forms of physical harm independent from self-harm and suicide. Among the most common physical manifestations of extreme isolation include severe headaches, heart palpitations, insomnia, extreme weight loss, and digestive problems.<sup>96</sup> Other physiological manifestations include abdominal pain and muscle pains in the neck and back, as well as pain and pressure in the chest.<sup>97</sup> Some of these physical manifestations are a result of the “stress hormone” cortisol, which builds up in the body during extreme isolation.<sup>98</sup>

Additionally, there are theories that neural pathways in the brains of people subjected to isolation physically change. Advances in technology, neurobiology, brain chemistry, and other studies of the brain have established that the harms associated with solitary confinement also tend to trigger detectable changes in neural pathways of the brain.<sup>99</sup> These changes can be accurately characterized as physical injury because they adversely affect the physical nature and functioning of the sufferer’s brain.

Given the deprivation of meaningful social interaction, coupled with a severe lack of environmental stimulation, people “become incapable of maintaining an adequate state of alertness and attention,” and within days, scans of their brains may reflect “abnormal pattern[s] characteristic of stupor and delirium.”<sup>100</sup> Although such manifestations sound like mental harm, the fact that these harms can be detected by brain scans implicate a physiological harm. A growing body of literature shows that solitary confinement can change brain activity, resulting in adverse symptoms, sometimes in as few as seven days.<sup>101</sup> Other studies show that “certain regions of the brain of people who experience extreme psychological stress (like those in solitary confinement) literally diminish in volume because the neural cells become shriveled.”<sup>102</sup>

More research still suggests that the different pathways for physical and psychological pain share neural and computational mechanisms.<sup>103</sup> Studies have shown that higher levels of social support—something prisoners trapped in solitary confinement

<sup>96</sup> Haney, *Mental Health Issues in Long-Term Solitary Confinement*, *supra* note 10, at 131–33; Smith, *supra* note 30, at 488–89.

<sup>97</sup> Smith, *supra* note 30, at 489.

<sup>98</sup> See *infra* Part III for a more complete discussion of cortisol, including how the cortisol response causes neither clear physical or psychological harm.

<sup>99</sup> See Jules Lobel & Huda Akil, *Law & Neuroscience: The Case of Solitary Confinement*, 147 DAEDALUS 61, 63 (2018); Carol Schaeffer, “Isolation Devastates the Brain”: *The Neuroscience of Solitary Confinement*, SOLITARY WATCH (May 11, 2016), <https://solitarywatch.org/2016/05/11/isolation-devastates-the-brain-the-neuroscience-of-solitary-confinement/>; see also Gendreau et al. *supra* note 61, at 340; Bruce S. McEwen, *The Neurobiology of Stress: From Serendipity to Clinical Relevance*, 886 BRAIN RES. 172, 173 (2000).

<sup>100</sup> Grassian, *supra* note 21, at 330–31.

<sup>101</sup> Gendreau et al., *supra* note 61, at 57–58; Grassian, *supra* note 21, at 348–49; Lobel & Akil, *supra* note 99, at 62, 69–70; Schaeffer, *supra* note 99.

<sup>102</sup> Lobel & Akil, *supra* note 99, at 70 (citation omitted). See *infra* Part III for a continuation of the discussion on physical brain changes and the associated harms, which are neither strictly physical or psychological in nature.

<sup>103</sup> Naomi I. Eisenberger & Matthew D. Lieberman, *Why Rejection Hurts: A Common Neural Alarm System for Physical and Social Pain*, 8 TRENDS COGNITIVE SCI. 294, 294 (2004).



are almost completely lacking—“are associated with lower levels of chronic pain . . . [and] cardiac pain . . . In addition, people who are socially alienated are more prone to physical ailments.”<sup>104</sup> The conclusion is that “the social pain caused by isolation is not metaphorical pain, but has a physical effect on brain activity.”<sup>105</sup> Although this research has largely taken place outside of a correctional setting, it nonetheless suggests the line between physical and psychological pain is not clear, and that the social isolation may be just as “painful” as physical pain.

There can be no question that solitary confinement places prisoners at enormous risk of suffering serious psychological and physiological harms. Worse still, prisoners with mental illness, who are already overrepresented in solitary, are at a greater risk to these deleterious harms, which can be permanent. Part III demonstrates that the psychological and physiological horrors of solitary are often linked, and therefore there can be no bright line drawn between the two.

### III. BLURRING THE LINE BETWEEN PHYSICAL AND PSYCHOLOGICAL HARM

There is a growing consensus among the psychology and psychiatry communities that the distinction between psychological and physical harm is no longer accurate or appropriate.<sup>106</sup> Senator John McCain, who spent more than two years in isolation as a prisoner of war in Vietnam, said that solitary is the worst form of mistreatment.<sup>107</sup> This assertion comes “from a man who was beaten regularly; denied adequate medical treatment for two broken arms, a broken leg, and chronic dysentery; and tortured to the point of having an arm broken again.”<sup>108</sup> A study of several former prisoners of the Vietnam War reported that they all found social isolation to be at least as torturous and agonizing as any physical abuse they experienced, possibly more agonizing.<sup>109</sup>

Research suggests that drawing a hard line between physical and psychological pain is inappropriate in part because psychological harm can be just as painful, if not more painful, than physical abuse.<sup>110</sup> Perhaps this is why solitary confinement is so commonly used for the specific purpose of torture. Studies have found that “psychological stressors such as isolation can be as clinically distressing as physical torture.”<sup>111</sup> Many of the adverse effects of prolonged solitary confinement are strikingly similar “to the acute reactions suffered by torture and trauma victims, including post-traumatic stress disorder (PTSD) and the kind of psychiatric sequelae that plague victims of what are called deprivation and constraint torture techniques.”<sup>112</sup>

<sup>104</sup> Geoff MacDonald & Mark R. Leary, *Why Does Social Exclusion Hurt? The Relationship Between Social and Physical Pain*, 131 *PSYCHOL. BULL.* 202, 207 (2005) (internal citations omitted).

<sup>105</sup> Lobel & Akil, *supra* note 99, at 69.

<sup>106</sup> See Metin Basoglu et al., *Torture vs. Other Cruel, Inhuman, and Degrading Treatment*, 64 *ARCHIVES GENERAL PSYCHIATRY* 277, 285 (2007); Lobel & Akil, *supra* note 99, at 63; Hermán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 867 *INT’L REV. RED CROSS* 591, 616 (2007).

<sup>107</sup> Bennion, *supra* note 9, at 753.

<sup>108</sup> *Id.* (citing Atul Gawande, *Hellhole*, *NEW YORKER*, Mar. 30, 2009, at 36, 39).

<sup>109</sup> *Id.*

<sup>110</sup> Metzner & Fellner, *supra* note 49, at 104.

<sup>111</sup> *Id.*

<sup>112</sup> Haney, *Restricting Solitary Confinement*, *supra* note 10, at 295 (citations omitted).

Dr. Hernán Reyes, a specialist on the medical effects of detention, describes solitary confinement as a method of torture that does not physically assault the body and yet “entail[s] severe psychological pain and suffering and profoundly disrupt[s] the senses and personality.”<sup>113</sup> Psychological torture “should not be minimized under the pretext that pain and suffering must be physical in order to be real.”<sup>114</sup> Indeed, prolonged solitary confinement “has been said to be the most difficult torment of all to withstand.”<sup>115</sup> If solitary confinement wreaks such psychological havoc so as to potentially cause worse pain than physical abuse, prisoners already suffering from mental illness in isolation are at risk of even more serious harm.

Neurobiological studies show that the physical and psychological effects of solitary are intimately interconnected in ways that make a bright line distinction between the two inappropriate. Two prominent professors and researchers in the field, Jules Lobel and Huda Akil, write that “[n]euroscience at least muddies the distinction between bodily injury and mental harm, and, in the future, it might negate it entirely.”<sup>116</sup> In making this assessment, Lobel and Akil discuss brain imaging and how emotional pain, such as chronic anxiety and depression, can actually alter the brain structure and function.<sup>117</sup> For those who are isolated for lengthy periods of time, especially those with pre-existing mental illness, the effects may be permanent.<sup>118</sup> For example, Akil’s work suggests that solitary confinement can “fundamentally alter the structure of the human brain in profound and permanent ways.”<sup>119</sup> She argues that one region of the brain that is particularly susceptible to “fundamentally alter” is the hippocampus, which plays a major role in memory and stress, and physically shrinks under “severe and sustained stress.”<sup>120</sup> Notably, this physical damage can lead to mental harms, including “loss of emotional and stress control, loss of stress regulation, . . . defects in memory, spatial orientation, and other cognitive processes,” and, potentially, “lasting changes in mood, including severe depression.”<sup>121</sup> This work demonstrates that there is “clear biological evidence of the overlap between physical and mental distress,” and supports the basic point that the line between the two is blurry at best.<sup>122</sup>

Other laboratory studies have focused on the physiological effects of social isolation on prisoners’ cortisol levels, which directly correlate to serious physiological and psychological consequences.<sup>123</sup> Cortisol, the “stress hormone,” is a regulatory hormone that is released when the body is under stress, including stress as a result of

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<sup>113</sup> Reyes, *supra* note 106, at 591.

<sup>114</sup> *Id.* at 615.

<sup>115</sup> *Id.* at 607.

<sup>116</sup> Lobel & Akil, *supra* note 99, at 63.

<sup>117</sup> *Id.* at 64. *See also*, text accompanying *supra* notes 102–105.

<sup>118</sup> Hafemeister & George, *supra* note 25, at 41–44.

<sup>119</sup> Lobel & Akil, *supra* note 99, at 69 (citation omitted).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 69–70.

<sup>122</sup> *Id.* at 64.

<sup>123</sup> Nina Grant et al., *Social Isolation and Stress-Related Cardiovascular, Lipid, and Cortisol Responses*, 37 ANNALS BEHAV. MED. 29, 29 (2009).

isolation.<sup>124</sup> Social isolation is associated with an overall elevated cortisol profile, which has also been linked to general stress, neuroticism, and depression.<sup>125</sup> Furthermore, high levels of isolation are associated with negative cardiovascular, metabolic, and neuroendocrine processes.<sup>126</sup> Studies suggest that high levels of cortisol can increase blood cholesterol, triglycerides, and blood pressure, which are common risk factors for heart disease.<sup>127</sup> Chronic elevated cortisol also increases the risk for depression, mental illness, and lower life expectancy.<sup>128</sup> Elevated cortisol levels cause systemic inflammation, which wreaks havoc on the mind and body.<sup>129</sup> When it comes to the physiological response to extreme isolation of increased cortisol, it is simply impossible to determine where the line should be drawn between physical and psychological harm. They are deeply connected.

The harms solitary confinement has on human minds and bodies are many and complex. The psychological horrors suffered by people in extreme isolation are no less worthy of reprieve than serious physical harm and are often inextricably connected so as to make a distinction unwarranted. However, as Part IV demonstrates, there exist substantial barriers which make it incredibly difficult for prisoners in solitary confinement suffering from mental illness to bring successful conditions of confinement claims.

#### IV. LEGAL CONSEQUENCES: WHY DOES IT MATTER?

The idea that physical harm is somehow worse than psychological harm has created substantial barriers to mentally ill prisoners seeking relief from their own personal hell. First, courts have been “more reluctant to find [Eighth Amendment] constitutional violations in the psychological conditions of solitary confinement rather than in the physical conditions.”<sup>130</sup> Additionally, various provisions of the PLRA serve as a reminder that mental injury is not as worthy of reprieve as physical injury. The physical injury requirement limits prisoner litigants’ ability to recover compensatory damages for claims alleging only mental harm. Moreover, the PLRA’s distinction between physical and psychological harm makes it extremely difficult for indigent litigants with three strikes to bring a successful challenge because, as a threshold matter, they must prove they are in imminent danger of serious bodily (i.e., physical harm). However, in a world where physical and psychological harm were instead treated as similarly serious, these barriers would not exist.

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<sup>124</sup> Christopher Bergland, *Cortisol: Why the “Stress Hormone” Is Public Enemy No. 1*, PSYCHOLOGY TODAY (Jan. 22, 2013), <https://www.psychologytoday.com/blog/the-athletes-way/201301/cortisol-why-the-stress-hormone-is-public-enemy-no-1>.

<sup>125</sup> Grant et al., *supra* note 123, at 35.

<sup>126</sup> *Id.* at 36.

<sup>127</sup> *Stress Can Increase Your Risk for Heart Disease*, UNIV. OF ROCHESTER MED. CTR., <https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=2171> (last visited Feb. 11, 2018).

<sup>128</sup> Bergland, *supra* note 124.

<sup>129</sup> CARNEGIE MELLON UNIV., *How Stress Influences Disease: Study Reveals Inflammation as the Culprit*, SCIENTEDAILY (Apr. 2, 2012), <https://www.sciencedaily.com/releases/2012/04/120402162546.htm>.

<sup>130</sup> Rebman, *supra* note 87, at 607 n.359.

A. *The Eighth Amendment Prohibition on Cruel and Unusual Punishment*

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.”<sup>131</sup> If prolonged solitary confinement is truly as awful as everyone, even correctional professionals,<sup>132</sup> says it is for prisoners suffering from mental illness, then it is a per se violation of the Eighth Amendment. Indeed, a handful of courts have recognized that placing seriously mentally ill prisoners in solitary confinement risks causing mental pain that might rise to the level of cruel and unusual punishment.<sup>133</sup> Regardless, “courts, prison officials, and legislators have been unwilling to recognize . . . significant risk of mental pain and illness as constituting an Eighth Amendment Violation.”<sup>134</sup>

To win an Eighth Amendment claim, a prisoner must establish both an objective component—the seriousness of the challenged conditions—and a subjective component—the mental state of the officials who are responsible for the conditions.<sup>135</sup> There has been no shortage of Eighth Amendment challenges to solitary confinement.<sup>136</sup> However, they have rarely succeeded.<sup>137</sup> Lower courts have occasionally recognized grave mental harm in the conditions of confinement context,<sup>138</sup> but the Supreme Court has never done so.<sup>139</sup> Courts have instead focused on duration and the physical conditions

<sup>131</sup> U.S. CONST. amend. VIII (emphasis added).

<sup>132</sup> See ABRAMSKY & FELLNER, *supra* note 47, at 145, 154, 155; Raemisch, *supra* note 75.

<sup>133</sup> See, e.g., Sanders v. Melvin, 873 F.3d 957, 957 (7th Cir. 2017); *supra* notes 69–74.

<sup>134</sup> Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 133 (2008).

<sup>135</sup> Farmer v. Brennan, 511 U.S. 825, 834 (1994).

<sup>136</sup> A cursory search for cases in Westlaw involving Eighth Amendment challenges to solitary confinement returned over 6,000 federal cases.

<sup>137</sup> See e.g., Rhodes v. Chapman, 452 U.S. 337, 348 (1981) (suggesting that the Eighth Amendment is only concerned with “deprivations of essential food, medical care, or sanitation” or “other conditions intolerable for prison confinement”); Isby v. Brown, 856 F.3d 508, 524 (7th Cir. 2017) (“While, as a personal matter, we . . . find the length of [plaintiff’s] confinement [10 years] greatly disturbing . . . we agree that under the law as it currently stands, [plaintiff] has not made out an Eighth Amendment violation.”); Johnson v. Doe, 582 F. App’x 512, 513 (5th Cir. 2014) (finding a prisoner with serious mental illness failed to meet the “extremely high” deliberate indifference standard); Pettigrew v. Zavaras, 574 F. App’x 801, 809 (10th Cir. 2014) (recognizing the possibility that a mentally ill prisoner challenging his segregation stated a cognizable Eighth Amendment claim, but declining to reach the issue and instead affirming the district court’s dismissal on the grounds of qualified immunity); Harden-Bey v. Rutter, 524 F.3d 789, 795 (6th Cir. 2008) (holding that allegations of confinement in administrative segregation for “three years and running” failed to state an Eighth Amendment claim).

<sup>138</sup> See Benefield v. McDowall, 241 F.3d 1267, 1272 (10th Cir. 2001) (holding psychological harm actionable under Eighth Amendment); Hicks v. Frey, 992 F.2d 1450, 1457 (6th Cir. 1993) (“[E]xtreme conduct by custodians that causes severe emotional distress is sufficient.”); Scher v. Engelke, 943 F.2d 921, 924 (8th Cir. 1981) (holding that “the scope of the eighth amendment protection is broader than the mere infliction of physical pain,” and that evidence of “fear, mental anguish and misery” can establish the requisite injury for an Eighth Amendment claim).

<sup>139</sup> See Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (stating that he “[did] not read anything in the Court’s opinion to limit injury cognizable under the Eighth Amendment to physical injury,” and that “[i]t is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual”).

of solitary confinement.<sup>140</sup> As such, Eighth Amendment claims generally have “succeeded only when a prisoner alleged a concurrent deprivation of a physical need.”<sup>141</sup>

The way courts treat psychological harm varies, but generally courts are more reluctant to find constitutional violations in psychological conditions of solitary confinement than in physical conditions.<sup>142</sup> Even courts that have recognized the problem with psychological harm seem to be more comfortable focusing on physical rather than psychological pain.<sup>143</sup> Physical conditions are visible, and more apparent to prison officials, while psychological conditions are typically hidden in the minds of the prisoners and are incapable of diagnosis by untrained observers. One scholar argues that the reason for the lack of recognition of psychological pain is the “discounting of mental pain in the United States’ approach to cruel and inhuman treatment,” as evidenced by the PLRA provision denying damages for mental or emotional injury without a showing of physical injury.<sup>144</sup> Although courts have recognized that psychological harm can constitute a violation of the Eighth Amendment,<sup>145</sup> the failure to treat mental pain as seriously as physical pain has limited such claims. Furthermore, Eighth Amendment claims centering around psychological pain are often seen as feigned or exaggerated,<sup>146</sup> so they are sometimes “limited or denied in the absence of observable physical injury.”<sup>147</sup>

Any legal claim to categorically prohibit the placement of prisoners with mental illness in solitary confinement must be based on a violation of the Eighth Amendment. It must allege that, taken together, the risks to mental and physical health from placement in isolated confinement pose a substantial and unreasonable risk of serious harm.<sup>148</sup> While there are a handful of lower courts that have found mental harm to be sufficiently serious in mentally ill prisoners to make a cognizable Eighth Amendment claim, the reluctance of

<sup>140</sup> See e.g., *Sandin v. Conner*, 515 U.S. 472, 486 (1995) (considering both “degree of restriction” imposed by particular solitary-confinement regime and its duration before concluding that plaintiff did not suffer an “atypical, significant deprivation”).

<sup>141</sup> Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250, 1261 (2015).

<sup>142</sup> See Rebman, *supra* note 87, at 607 n.358 (comparing the way that courts generally treat physical conditions to the way that courts treat psychological conditions in the context of Eighth Amendment claims).

<sup>143</sup> See *Young v. Quinlan*, 960 F.2d 351, 364–65 (3d Cir. 1992) (noting that “[w]hile the prison administration may punish [inmates], it may not do so in a manner that threatens the physical and mental health of prisoners” and finding that placing a prisoner in a “dry cell” where he was refused access to adequate sanitation was cruel and unusual; however, the analysis focused much more on the physical conditions than on whether the conditions jeopardized the mental health of inmates in those conditions).

<sup>144</sup> Lobel, *supra* note 134, at 133.

<sup>145</sup> *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003) (holding that strip search of male prisoners in front of female guards made an Eighth Amendment claim if the search was “conducted in a harassing manner intended to humiliate and inflict psychological pain”); *Babcock v. White*, 102 F.3d 267, 273 (7th Cir. 1996) (“[T]he Constitution does not countenance psychological torture merely because it fails to inflict physical injury.”); *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) (finding that “significant . . . emotional injury” can constitute Eighth Amendment pain).

<sup>146</sup> See *supra* Part II(B)(1) (discussing the tendency of prison officials to label prisoners as malingering).

<sup>147</sup> Lobel, *supra* note 134, at 133 n.78.

<sup>148</sup> Conditions of confinement are “a form of punishment subject to scrutiny under the Eighth Amendment . . .” *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981) (quoting *Hutto v. Finney*, 437 U.S. 678, 685 (1978)). To prevail on a conditions-of-confinement claim, there must be a “substantial risk of serious harm” to which prison officials were deliberately indifferent. *Farmer v. Brennan*, 511 U.S. 825, 832–36 (1994).

courts to treat psychological harm the same as physical harm has led to limited success in ensuring that prisoners suffering from mental illness are not subjected to extreme isolation for prolonged periods of time.

Recognizing that the physical and psychological harm prisoners with mental illness experience are not readily separable, and instead placing the harm on same level of severity, would make such a claim under the Eighth Amendment easier to make—in other words, the inquiry of whether the alleged ailment is sufficiently serious to warrant a constitutional concern would be an easier question to answer if mental harm (short of suicide and self-mutilation) was automatically considered serious. Courts and the legislature alike should defer to the scientific community, which is in overwhelming agreement that the physical and psychological effects of solitary confinement on prisoners with mental illness are devastating.

### B. *The Prison Litigation Reform Act*

The Prison Litigation Reform Act (PLRA), a 1996 federal statute, has made it more difficult for prisoners to pursue legal claims in federal court and get meaningful redress. First, § 1915(g), the three-strikes provision, forbids prisoners who have accumulated three-strikes during previous litigation efforts from proceeding *in forma pauperis* unless they are in imminent danger of serious bodily harm.<sup>149</sup> Additionally, § 1997e(e), the physical injury requirement, limits the ability of prisoners alleging mental injury to get meaningful redress by removing the possibility to recover compensatory damages.<sup>150</sup> Both sections perpetuate the misconception that physical harm is more serious and worthier of redress than mental harm.

#### 1. Three Strikes Litigation

Recognizing that psychological harm can be just as serious, if not more serious than physical harm would help protect some of the most vulnerable prisoners in solitary confinement: those who have “three strikes.” Under the § 1915(g) of the PLRA, prisoners may not proceed *in forma pauperis* (IFP) if the prisoner has brought three or more actions or appeals that were dismissed as frivolous, malicious, or failing to state a claim, “unless the prisoner is under imminent danger of serious physical injury.”<sup>151</sup> This constraint puts many prisoners with mental illness who are confined to prolonged and extreme isolation in a difficult position.

The federal IFP statute authorizes a waiver of up-front filing fees for bringing an action or appeal in federal court.<sup>152</sup> The ability to proceed IFP is critical for prisoners

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<sup>149</sup> 28 U.S.C. § 1915(g) (2012).

<sup>150</sup> 42 U.S.C. § 1997e(e) (2012).

<sup>151</sup> § 1915(g).

<sup>152</sup> See § 1915(a)(1) (“Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security thereof, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.”).

attempting to bring civil claims.<sup>153</sup> The filing fee for a civil action in a federal appellate court is \$505, while in district court it is \$400.<sup>154</sup> The three strikes provision forces some prisoners to pay the filing fee upfront, which most prisoners cannot afford. If a prisoner with three strikes does not have the money to pay upfront, the prisoner must prove that he or she is in “imminent danger serious physical injury.”<sup>155</sup> The legislature, by drawing a bright line between physical and psychological harm when it enacted the PLRA, has compounded the problem for prisoners held in solitary confinement and created an almost insurmountable barrier for prisoners with mental illnesses.

Furthermore, it is quite easy for prisoners to rack up three strikes, especially considering the relevant population: mentally ill prisoners in solitary confinement as discussed in Part I. Defining a strike as any claim that is frivolous, malicious, or dismissed for failure to state a claim created a large net, capturing a wide range of claims.<sup>156</sup> There is also a lack of clarity in what constitutes such a claim. For example, courts have found that claims of small monetary value may be frivolous.<sup>157</sup> In *Nagy v. FMC Butner*, the Fourth Circuit upheld a lower court’s dismissal of a claim for \$25 for a lost coat as frivolous.<sup>158</sup> While \$25 for a coat may seem trivial to someone outside of a prison context, to someone with very few personal possessions, a \$25 coat may have increased importance and significance. In another example, a complaint that repeated allegations of a previous litigation was deemed abusive and malicious.<sup>159</sup>

Prisoners with mental illness in solitary confinement are also particularly vulnerable to making mistakes that cause them to rack up strikes. First, solitary confinement limits prisoners access to legal resources, making it substantially more difficult for such prisoners to bring actions that successfully state a claim, even where there is an objectively cognizable claim.<sup>160</sup> Moreover, given the impacts of solitary

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<sup>153</sup> In practice, most civil litigation by prisoners is civil rights litigation. Randal S. Jeffrey, *Restricting Prisoners' Equal Access to the Federal Courts: The Three Strikes Provision of the Prison Litigation Reform Act and Substantive Equal Protection*, 49 BUFF. L. REV. 1099, 1107 (2001) (citing Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 362 n.10 (1998)).

<sup>154</sup> *Fee Schedule*, U.S. DIST. COURT FOR THE S. DIST. OF ILL., <https://www.ilsd.uscourts.gov/FilingCases.aspx> (last visited Dec. 13, 2018). Although this site is for one U.S. district court and one federal court of appeals, the fees are the same across the country.

<sup>155</sup> § 1915(g).

<sup>156</sup> For example, one court dismissed on appeal a prisoner’s claim that his eight-day placement in solitary confinement arose to a liberty interest subject to due process. Two strikes were assessed against the prisoner—one for the dismissal on appeal, and one for the dismissal below. *Dehghani v. Vogelgesang*, 229 F. App’x 282, 284 (5th Cir. 2007). In an immigrant detainee’s suit over conditions of confinement, the court dismissed the claims of loud noise, constant light, noxious smells, and low room temperature as frivolous. *Preval v. Reno*, 57 F. Supp. 2d 307, 312 (E.D. Va. 1999). The plaintiff’s complaint for failure to protect from assault was also deemed frivolous. *Id.*

<sup>157</sup> *Nagy v. FMC Butner*, 376 F.3d 252, 253–54 (4th Cir. 2004).

<sup>158</sup> *Id.*

<sup>159</sup> *Ballentine v. Crawford*, 563 F. Supp. 627, 629 (N.D. Ind. 1983); see also *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988) (“[A]n IFP complaint that merely repeats pending or previously litigated claims may be considered abusive and dismissed . . .”).

<sup>160</sup> Prisoners in solitary confinement have few privileges, including restricted or prohibited access to general prison library services. *Solitary Confinement: Fact Sheet*, JOHN HOWARD SOC’Y OF ONT. (Feb. 3, 2017), <http://johnhoward.on.ca/wp-content/uploads/2017/02/Solitary-Confinement-FactSheet-Final.pdf>.

confinement on cognitive functions discussed earlier,<sup>161</sup> coupled with a pre-existing mental illness, it should come as no surprise that prisoners rack up strikes, especially given the fact that courts will find repetitive litigation to be malicious, and “trivial” litigation to be frivolous.<sup>162</sup> By applying the three strikes provision to prisoners who seek to bring civil rights actions and appeals, but who are unable to afford the filing fees, the provision effectively denies such persons access to the courts.

## 2. The Exception to the Three Strikes Provision

Although there is an exception to the three strikes provision for prisoners that are in imminent danger of serious physical injury, courts are divided on what satisfies the imminent danger of serious physical injury requirement, especially when it comes to psychological harm. Some courts emphasize the difference between psychological and physical injury and find that psychological harm “does not satisfy the requirement that [a prisoner] be in ‘imminent danger of *serious physical harm*.’”<sup>163</sup> In *Watley v. Collins*, the court held that the plaintiff failed to meet the imminent danger standard despite his allegations that he was mentally ill and had been placed in supermax conditions as a result of his misbehavior, which aggravated his mental illness and therefore his misbehavior.<sup>164</sup> The prisoner had attempted suicide, was maced, and engaged in behavior that disturbed other prisoners, who then threw urine and feces at him.<sup>165</sup> In *Darvie v. Countryman*, the court characterized “anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, weight loss, etc.” as “essentially emotional in nature” and not satisfying the physical harm requirement.<sup>166</sup>

Many courts find that even the risk of self-harm as the result of mental illness does not satisfy the physical injury or imminent danger standard. In such cases, the courts express concern that prisoners will try to escape the three strikes provision of the PLRA by inflicting “imminent danger” on him or herself,<sup>167</sup> supporting the proposition that prisoners are often seen as feigning mental health issues in a prison context.<sup>168</sup>

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<sup>161</sup> See *supra* notes 65–66 and accompanying text.

<sup>162</sup> *Denton v. Hernandez*, 504 U.S. 25, 34 (1992); *Deutsch v. United States*, 67 F.3d 1080, 1087 (3d Cir. 1995).

<sup>163</sup> *Bryan v. McCall*, No. 5:15-871, 2016 WL 529574, at \*3 (D.S.C. Feb. 10, 2016) (quoting 28 U.S.C. § 1915(g) (2012)).

<sup>164</sup> No. 1:06-cv-794, 2006 WL 3422996, at \*1–2 (S.D. Ohio Nov. 28, 2006).

<sup>165</sup> *Id.*

<sup>166</sup> No. 9:08-CV-0715, 2008 WL 2725071, at \*7 (N.D.N.Y. July 10, 2008).

<sup>167</sup> See *Pinson v. Pledger*, No. CIV-15-319-F, 2016 WL 4534925, at \*5 (W.D. Okla. July 22) (collecting cases), *report and recommendation adopted sub nom.* *Pinson v. FNU Pledger*, No. CIV-15-0319-F, 2016 WL 4535044 (W.D. Okla. Aug. 30), *appeal dismissed*, *Pinson v. Pledger*, No. 16-6272, 2016 WL 9665172 (10th Cir. Nov. 1, 2016); *Widmer v. Butler*, No. 14-cv-874-NJR, 2014 WL 3932519, at \*2 (S.D. Ill. Aug. 12, 2014) (holding that prisoner may not escape the three-strikes provision of the PLRA by inflicting “imminent danger” upon himself); *Pauline v. Mishner*, No. 09-00182, 2009 WL 1505672, at \*2 (D. Haw. May 28, 2009) (“Although Plaintiff states that he has harmed himself again, may be suicidal, and may harm others, Plaintiff has not shown that he was in imminent danger of serious physical injury when he filed this complaint.”); *Cooper v. Bush*, No. 3:06-cv-653-J-32TEM, 2006 WL 2054090, at \*1 n.3 (M.D. Fla. Jul. 21, 2006) (holding that plaintiff’s allegations that he will commit suicide, or that he has already attempted suicide and will do so again, are insufficient to show imminent danger); *Wallace v. Cockrell*, No. 03-MC-



Courts are reluctant to hold that pure “mental harm” can, on its own, satisfy the requirement of § 1915(g).<sup>169</sup> However, some courts have found that self-harm can satisfy the injury requirement.<sup>170</sup> The Seventh Circuit has been receptive to 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.<sup>171</sup> In July 2018, the court found that a mentally ill prisoner raised a “genuine concern that the negative psychological effects of his segregation will drive him to self-harm. So [Plaintiff] ha[d] plausibly alleged that his continued segregation place[d] him in imminent danger of serious bodily injury.”<sup>172</sup>

While the Seventh Circuit’s more progressive view of what can satisfy §1915(g) is an important step, it still draws a sharp line between psychological and physiological harm, cementing the view that “mental anguish is not a serious physical injury.”<sup>173</sup> Finding that only mentally ill prisoners who are in imminent danger of self-harming or committing suicide satisfy § 1915(g) still promulgates the idea that physical harm or pain is somehow worse than psychological pain. This represents a failure among courts, even those most receptive to mentally ill prisoners’ challenges to solitary, to contend with the fact that mental injury or pain can be just as debilitating and serious as physical injury or pain, even absent suicidal actions.

### 3. The Physical Injury Requirement

Section 1997e(e) of the PLRA states that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”<sup>174</sup> The physical injury requirement has been cabined by courts so that lawsuits for injunctive and declaratory relief remain available to prisoner litigants alleging mental injury.<sup>175</sup> Additionally, punitive and nominal damages generally remain available.<sup>176</sup> However, such damages are often ineffective at redressing the harm prisoners with mental illness in solitary face. First, courts have not reached a consensus over whether a

98-K, 2003 WL 22961212, at \*2 (N.D. Tex. Oct. 27, 2003) (holding that a prisoner’s claim that he was suicidal “cannot create the imminent danger so as to escape the three strikes provision of the PLRA”).

<sup>168</sup> See *supra* Part II(B)(1) (discussing the tendency of prison officials to label prisoners as malingering or feigning).

<sup>169</sup> See *Dye v. Bartow*, No. 06-C-0634, 2007 WL 1168771, at \*1 (E.D. Wis. Apr. 17, 2007) (opining that “the plaintiff may be in imminent danger of serious mental harm . . . [and] plaintiff will be permitted to proceed *in forma pauperis* in this action” only after discussing the physically life-threatening side effects of his mental illness, including dehydration and weight loss).

<sup>170</sup> See *Settle v. Phillips*, No. 3:16-CV-250-RLJ-CCS, 2016 WL 3080810, at \*2 (E.D. Tenn. May 31, 2016) (prisoner with significant mental-health problems who alleged that his seventeen years in solitary confinement placed him at risk of serious physical injury to himself was deemed to be in imminent danger so as to satisfy § 1915(g)).

<sup>171</sup> *Wallace v. Baldwin*, 895 F.3d 481, 485 (7th Cir. 2018); *Sanders v. Melvin*, 873 F.3d 957, 960 (7th Cir. 2017); *Gilbert-Mitchell v. Lappin*, No. 06-741-MJR, 2008 WL 4545343, at \*3 (S.D. Ill. Oct. 10, 2008).

<sup>172</sup> *Wallace*, 895 F.3d at 485 (citing *Sanders*, 873 F.3d at 960).

<sup>173</sup> *Thompson v. Patterson*, No. 12-0086-KD-M, 2012 WL 3257802, at \*3 (S.D. Ala. July 11, 2012).

<sup>174</sup> 42 U.S.C. § 1997(c) (2012).

<sup>175</sup> Note, *Developments in the Law of Mental Illness* (pt. 1), 121 HARV. L. REV. 1114, 1151 (2008).

<sup>176</sup> *Id.*

prisoner must actually plead nominal damages.<sup>177</sup> Additionally, nominal damages rarely exceed one dollar.<sup>178</sup> As for punitive damages, though a majority of circuit courts permit the recovery in the absence of compensatory damages, some do not.<sup>179</sup> Further, punitive damages are never awarded as a matter of right, no matter how egregious the situation.<sup>180</sup> Even in circuit courts that allow for punitive damages, the bar to recovery is nearly insurmountable: a prisoner must prove that a defendant acted with malicious intent or reckless indifference.<sup>181</sup>

In sum, compensatory damages are the most important backward-looking remedy, and prisoners alleging only mental injury are barred from recovering them.<sup>182</sup> Because the PLRA also severely limits the amount attorneys can recover in fee awards,<sup>183</sup> the bar on compensatory damages reduces the incentives for attorneys to take these cases, creating yet another barrier to successful litigation. In denying compensatory damages for mental or emotional harm, the PLRA physical injury requirement delivers a strong message: mental pain is not as worthy of reprieve as physical harm.

### C. *No Relief for Prisoners in Solitary Confinement Suffering from Mental Illness*

While a few states and some judges have acknowledged the horrors that prisoners suffering from mental illness face in solitary confinement, the vast majority of prisoners are denied relief.

In February of 2016, the Indiana Department of Corrections reached a settlement in a case brought by the American Civil Liberties Union of Indiana and the Indiana Protection and Advocacy Services Commission on behalf of prisoners in solitary confinement.<sup>184</sup> The settlement prohibits, with some exceptions, the placement of individuals with *serious* mental illness in solitary confinement.<sup>185</sup> While these changes

<sup>177</sup> Alison Cohn, Comment, *Can \$1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act's Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299, 309 (2006).

<sup>178</sup> James Pfander, *A Nominal Solution to Qualified Immunity*, 111 COLUM. L. REV. 1602, 1610 n.40 (2011).

<sup>179</sup> See *Harris v. Garner*, 190 F.3d 1279, 1286–87 (11th Cir. 1999); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

<sup>180</sup> *Smith v. Wade*, 461 U.S. 30, 51–52 (1983).

<sup>181</sup> *Id.* at 56.

<sup>182</sup> While circuit courts are split as to whether Congress intended § 1997e(e) to apply to constitutional claims, which presumably would encompass the Eighth Amendment, the analysis is generally in regard to First Amendment violations. Compare *Al-Amin v. Smith*, 637 F.3d 1192, 1196 (11th Cir. 2011) (holding that § 1997e(e) extends to First Amendment claims), *Geiger v. Jowers*, 404 F.3d 371, 374–75 (5th Cir. 2005), *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004), *Searles v. Van Bebber*, 251 F.3d 869, 875–76 (10th Cir. 2001), *Allah v. Al-Hafeez*, 226 F.3d 247, 250–51 (3d Cir. 2000), with *Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017) (holding that prisoners may seek compensatory damages when prison officials violate their First Amendment rights), *Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016), *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015), *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013), *Rowe v. Shake*, 196 F.3d 778, 781–82 (7th Cir. 1999), *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998).

<sup>182</sup> 28 U.S.C. § 1915(g) (2012).

<sup>183</sup> 42 U.S.C. § 1997e(d) (2012).

<sup>184</sup> Jack Denton, *Settlement Limits Solitary Confinement for People with Mental Illness in Indiana's Prisons*, SOLITARY WATCH (Feb. 11, 2016), <http://solitarywatch.com/2016/02/11/settlement-limits-solitary-confinement-for-people-with-mental-illness-in-indianas-prisons/>.

<sup>185</sup> *Id.*

match what a few other states have done,<sup>186</sup> “declining to torture the mentally ill is a low bar.”<sup>187</sup> Other states, including Colorado, Massachusetts, and New York also have passed legislation that bans the placement of people with *serious* mental illness in solitary confinement.<sup>188</sup> In addition to state-wide initiatives, there is some case law suggesting that solitary confinement might be inappropriate for people with mental illness.<sup>189</sup>

Settlement agreements, legislative initiatives, and litigation efforts do not necessarily mean change is imminent for mentally ill prisoners. In Alabama, despite a court directive issued in June 2017 to remove prisoners with serious mental illness from solitary confinement absent extenuating circumstances,<sup>190</sup> two random inspections in December 2017 and January 2018 revealed 152 prisoners with a “serious mental illness” in such conditions.<sup>191</sup> In Colorado, a 2014 law prohibits placing people with serious mental illness in solitary cells.<sup>192</sup> However, in 2016, a state auditor found 45 of the 326 people in shorter-term disciplinary segregation had serious mental illness.<sup>193</sup> The report revealed that the department did not test whether people had mental illness before isolating them, so the actual number of people with mental illness in isolation was likely higher than what the report suggested.<sup>194</sup> Additionally, following the 2016 report, over about a six-month period, three prisoners in Colorado with serious mental illness ended up in long-term solitary.<sup>195</sup> Six inmates were not removed from solitary within thirty days after staff discovered they suffered from mental illness, and thirty-six were held in disciplinary segregation for over two months.<sup>196</sup>

Not a single legal or advocacy effort has led to the conclusion that the placement of prisoners suffering from mental illness in prolonged solitary confinement is a per se violation of the Eighth Amendment. This leaves the door open for exceptions, which is unacceptable given the overwhelming scientific consensus of what inevitably happens to people with mental illness in solitary confinement. Furthermore, these state-wide initiatives, settlement agreements, and cases impact just a fraction of the mentally ill prisoners trapped in solitary.

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<sup>186</sup> Arizona, California, Illinois, Oregon, and Pennsylvania have reached agreements promising to reduce the number of prisoners with mental illness in solitary confinement. *Id.*

<sup>187</sup> Editorial Bd., *Indiana Takes a Step Forward on Solitary Confinement*, WASH. POST (Jan. 28, 2016), [https://www.washingtonpost.com/opinions/indianas-step-forward-on-solitary-confinement/2016/01/28/9838e184-bfc2-11e5-83d4-42e3bcee902\\_story.html?utm\\_term=.58d75f6dcb05](https://www.washingtonpost.com/opinions/indianas-step-forward-on-solitary-confinement/2016/01/28/9838e184-bfc2-11e5-83d4-42e3bcee902_story.html?utm_term=.58d75f6dcb05).

<sup>188</sup> Denton, *supra* note 184.

<sup>189</sup> *See, e.g., supra* notes 69–74.

<sup>190</sup> *See* Bragg v. Dunn, 257 F. Supp. 3d 1171, 1247 (M.D. Ala. 2017).

<sup>191</sup> *Despite Court Directive, Alabama Still Segregates Seriously Mentally Ill Prisoners*, S. POVERTY L. CTR. (Feb. 8, 2018), <https://www.splcenter.org/news/2018/02/08/despite-court-directive-alabama-still-segregates-seriously-mentally-ill-prisoners>.

<sup>192</sup> Andrew Kenney, *Auditor: Colorado Prisons Have Sharply Reduced Their Use of Solitary Confinement, but There Are Still Some Serious Issues*, DENVERITE (Dec. 6, 2016), <https://www.denverite.com/auditor-colorado-prisons-sharply-reduced-use-solitary-confinement-still-serious-issues-24380/>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

## CONCLUSION

*Being human is relational*, plain and simple. We exist in relationship to one another, to ideas, and to the world. It's the most essential thing about us as a species: how we realize our potential as individuals and create meaningful lives. Without that, we shrink. Day by day, we slowly die.<sup>197</sup>

For the tens of thousands of mentally ill prisoners currently deteriorating in solitary confinement, the line between physical and psychological harm is a significant obstacle between them and reprieve from the torture of solitary confinement. The effects of solitary confinement, both physically and psychologically, on prisoners with mental illness are well known, not just in the medical and scientific communities, but in the corrections community at large. Their brains literally shrink in size. They mutilate their bodies. They die.

Given the overwhelming research suggesting that psychological harm can be just as, if not more, debilitating than physical harm, placing a mentally ill person in solitary confinement should be a per se constitutional violation. Courts recognizing that placing mentally ill prisoners in solitary confinement violates the Eighth Amendment would have profound consequences. I do not trivialize the burden such a finding would have on the prison system in the United States. Prisons would have an affirmative duty to perform diligent mental health evaluations on every single prisoner before placing him or her in solitary confinement. Furthermore, because it is well known that solitary confinement can bring out mental health issues in prisoners, these mental health evaluations would need to be conducted at frequent intervals. However, this seems to be a small price to pay to prevent the incredible harm that such prisoners are sure to face when thrown in the "hole".

While a finding that solitary confinement is categorically inappropriate for prisoners with mental illness would be preferable, at minimum courts should begin to treat serious psychological harm with the same level of severity as physical harm so as to remove some of the barriers prisoners with mental illness currently face in bringing successful challenges to their placement in solitary confinement. By recognizing that the line between serious physical and serious psychological harm is blurry, courts could stop making determinations they are simply not qualified to make. It is not only cruel, but objectively dangerous, to prevent prisoners with mental illness from bringing a claim to court to seek treatment or other help to reduce the effects of their illness, such as a reprieve from extreme isolation. Removing the bright line courts have drawn between physical and psychological harm would impact the ability of mentally ill prisoners to bring civil rights claims challenging their extreme isolation, regardless of whether they have accumulated three strikes, and regardless of whether their mental suffering is accompanied a traditionally physical injury.

Prisons have unwillingly become mental health centers. More mentally ill people are housed in prisons and jails than in actual mental health facilities.<sup>198</sup> Perhaps a finding that those suffering from mental illness do not belong in extreme isolation or a court

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<sup>197</sup> HELL IS A VERY SMALL PLACE, *supra* note 32, at xii.

<sup>198</sup> See generally TORREY ET AL., *supra* note 42.

system that effectively evaluates extreme psychological harm to those same prisoners placed in solitary confinement would provide an impetus for Congress to take a harder look at the mental health crisis in our country and invest in strong mental health systems outside of prisons and jails.

As a country we can, and indeed we must, do better. Regardless of whether mentally ill prisoners trapped in steel boxes are seriously suffering physically, psychologically, or both, “evolving standards of [human] decency”<sup>199</sup> should tell us that such suffering is unacceptable.

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<sup>199</sup> Rhodes v. Chapman, 452 U.S. 337, 346 (1981).