# *SWALLOWING RAZORS, GOUGING THEIR EYES OUT*: THE DETAINEE TREATMENT ACT AND EIGHTH AMENDMENT PROTECTIONS FOR ASYLUM SEEKERS IN SEGREGATED ISOLATION

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ABSTRACT

This Note grapples with the question of how to protect immigrants' rights in detention given the Eighth Amendment's inapplicability to this "civil" context. As an avenue for incorporating Eighth Amendment standards to immigration detention, and thus securing heightened protections for detained immigrants, this Note looks to the Detainee Treatment Act of 2005 (DTA). Through a close analysis of the statute's text, this Note argue that the DTA, which tracks Eighth Amendment language and affords the same protections as those recognized by the Eighth Amendment, applies to immigrants in detention. As a case study for and application of this proposition, this Note also argues that, under the DTA, subjecting asylum seekers in immigration detention to solitary confinement breaches Eighth Amendment standards and is thus prohibited by the DTA. This Note thus provides two distinct—albeit interrelated—and novel contributions to legal scholarship. First, it engages in the first extensive statutory interpretation of the DTA within the context of immigration detention. Second, it brings together Eighth Amendment scholarship and immigrants' rights by proposing that the protections afforded by the prohibition against "wanton and unnecessary

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infliction of pain" can be invoked in the context of immigration detention.

TABLE OF CONTENTS

## INTRODUCTION

> *They hurt me psychologically. I still have nightmares about it. I have nightmares that I'm still there, that I'm still in the proceedings. That I can't see my daughter. My worst fear is ever having to go back, not being able to see my daughter or my wife again. I feel like those officers are everywhere now. Like they could still get me again.*

When Jose[1] was arrested by U.S. Customs and Immigration Enforcement (ICE) officials, he immediately feared his arrest would result in him being placed in immigration detention. Like many others, he had heard the stories. Yet not even the most nightmarish tales could have prepared him for the correctional facility in which he was detained. After having spent close to a year in detention, Jose became one of dozens of immigrants who were transferred to a then defunct punitive segregation unit.[2] For the next three months of his life, he was held in solitary confinement.

The segregation unit where Jose was placed had seemingly been abandoned and not been prepared for the transfer of detainees. Filth and mold covered the walls, and the smell of urine permeated the air. There were no mattresses in the cells; the toilets did not

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1. At Jose's request, his name has been changed to protect his identity and privacy, as he fears retaliation for sharing his story. The details of the experience he shared, however, just like the experiences of thousands of others in immigration detention, are very much real. The following quotes and descriptions of his experience were collected in a telephone conversation held with him on October 16, 2023 as part of research on detention center conditions. Jose provided his full consent to using his story.

2. Jose's transfer did not occur in a vacuum. After months of filing grievances over the racist harassment of prison officers, the appalling state of the correctional facility's infrastructure, and the food quality, dozens of immigrant detainees went on a hunger strike. The strike lasted weeks. Only a few days after Jose and others believed they had reached a compromise with correctional officials, strikers were transferred to a defunct segregation unit. On April 4, 2023, the New York Civil Liberties Union, Bronx Defenders, and Center for Constitutional Rights filed a lawsuit against New York officials and ICE for the retaliation against these detainees' exercise of their First Amendment right to engage in a hunger strike. Jose is not a party to that lawsuit. *See Detained Immigrants Sue ICE and NY Officials for Retaliation Against First Amendment Protected Protest*, NYCLU (Apr. 4, 2023), https://www.nyclu.org/en/press-releases/detained-immigrants-sue-ice-and-ny-officials-retaliation-against-first-amendment [https://perma.cc/X9RX-JW3R] (explaining the conditions of confinement and the factual and legal basis behind the suit filed against New York officials and ICE).

work. Jose only had the few things he managed to pack before he was disappeared to the unit in the middle of the night. He was thrown in a cell and told he was being punished. No one ever explained to him how long he would be held there, and an immigration officer never came to discuss his situation with him. Soon enough, however, one fact became strikingly clear to Jose: he would be held in a cell alone for twenty-three hours a day, every day, for the foreseeable future.

The first few days were days of nausea. Jose was frozen, terrified of what was going to happen. Since he could not easily communicate with other detainees, or even peer into their cells, he had very limited knowledge of what happened outside the four walls surrounding him. The little time he had outside was no less suffocating. The segregation unit had no yard for recreation, a space common in most prisons. Instead, Jose was placed in a slightly bigger cell, a square, and forced to pace around like an animal inside a cage, until his recreation hour was up.

> *Time is almost drilled into your head. I felt like I was going insane.*

When asked about his time in solitary, Jose deflected. He felt comfortable sharing the general contours of what had happened to him, of the experience he had survived, yet appeared afraid of diving deeper into the details of how it had affected him psychologically. The one thing he kept circling back to—what he seemed most concerned with—was the fact that the segregation unit is still in operation.

> *I am out now. But others are still there. Others have not been allowed to leave, there are still people there. They don't receive their rights. Nothing has changed.*

Jose's story is not the only testimony regarding the reality of ICE detention centers. Over the past couple of years, the number of reports, lawsuits, and articles detailing the abject conditions inside detention centers has placed ICE facilities in the spotlight.[3] As

3. *See, e.g.*, *"Endless Nightmare": Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention*, HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM & PHYSICIANS FOR HUM. RTS. (Feb. 6, 2024), https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf [https://perma.cc/9X5B-74JS]; Freddy Martinez & Nick Schwellenbach, *DHS's Secret Reports on ICE Detention,* POGO (Aug. 21, 2023), https://www.pogo.org/investigations/dhss-secret-reports-on-ice-detention (on file with the *Columbia Human Rights Law Review*); Tom Dreisbach, *Government's Own Experts Found 'Barbaric' and 'Negligent' Conditions Inside ICE Detention,* NPR (Aug. 16, 2023), https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions [https://perma.cc/9W6R-9EQD].

immigrant detention centers increasingly become virtually indistinguishable from prisons,[4] an urgency to preserve the fundamental rights of immigrant detainees arises. Yet, while an immediate source of prison protections for incarcerated individuals in the criminal context emanates from the Eighth Amendment,[5] the amendment's very nature precludes its direct application to civil detention.[6] The question thus arises: how may immigrants' rights be secured when the civil label attached to their detention prevents them from enjoying Eighth Amendment protections?

To answer this question and propose an alternative avenue for the protection of immigrants' rights, this Note looks to the Detainee Treatment Act of 2005 (DTA),[7] an act rooted in the need to safeguard the fundamental human rights of prisoners of war (POWs) during the Bush administration.[8] Focusing on the DTA's broad language and its reliance on Eighth Amendment standards to define the scope of protection it affords,[9] this Note contends that the DTA could serve as a way of applying Eighth Amendment protections to the asylum seekers subjected to solitary confinement,[10] and argues

4. Ted Hesson et al., *Biden Vowed to Reform Immigration Detention. Instead, Private Prisons Benefited,* REUTERS (Aug. 7, 2023), https://www.reuters.com/world/us/biden-vowed-reform-immigration-detention-instead-private-prisons-benefited-2023-08-07 (on file with the *Columbia Human Rights Law Review*).

5. U.S. CONST. amend. VIII.

6. *See* Andrew M. Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1699–1700 (1987) (explaining the restriction of Eighth Amendment protections to the criminal context).

7. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd [hereinafter DTA].

8. Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 257–58 (2006) (explaining the origins of the DTA).

9. DTA § 1003(d) (outlining that the limits of the protections created by the DTA will run parallel to Eighth Amendment jurisprudence).

10. Throughout this Note, the terms "solitary confinement," "isolated segregation," and "isolated confinement" will be used interchangeably to describe the practice of placing detainees in restricted housing for over twenty-two hours a day under conditions of heightened liberty restrictions and the complete elimination of all but essential social contact with correctional staff or other detainees. *See* Mimosa Luigi et. al, *Shedding Light on "the Hole": A Systematic Review and Meta-Analysis on Adverse Psychological Effects and Mortality Following Solitary Confinement in Correctional Settings*, 11 FRONT PSYCHIATRY, 2 (Aug. 18, 2020), https://www.frontiersin.org/journals/psychiatry/articles/10.3389/fpsyt.2020.00840/full [https://perma.cc/4GHF-3Y4F] (providing a general definition of solitary confinement).

that the practice constitutes cruel and unusual punishment prohibited under the Eighth Amendment's "unnecessary and wanton infliction of pain standard."[11] This Note thus provides two novel contributions to legal scholarship. First, it engages in the first extensive statutory interpretation of the DTA within the context of immigration detention. Second, it brings together Eighth Amendment scholarship and immigrants' rights by proposing that the protections afforded by the prohibition against "wanton and unnecessary infliction of pain" can be invoked in the context of immigration detention.[12]

The Note addresses two distinct legal questions. First, in the absence of case law discussing the implementation of the DTA to the immigration context, what is the best legal argument in support of its applicability? Second, if the DTA indeed applies to immigration detention, how can one establish that subjecting asylum seekers to solitary confinement constitutes "unnecessary and wanton infliction of pain" as that standard is defined by the Eighth Amendment?

Part I will begin by providing a summary of the asylum process and current detention practices, including solitary confinement, in the United States, as well as an overview of the evolution of Eighth Amendment jurisprudence. Part II then focuses on the first legal question and establishes the DTA's applicability to detained immigrants; it begins by dissecting the Act's text before delving into its legislative history. Part III then addresses the second legal question, arguing that subjecting detained asylees to solitary confinement violates the protections encompassed by the Eighth Amendment. Part III first examines case law on the general

11. U.S. CONST. amend. VIII.

12. The DTA's applicability to the immigration detention context has never been analyzed. As of February 2026, only three articles cite the Act in reference to its applicability to immigration detention, and none interpret the statute or explore how it would bear on the rights of immigrants in detention. *See* Erika Voreh, *The United States' Convention Against Torture Ruds: Allowing the Use of Solitary Confinement in Lieu of Mental Health Treatment In U.S. Immigration Detention Centers*, 33 EMORY INT'L L. REV. 287 (2019) (stating briefly the DTA's applicability to immigration, but building no argument to support that claim); Allyson Zivec, *Don't Give Us Your Sick: Inadequate Medical Care in Immigration Detention Centers and How it Violates International Human Rights Law*, 5 PHOENIX L. REV. 229 (2011) (mentioning the possibility of applying the DTA to detained immigrants, but omitting an extensive discussion of the Act and its applicability to solitary confinement); Kelsey E. Papst, *Protecting the Voiceless: Ensuring Ice's Compliance with Standards That Protect Immigration Detainees*, 40 MCGEORGE L. REV. 261 (2009) (mentioning the DTA in a footnote and suggesting that it could be helpful in protecting immigrants in detention).

permissibility of solitary confinement, identifying a nascent trend against holding individuals with preexisting mental illnesses,[13] or with a predisposition to develop them, in isolated segregation. Part III then draws from the well-documented, long-term psychological effects of solitary confinement to posit that subjecting asylees to segregated isolation breaches the Eighth Amendment's prohibition against the "unnecessary and wanton infliction of pain."[14] This Note thereby traces a direct line between the DTA and the impermissibility of placing asylees in solitary confinement, elucidating the legal promise held by the Act's potential applicability to immigrant detainees.

## I. IMMIGRATION DETENTION IN THE UNITED STATES TODAY AND STANDING EIGHTH AMENDMENT JURISPRUDENCE

Before analyzing how the DTA applies to detained asylees, it is necessary to establish the legal and historical background against which asylum seekers' detention has unfolded. Section I.A begins by providing an overview of the defensive asylum process, including what asylum is and the historical treatment of asylum seekers in the United States. This Section also examines immigration detention, summarizing the statutory sources of the power to detain immigrants and tracing its historical evolution. Section I.B turns an eye to current detention practices through an overview of the conditions inside ICE detention centers and the correctional facilities with ICE contracts`. Finally, Section I.C focuses on the jurisprudential context by summarizing how the Supreme Court has interpreted and applied the Eighth Amendment's prohibition against cruel and unusual punishment.

### A. On the History of Asylum and the Beast of Immigration Detention

Immigration seems to be the toy everyone wants to play with. A hotly contested issue on both sides of the American political spectrum, every administration since the turn of the millennium has taken a stab at carving out the immigration system they believe

13. Throughout this Note, the terms "mental illness" and "mental health condition" refer to the sort of psychological or psychiatric conditions that district courts found to be relevant in their analyses of Eighth Amendment claims, such as, but not limited to, depression, PTSD, and anxiety.

14. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

ought to be in place.[15] Despite these shifts in interpretation and policy, the central legal structure articulating asylum law has remained relatively unchanged since 1980.[16] When the foundational statutory text for immigration law and practice, the Immigration and Nationality Act (INA), was enacted in 1952, the term "asylum" was not part of its vocabulary.[17] This poignant omission did not change when the United States ratified the 1967 Protocol Relating to the Status of Refugees, aligning itself with the international community's commitment to protect asylees and refugees.[18] In fact, all the

15. Among the many examples one could cite, several asylum-related shifts in policy stand out. *See, e.g.*, Matter of A-B- I, 27 I. & N. Dec. 316 (A.G. 2018) (overturned by Matter of A-B- III, 28 I. & N. Dec. 307 (A.G. 2021) (overturning decades of precedent, making it exceedingly difficult for survivors of domestic violence to receive asylum)); John Gramlich, *Key Facts About Title 42, the Pandemic Policy That Has Reshaped Immigration Enforcement at U.S.-Mexico Border*, PEW RSCH. CTR. (Apr. 27, 2022), https://www.pewresearch.org/short-reads/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border [https://perma.cc/88BC-G227] (explaining the use of Title 42 during the Covid-19 pandemic to swiftly expel asylum seekers at the border). *See also New Asylum Transit Ban Is Dangerous and Shortsighted*, AM. IMMIGR. COUNCIL (May 10, 2023), https://www.americanimmigrationcouncil.org/news/new-asylum-transit-ban-dangerous-and-shortsighted [https://perma.cc/36D9-RRBR] (explaining the implementation of a third country transit ban by the Biden administration which sought to penalize asylum seekers who travelled through third countries on their way to the United States but failed to apply for protection in those countries).

16. The Refugee Act was enacted in 1980. *See* Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. 253, 281 (1995).

17. RYAN BAUGH, DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2019, at 2 (Sept. 2020), https://ohss.dhs.gov/sites/default/files/2023-12/refugee_and_asylee_2019.pdf [https://perma.cc/B9QT-WPXY].

18. U.N. Protocol Relating to the Status of Refugees arts. I, IV, *entered into force* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268. The 1967 Protocol effectively amended the original 1951 Convention by removing its geographic and temporal limitations. The United States was never a party to the Convention. *Signatories of the Convention Relating to the Status of Refugees*, UNITED NATIONS TREAT COLLECTIONS, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en [https://perma.cc/DJ4K-SLVE]. While the distinction does not directly bear on the purposes of this Note, American immigration law draws a distinction between asylees and refugees. Whereas refugees are those who apply for refugee status while still outside the United States, asylum seekers are those who apply once in the United States or at a U.S. port of entry. Beyond that distinction, refugees and asylees are encompassed by the same definition. *See Refugee Admissions and Resettlement Policy*, CONG. RSCH. SERV. 1 (Nov. 7, 2017),

programs enacted in the years following the 1952 INA continued to neglect asylum matters.[19] Only in 1980, with the passage of the Refugee Act of 1980, was the INA amended to include a comprehensive policy of refugee admissions, provide a statutory basis for asylum, and bring the United States into compliance with its humanitarian international obligations.[20]

Under U.S. law, an asylum seeker is:

> Any person who is outside their country of origin and who is unable or unwilling to return and to avail themselves of the protection of that country due to persecution or a well-founded fear of persecution on account of race, nationality, membership in a particular social group, or political opinion.[21]

There are two broad paths to seeking asylum in the United States, each defined by the context in which the application arises.[22] Affirmative asylum applications, those filed by individuals *not* in removal proceedings, are non-adversarial in nature.[23] They are filed before the U.S. Citizenship and Immigration Services (USCIS), and a USCIS officer determines eligibility.[24] Defensive asylum applications, conversely, arise only in the removal context.[25] The individual asserts

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https://crsreports.congress.gov/product/pdf/RL/RL31269/22 (on file with the *Columbia Human Rights Law Review*).

19. In the years between the 1952 INA and the Refugee Act of 1980, the United States passed over five different acts directed at developing refugee assistance and admission to the United States. However, most of the acts, just like a variety of humanitarian programs which were also implemented during the same period, focused on specific populations. None created a fully-fledged system of refugee and asylee admission and proceedings that could be applied across the board. *See Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline [https://perma.cc/2RT5-LZHS].

20. *Id.*; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; I.N.S. v. Cardozo-Fonseca, 480 U.S. 421, 436–37 (1987).

21. Immigration and Nationality Act § 101(a)(42) [hereinafter I.N.A].

22. *Immigration: U.S. Asylum Policy*, CONG. RSCH. SERV. 2–4 (Feb. 19, 2019), https://crsreports.congress.gov/product/pdf/R/R45539 (on file with the *Columbia Human Rights Law Review*).

23. *Id.* at 3.

24. *Id. See also Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum [https://perma.cc/QH6X-3S6M]. When USCIS denies the affirmative application, an applicant for asylum is funneled into the immigration court system and can seek asylum defensively before an immigration judge. *Id.*

25. CONG. RSCH. SERV., *supra* note 22, at 5. "Removal context" refers to the administrative process in which an immigration judge determines whether a

asylum eligibility as grounds for relief against deportation during an immigration hearing.[26] Defensive asylum applications thus take on an entirely adversarial approach: the noncitizen, or an advocate on their behalf, must appear before the immigration judge, as does an ICE attorney on behalf of the government.[27] The applicant and any witnesses are subjected to direct and cross-examination, and both sides introduce evidence.[28]

During removal proceedings, individuals are often held in detention;[29] the INA directs the detention of noncitizens in four circumstances.[30] First, the INA authorizes the detention of noncitizens who have not been convicted of specific crimes[31] pending their removal proceedings. Detention of noncitizens falling in this category is discretionary, and they may be released on bond.[32] Second, the INA mandates the detention of individuals who are in removal proceedings and who have been convicted of these specific crimes.[33] Third, the INA also requires the detention of individuals who have been denied admission to the United States and who are subject to removal.[34] This includes individuals who have asserted a well-founded fear of persecution[35]—meaning asylum seekers. Finally, the INA also mandates the detention of noncitizens who have been ordered removed and are pending removal.[36]

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noncitizen should be lawfully deported from the United States. *See* I.N.A. §§ 239, 240.

26. CONG. RSCH. SERV., *supra* note 22, at 5.

27. *Id.* at 5–7.

28. *Id.*

29. *Immigration Detention: A Legal Overview*, CONG. RSCH. SERV. 1–2 (Sept. 16, 2019), https://crsreports.congress.gov/product/pdf/R/R45915 (on file with the *Columbia Human Rights Law Review*).

30. I.N.A. § 235(b)(1)(B)(IV), (b)(2); I.N.A. § 236(a), (c).

31. The INA does not provide an exhaustive list of the crimes that fall within this category. Some of the crimes included, however, are aggravated felonies, controlled substances offenses, human trafficking, and drug trafficking. I.N.A. § 236(a), (c). While I.N.A. § 236(a) does not specify the rationale for this discretionary form of detention, noncitizens detained under this category must prove that they are neither a flight risk nor a danger to the community to be released on bond. Security and flight risk thus seem to be the objectives authorizing detention under I.N.A. § 236(a).

32. I.N.A. § 236(a).

33. I.N.A. § 236(c).

34. I.N.A. § 235(b).

35. I.N.A. § 235(b)(1)(B)(IV).

36. I.N.A. § 241(a). *See also* Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (holding that the INA will be construed to include a "reasonable time limitation" to avoid potential constitutional issues).

The Supreme Court has upheld the constitutionality of immigrant detention.[37] In an in-depth reflection on the subject, the Court sanctioned Congress' ability to "make rules as to aliens that would be unacceptable if applied to citizens," and sided with the legislative concern that, absent detention, "criminal aliens" would continue "to engage in crime and fail to appear for their removal hearings in large numbers."[38] Detention, however, was not always part of the immigration enforcement playbook. Up until the mid-19th century, immigration remained largely unregulated; no systematic framework for the control of admissions governed entry into the country and no machinery of deportation had yet been engineered.[39] This now almost inconceivable period of quasi open borders began to see its demise with the rise of a renewed wave of xenophobia and racism across the country. Following the feverish gold rush that drew many East Asians—particularly Chinese people—to the West coast, the demand for labor quickly dissolved into animosity, Sinophobia, and calls for measures to limit their entry into the country.[40] The Chinese Exclusion Act of 1882, arguably the legislative culmination of chauvinist anti-Chinese sentiment, banned the immigration of Chinese laborers into the United States for ten years.[41] The enforcing mechanism was none other than detention.[42] The Act called for immigrants to be held at arriving ships while officers verified that they met the requirements to enter the country.[43] In this sense, the Act not only marked the dawn of American immigration admission procedures and controls at ports of entry, but continued a practice

37. *See* Demore v. Hyung Joon Kim, 538 U.S. 510, 513 (2003) (holding that detention of noncitizens pending removal proceedings is constitutionally permissible); *Zadvydas*, 533 U.S. at 682 (finding detention of noncitizens during a certain period of time to be constitutionally permissible); Reno v. Flores, 507 U.S. 292, 306 (1993) (noting "Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings"); Wong Wing v. United States, 163 U.S. 228, 235 (1896) (finding the detention of noncitizens to be a valid mechanism for ensuring the exclusion or deportation of noncitizens).

38. *Demore*, 538 U.S. at 513, 521.

39. Aaron Korthius, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 129 YALE L. J. F. 238, 244–45 (2019).

40. *Id.* at 246.

41. Priscilla Mendoza, *Calentando Las Hieleras ("Warming Up the Ice Boxes"): Holding For-Profit, Private Detention Centers Accountable for Immigrant Detainees' Due Process Rights*, 44 T. MARSHALL L. REV. 163, 165 (2020).

42. Korthius, *supra* note 39, at 246–47.

43. *Id.*

that had already been implemented years before through the lesser known Page Act of 1875.[44]

In the years before and immediately following the opening of Angel Island and Ellis Island,[45] Congress passed at least two more acts authorizing the inspection of all arriving ships and the detention of individuals pending verification of their lawful admission.[46] Detention had thus already started to become the norm. The closure of Ellis Island in 1954 and the establishment of parole as the ruling procedure for admission by the mid-20th century[47] embodied but a brief pause in the creation of the detention machine that today dominates U.S. immigration. Indeed, by the time President Reagan left office, his administration had expanded mandatory detention to all inadmissible arriving noncitizens, thereby establishing one of the most expansive detention policies to date.[48] Before the turn of the

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44. *Id.* The Page Act of 1875 constituted Congress' response to a perceived problem of trafficking Chinese and Japanese women into the United States. It called for the inspection of arriving passenger ships and authorized officials to hold individuals onboard until officials could confirm that their entry would not violate the Act. *Id.*

45. Ellis Island opened in 1882 in New York; almost twenty years later, in 1910, Angel Island opened in San Francisco. Both facilities constituted the first federally run immigration processing centers where arriving noncitizens were held prior to being allowed entry to the United States. *See* Evangeline Dech, *Nonprofit Organizations: Humanizing Immigration Detention*, 53 CAL. W. L. REV. 219, 223 (2017) (discussing how the Ellis Island facility was the first federally operated immigration detention center in the United States); Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L. J. 55, 64 (2014) (comparing how Ellis Island "enabled routine detention of non-citizens arriving from Europe" while Angel Island "allowed the routine detention of Asian immigrant labourers").

46. *See* Immigration Act 1903, Pub. L. No. 57–162, 32 Stat. 1213 (1903); Immigration Act 1917, Pub. L. No. 64–301, 39 Stat. 874 (1917).

47. Jefferis suggests that the replacement of detention with parole by the mid-20th century was partly motivated by the decline in arriving immigrants, which in turn was driven both by the Great Depression and the strict immigration policies of the Ellis Island era. *See* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L. J. 145, 151–52 (2020).

48. Carl Lindskoog, *The Historical Origins of the World's Largest Immigration Detention System*, 97 DENV. L. REV. 655, 660–61 (2020). While fully analyzing how immigration laws in the United States have directly targeted Brown and Black communities is out of this Note's scope, the Reagan administration's approach had particular, racially charged roots. In May 1981, the administration implemented the policy of detaining all undocumented arriving immigrants from Haiti in response to the increase in arrivals. Only after the program was struck down did the administration announce a new, all-encompassing policy. *Id.* at 661–62.

millennium, two other acts significantly altered the scope and nature of immigration detention: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[49] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[50] AEDPA and IIRIRA not only focused on the immediate aftermath of noncitizens' arrivals, they also sought to reach noncitizens already living in the United States.[51] The acts further expanded the definition of "aggravated felony" included in the Immigration and Nationality Act of 1952, thus multiplying the types of crimes that would trigger removal proceedings and the classes of noncitizens subject to mandatory detention.[52] The number of immigration detention centers rocketed in the years that followed, as did the number of detainees.[53] In mid-January 2026, ICE was holding 73,000 noncitizens—an over 75% increase in ICE detainees from the beginning of the second Trump administration.[54]

### B. The "Barbaric" And "Negligent" Conditions Inside ICE Detention Centers

*Speculative* may have once accurately defined the reports of detainee treatment inside ICE detention centers. Today, the only appropriate qualifying term is *horrifying*. Recent public reports written by experts hired by the Department of Homeland Security's (DHS) Office for Civil Rights and Civil Liberties (CRCL) have shed light on the systemic failures at ICE detention centers, revealing practices inspectors labeled as "barbaric" and "negligent."[55] The

49. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996).

50. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104 208, 110 Stat. 3009–546 (1996).

51. Jefferis, *supra* note 47, at 156.

52. *Id.*; Megan Shields Casturo, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 PENN ST. L. REV. 825, 832 (2018).

53. *See* Dech, *supra* note 45, at 230 (discussing how the daily immigration detention capacity increased from 6,600 in 1995 to approximately 20,000 in 2001 due to Congress passing the Illegal Immigration and Immigrant Responsibility Act).

54. Aaron Reichlin-Melnick, *New Report Details ICE's Expanding and Increasingly Unaccountable Detention System,* AM. IMMIGR. COUNCIL (Jan. 23, 2026), https://www.americanimmigrationcouncil.org/blog/ice-expanding-detention-system/ [https://perma.cc/FT7T-HEAQ].

55. These reports were circulated only after organizations such as NPR and the Project on Government Oversight filed several Freedom of Information Act (FOIA) requests and published subsequent articles summarizing the main findings and patterns. *See* Dreisbach, *supra* note 3 (summarizing CRCL reports);

reports provide detailed accounts of the abysmal state of medical care in the centers: overwhelming numbers of patients per medical staff member, detainees transferred without their complete medical records, and even cases of mentally ill patients unjustifiably being held in restraint chairs.[56] Inspectors also noted the absence of full-time on-site physicians in multiple facilities and emphasized staff members' lack of preparation for medical emergencies.[57]

In one of the most abhorrent incidents reported, Kamyar Samimi died in ICE detention after medical staffers doubted the genuineness of his withdrawal symptoms, despite him vomiting several times and barely eating.[58] Correctional officers had cut off Samimi from his medication for managing opioid disorder and treated his withdrawal symptoms as though he was feigning discomfort to seek drugs rather than experiencing genuine opioid withdrawal.[59] No doctor ever examined Samimi, not even after he vomited blood inside his cell.[60]

Staff misconduct at detention centers often goes beyond omission of their duties. Testimonies and records compiled by Futuro Investigates paint a disturbing picture of officials wielding their positions of authority to force detainees into sexual interactions, often weaponizing the possibility of deportation.[61] In a particularly gut-wrenching case, a Georgia facility was shut down following allegations by a whistleblower that a gynecologist had subjected female detainees to non-consensual hysterectomies.[62] Other examples

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Martinez & Schwellenbach, *supra* note 3 (describing the main findings of CRCL reports).

56. Dreisbach, *supra* note 3; Martinez and Schwellenbach, *supra* note 3.

57. Dreisbach, *supra* note 3.

58. John Ferrugia, *"We Didn't Have People Who Cared Enough to Save Him": Records Describe Colorado Man's Death in Custody of Immigration Enforcement*, PBS (Oct. 24, 2019), https://www.rmpbs.org/blogs/news/we-didnt-have-people-who-cared-enough-to-save-him-records-describe-mans-death-in-colorado-immigration-detention-center [https://perma.cc/CKK4-EF25].

59. *Id.*

60. Katherine Hawkins, *Medical Neglect at a Denver Immigration Jail*, POGO (May 21, 2019), https://www.pogo.org/investigations/medical-neglect-at-a-denver-immigration-jail (on file with the *Columbia Human Rights Law Review*).

61. Zeba Warsi, *'Immensely Invisible:' Women Fighting ICE's Inaction on Sexual Abuses*, FUTURO INVESTIGATES (July 21, 2023), https://futuroinvestigates.org/investigative-stories/immensely-invisible/immensely-invisible-women-fighting-ices-inaction-on-sexual-abuses [https://perma.cc/2UE2-4YDU].

62. Jose Olivares & John Washington, *ICE Detention Center Shuttered Following Repeated Allegations of Medical Misconduct,* INTERCEPT (May 20,

of disproportionate force against detainees include the unwarranted use of pepper spray and force-feeding detainees on hunger strikes.[63] Similarly, CRCL reports revealed a pattern of racial and gender discrimination, and a failure to investigate complaints of racial harassment.[64] Unsurprisingly, centers' hygiene standards mirror staff members' appalling behavior. In addition to the extremely dirty common areas too frequently reported by inspectors, shocking examples of unsanitary conditions included rodents, insects, and even unclean drinking water.[65]

"Administrative segregation" or "disciplinary segregation,"[66] medical isolation,[67] "Special Management Unit[s],"[68]—while ICE may have rebaptized solitary confinement under new names, the horrifying nature of the practice has remained unchanged. CRCL reports repeatedly warned of the systematic misuse of solitary confinement in detention centers, noting how often segregation is used for incredibly prolonged periods of time.[69] Standard practices at ICE centers involve placing detainees diagnosed with mental illness in isolation, and contemplate no exceptions for detainees struggling with suicidal ideation even if the cell is not suicide-resistant.[70] In

2021), https://theintercept.com/2021/05/20/ice-irwin-hysterectomies-medical [https://perma.cc/Y4XZ-W8HS]; Alan Judd, *New Lawsuit Amplifies Claims of Medical Abuse at Georgia ICE Jail*, ATLANTA J.-CONST. (Dec. 22, 2020), https://www.ajc.com/news/new-lawsuit-amplifies-claims-of-medical-abuse-at-georgia-ice-jail/4KABX3CFAFEKLPRXX4BPAH3M7Q (on file with the *Columbia Human Rights Law Review*).

63. Martinez & Schwellenbach, *supra* note 3; Dreisbach, *supra* note 3.

64. Martinez & Schwellenbach, *supra* note 3; Dreisbach, *supra* note 3.

65. Martinez & Schwellenbach, *supra* note 3. Some reports went as far as describing the living conditions as "unsanitary" and "unsafe for occupancy." *See* Dreisbach, *supra* note 3 (describing the unsanitary conditions).

66. U.S. IMMIGR. & CUSTOMS ENF'T, INS DETENTION STANDARD: SPECIAL MANAGEMENT UNIT (ADMINISTRATIVE SEGREGATION) (2000) [hereinafter ICE, INS Detention Standard (Administrative)].

67. *Id.* at 1 (stating that administrative segregation applies to "those requiring segregation for medical reasons").

68. U.S. IMMIGR. & CUSTOMS ENF'T, INS DETENTION STANDARD: SPECIAL MANAGEMENT UNIT (DISCIPLINARY SEGREGATION) (2000) [hereinafter ICE, INS Detention Standard (Disciplinary)].

69. Martinez & Schwellenbach, *supra* note 3.

70. Nick Schwellenbach et al., *ISOLATED: ICE Confines Some Detainees with Mental Illness in Solitary for Months*, POGO (Aug. 14, 2019), https://www.pogo.org/investigations/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months (on file with the *Columbia Human Rights Law Review*). Oftentimes, individuals who were transferred to medical isolation after displaying suicidal behaviors were kept in isolation even after they stopped

multiple cases, individuals held in solitary confinement for extended periods of time committed suicide either during or immediately following their confinement.[71] Testimonies of detained immigrants reveal that they sometimes avoid seeking medical care due to fear of being placed in isolation.[72] Their misgivings are not unfounded: individuals are frequently placed in segregation with no explanation or documents stating why their segregation was necessary.[73]

The use of segregation described by the CRCL reports aligns with the findings of the only two nationwide studies conducted on solitary confinement in immigration detention centers.[74] Franco, Patler, and Reiter's study teases out concerning patterns in the implementation of solitary, where people with mental illnesses and individuals from Black-majority countries are disproportionately subjected to segregation.[75] Significantly for the purposes of this Note, the data also shows that mentally ill detainees are more likely to be placed in solitary and held there longer than individuals with no reported mental health conditions.[76] A report co-authored by the Immigration and Refugee Clinical Program at Harvard Law School points to similar concerning patterns. In the cases examined for that report, nearly 30% of the individuals held in solitary confinement for over ninety days and 25% of those held for over a year suffered from a mental health condition.[77] Studies in the prison context have similarly observed these findings despite ample knowledge that solitary confinement triggers and exacerbates underlying mental

exhibiting symptoms of mental illness or distress. *See* Martinez & Schwellenbach, *supra* note 3.

71. Martinez & Schwellenbach, *supra* note 3; Schwellenbach et al., *supra* note 70.

72. Martinez & Schwellenbach, *supra* note 3.

73. *Id*.

74. *See* HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM & PHYSICIANS FOR HUM. RTS., *supra* note 3 (providing an extensive overview of how ICE uses solitary confinement across detention facilities and its failure to adhere to its own policies, guidance, and directives); Konrad Franco et al., *Punishing Status and the Punishment Status Quo: Solitary Confinement in U.S. Immigration Prisons*, *2013-2017*, 24 PUNISHMENT & SOC'Y 170, 172 (2022) ("The present study provides the first national analysis of patterns and practices of solitary confinement use in immigration detention facilities across the United States.").

75. Franco et al., *supra* note 74, at 181–82.

76. *Id*. at 181.

77. HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM & PHYSICIANS FOR HUM. RTS., *supra* note 3, at 14.

illness.[78] Echoing conclusions drawn in other analyses of isolated segregation,[79] Franco, Patler, and Reiter's study suggests that solitary confinement is used as a mechanism to manage, rather than treat, detainees' mental health issues and crises,[80] and frequently serves as a substitute to adequate medical assistance. The report by Harvard's Immigration and Refugee Clinical Program supports this theory, finding that detention facilities often responded to manifestations of an individual's underlying mental health conditions by placing them in isolated segregation.[81]

Evidence of the behavioral and psychological repercussions of solitary confinement on individuals subjected to the practice is unequivocal: gouging their own eyes out, cutting their wrists, smearing feces over cell walls, mutilating their genitals, and experiencing flashbacks, hallucinations, bursts of anger, depression, and suicidal impulses.[82] Segregated isolation, however, continues to be widely implemented in immigration detention centers across the country.[83]

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78. *See*, *e.g.*, Fatos Kaba, et al., *Solitary Confinement and Risk Of Self-Harm Among Jail Inmates*, 104 AM. J. OF PUB. HEALTH 442, 445–46 (2014) (finding a "strong association" between self-harm and solitary confinement); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 476–81 (2006) (discussing how studies consistently show solitary confinement leads to significantly higher rates of mental illness than communal imprisonment); Reena Kapoor & Robert Trestman, *Mental Health Effects of Restrictive Housing*, *in* RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS 199, 207–11 (Nat'l Inst. of Just., U.S. Dep't of Just. ed., 2016) (providing an overview of several studies on the detrimental impact of segregation on incarcerated individuals, including the effects of the length of confinement, the level of in-cell activity, and the preexisting mental health of detained individuals).

79. Caitlin Patler et al., *The Black Box Within a Black Box: Solitary Confinement Practices in a Subset of U.S. Immigrant Detention Facilities*, 35 J. OF POPULATION RSCH. 435, 437 (2018).

80. Franco et al., *supra* note 74, at 181–82.

81. HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM & PHYSICIANS FOR HUM. RTS., *supra* note 3, at 16–7.

82. Spencer Woodman et al., *Solitary Voices: Thousands of Immigrants Suffer in Solitary Confinement in ICE Detention*, INTERCEPT (May 21, 2019), https://theintercept.com/2019/05/21/ice-solitary-confinement-immigration-detention (on file with the *Columbia Human Rights Law Review*).

83. ICE, INS Detention Standard (Administrative*), supra* note 66 (listing an extensive number of reasons why someone may be placed in isolation. However, the list is non-exhaustive and gives ample discretion for these determinations); ICE, INS Detention Standard (Disciplinary), *supra* note 68 (allowing for disciplinary segregation when someone's behavior "does not comply with the facility rules and regulations").

### C. The Birth of the Unnecessary and Wanton Infliction of Pain Standard.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[84]

Through its somewhat murky analysis of the demands of the Eighth Amendment, the U.S. Supreme Court has carved out limits on the types of punishment and prison conditions that are permissible under the Constitution.[85] The Court's jurisprudence can thus be divided between cases addressing the kinds of *punishment* allowed and those interpreting the amendment as reaching *prison conditions* themselves.[86]

Until *Weems v. United States,*[87] the Court had not considered the Eighth Amendment's punishments clause. Focusing on the language employed in the amendment's other clauses, the Court concluded that the Constitution not only forbids specific punishments, such as disembowelment and physical torture, but also prohibits punishments which "by their excessive length or severity are greatly disproportioned to the offenses charged."[88] Almost half a century later, in dicta that would come to articulate the underlying standard required by the amendment, the Court qualified in *Trop v. Dulles* how this proportionality ought to be understood. It announced that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society".[89] The inquiry to determine whether a punishment violates these evolving standards of decency, however, was not fleshed out until the late 20th century. Through two death penalty cases, the Court established that punishments must accord with "the dignity of man,"[90] finding excessive punishments to be unconstitutional.[91]

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84. U.S. CONST. amend. VIII.

85. For a thorough summary of the Court's Eighth Amendment jurisprudence, see Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L. J. 741 (2015). *See also*, Thomas E. Robins, Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eighth Amendment Jurisprudence, 119 PENN ST. L. REV. 885 (2015).

86. Bennion, *supra* note 85, at 764–65.

87. Weems v. United States, 217 U.S. 349 (1910).

88. *Id*. at 371.

89. Trop v. Dulles, 356 U.S. 86, 101 (1958).

90. Furman v. Georgia, 408 U.S. 238, 270–71 (1972) (Brennan, J., concurring).

91. *Id.* at 270–72; Gregg v. Georgia, 428 U.S. 153, 173 (1976).

Through the Court's decision in *Gregg v. Georgia,* the two-part test for evaluating whether a punishment was excessive was born. The inquiry requires contemporary values to be examined in light of the "objective indicia" of public opinion; the punishment is then weighed against these values to determine whether the penalty is excessive.[92]

It was not until 1976—the same year the two-part test was announced—that the Court considered whether the Eighth Amendment applied to prison conditions. The idea that it did was previously neither obvious nor broadly recognized.[93] In *Estelle v. Gamble*,[94] the Court finally opened that Pandora's box. *Estelle* dealt with the provision of medical care to incarcerated individuals,[95] and thus not directly with the use of prison infrastructure against detainees, such as solitary confinement or continuous lighting inside their cells. Nevertheless, the decision marked the birth of a new standard under the Eighth Amendment. The Constitution, *Estelle* held, proscribes the "unnecessary and wanton infliction of pain" against incarcerated individuals.[96] Still, it would take the Court almost twenty more years to clarify what an individual must show to demonstrate that prison conditions violate the Eighth Amendment. The Court eventually articulated this doctrine in *Wilson v. Seiter*, where the Court set out two central requirements.[97] First, the challenged condition must be proven to be sufficiently serious; second, prison officials, or the government, must have acted with deliberate indifference to the harm caused by the challenged condition.[98] In the years that followed, the Court distilled the meaning and scope of the requirements set forth in *Wilson* further. In *Helling v. McKinney*, the Court held that the challenged condition need not have caused actual harm to be sufficiently serious, finding that substantial risk of injury is enough.[99] Subsequently, in *Farmer v. Brennan*, the Court further clarified that prison officials or the government must have been aware of this excessive risk and still disregarded it.[100]

Two prongs have thus been fleshed out of the *Estelle* test. The first is an objective prong which requires actual deprivation (or

92. *Gregg*, 428 U.S. at 173.
93. Bennion, *supra* note 85, at 764.
94. Estelle v. Gamble, 429 U.S. 97 (1976).
95. *Id*. at 99–102.
96. *Id*. at 104.
97. Wilson v. Seiter, 501 U.S. 294, 299–304 (1991).
98. *Id*.
99. Helling v. McKinney, 509 U.S. 25, 36 (1993).
100. Farmer v. Brennan, 511 U.S. 825, 836–38 (1994).

substantial risk thereof) of a basic right or need through a prison condition or practice. The second is a subjective prong which calls for evidence of officials' deliberate indifference to the harm created by said condition or practice.[101] The *Estelle* test, however, does not immediately provide an avenue for its application in cases of civil detention such as immigration detention.[102] That is where the DTA steps in.

## II. WHAT IS YET TO BE WRITTEN ON THE DTA: APPLYING THE DTA TO IMMIGRATION DETENTION

While the Eighth Amendment would intuitively provide the most obvious mechanism for critiquing the seemingly unfettered implementation of solitary confinement, the impossibility of extending its protections to civil detention has led opponents to resort to alternative avenues. In recent years, advocates for restrictions on segregated isolation have increasingly looked to international human rights law, particularly the Convention Against Torture (CAT),[103] for arguments for its impermissibility, as have opponents of immigration detention more broadly.[104] In looking for alternative legal

101. Lauren Jaech, *Obstacles to Proving 24-Hour Lighting Is Cruel and Unusual Under Eighth Amendment Jurisprudence*, 97 WASH. L. REV. 1087, 1091 (2022).

102. Since civil detention is not the consequence of a criminal conviction, and therefore technically not a punishment, it has laid outside of the scope of Eighth Amendment protections. *See Farmer*, 511 U.S. at 832. The protections of the Eighth Amendment have only extended to defendants in civil proceedings under the Amendment's Excessive Fines clause, which covers cases of civil forfeiture. *See* Austin v. United States, 509 U.S. 602, 609–10 (1993).

103. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (entered into force June 26, 1987). As an international human rights treaty, CAT requires state parties to take measures to prevent torture in any territory under their jurisdiction. *Id.* art. 2.

104. *See e.g.*, Voreh, *supra* note 12. As Voreh points out, the reservations, understandings, and declarations (referred to collectively as RUDs) with which the United States ratified and signed CAT significantly limited the scope and usefulness of the international convention. First, the United States endorsed a much narrower definition of torture than that established by CAT and accepted by other international parties. Second, the United States declared that CAT is not a self-executing treaty and enacted no legislation to provide for its enforcement, making it impossible for plaintiffs in the United States to rely on CAT to enforce their rights. Voreh, *supra* note 12, at 307–08.

ammunition against these practices, however, advocates have by and large failed to extensively engage with the DTA.[105]

Enacted while the ink of the Abu Ghraib pictures was still wet,[106] most of the DTA deals with issues pertaining to military detainees in American custody: interrogation techniques, status review procedures for detainees not on U.S. soil, and the training of Iraqi forces on detainee treatment.[107] In symphony with *Hamdan v. Rumsfeld*[108] and *Boumediene v. Bush*,[109] most scholarly articles addressing the Act have focused on its impact on the rights of noncitizen detainees held outside the United States. Where some have built on the Court's analysis and evaluated detainees' due process rights under Section 1005 in the post-*Hamdan*-*Boumediene* era,[110] others have dissected Section 1002's prescribed standards for

105. *See supra* note 12 and accompanying text.

106. The infamous depictions of American troops abusing detainees at the Abu Ghraib detention site in Iraq precipitated a cataclysmic scandal in American military and foreign policy. The degrading treatment captured by the scenes at Abu Ghraib, coupled with the revelations that senior military officers—and, according to some allegations, Defense Secretary Donald Rumsfeld—had authorized the use of enhanced interrogation techniques, prompted intense public outcry, raising questions about the United States' compliance with international law. *See* Suleman, *supra* note 8, at 257–58.

107. DTA §§ 1002, 1005, 1006; Suleman, *supra* note 8, at 259–64. In fact, Senator John McCain introduced and sponsored the Act. McCain's experience as a POW during the Vietnam War heavily influenced his views on how the United States ought to treat military detainees during the War on Terror. Jennifer Williams, *Sen. John McCain's Complicated Moral Legacy on Torture*, VOX (Sept. 1, 2018), https://www.vox.com/policy-and-politics/2018/8/25/17778146/john-mccain-dies-torture-legacy-waterboarding-enhanced-interrogation-cia [https://perma.cc/96YV-A3JF].

108. Hamdan v. Rumsfeld, 548 U.S. 557, 576 (2006) (holding that the DTA did not strip the Court of jurisdiction to hear the habeas petition of a noncitizen *enemy* combatant because the appeal had been filed before the DTA was enacted).

109. Boumediene v. Bush, 553 U.S. 723 (2008) (holding that habeas rights extend to noncitizens detained by the U.S. outside American territory and finding that the DTA did not provide an adequate alternative for habeas hearings).

110. *See, e.g.*, Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352 (2010); Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L. J. 87 (2008); Dimitri D. Portnoi, *Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. REV. 293 (2008); John A. Sholar Jr., *Habeas Corpus and the War on Terror*, 45 DUQ. L. REV. 661 (2007).

interrogation techniques and the loopholes in the provision's bar against torturous methods.[111]

Few, however, have scrutinized the potential of Section 1003—the exception to the Act's fixation on military activities.[112] Unlike the other provisions, Section 1003 is not narrowly tailored to only cover Guantanamo detainees or others similarly situated; instead, it offers a facially wider scope.[113] Its first subsection reads: "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."[114] Still, scholars who have considered Section 1003 have limited their analyses to the protections it affords *military* detainees.[115] Similarly, none of the few articles mentioning the DTA

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111. *See, e.g.*, Alan W. Clarke, *De-Cloaking Torture: Boumediene and the Military Commission*s *Act*, 11 SAN DIEGO INT'L L.J. 59 (2009).

112. DTA § 1003.

113. *Id*.

114. *Id*. at § 1003(a). The full text of Section 1003 reads as follows:

> (a) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.
>
> (b) CONSTRUCTION.—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.
>
> (c) LIMITATION ON SUPERSEDURE.—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.
>
> (d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

115. *See, e.g.*, Katrina Carmichael, *The Unconstitutional Torture of an American by the U.S. Military: Is There a Remedy Under* Bivens*?*, 29 GA. ST. U.L. REV. 1093 (2013); David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343 (2011).

in the context of immigration delve into the Act extensively—in most cases, not beyond a footnote—and none address the fundamental question of why the DTA may be applicable to immigrants in detention.[116] Scholarly literature has also neglected how Section 1003 directly tracks Eighth Amendment jurisprudence and its intent to reproduce the protections and rights furnished by the Amendment.[117]

Section 1003 anchors this Note's thesis, prompting the first legal question it seeks to dissect: in the absence of case law on the matter,[118] can the DTA be applied to immigration detention? By examining the Act through the two dominant sources for statutory interpretation, the statute's text and its legislative history,[119] this Part posits that the DTA covers immigration detention and effectively provides a mechanism for incorporating Eighth Amendment

116. *See*, *e.g.*, Voreh, *supra* note 12 (briefly stating the applicability of the DTA to immigration, but building no argument to support that claim); Andrew Bramante*, Ending Indefinite Detention Of Non Citizens*, 61 CASE W. RES. L. REV. 933 (2011) (exploring the DTA in reference to detainees' right to a writ of habeas corpus, but overlooking Section 1003 and solitary confinement); Zivec, *supra* note 12 (mentioning the possibility of applying the DTA to detained immigrants, but omitting an extensive discussion of the act and its applicability to solitary confinement); Papst, *supra* note 12 (mentioning the DTA in a footnote and suggesting that it could be helpful in protecting immigrants in detention).

117. DTA § 1003(d) ("In this section, the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States . . . .").

118. Section 1003 rarely comes up in case law, and none of the few cases in which it does unfold in the immigration context. *See*, *e.g.*, Doe v. Rumsfeld, 683 F.3d 390 (D.C. Cir. 2012) (addressing DTA claims regarding torturous treatment while detained in Iraq); Ning Ye v. Police Dep't of New Castle, Delaware (NCCPD), No. 18-1781 (MN), 2020 WL 4501919 (D. Del. Aug. 5, 2020) (dismissing DTA claims brought against county police who had arrested plaintiff as the plaintiff was never "in the custody or control of the United States government"); Carpenter v. Kloptoski, No. 1:08-CV-2233, 2011 WL 995967 (M.D. Pa. Mar. 17, 2011) (finding that plaintiff's DTA claims after falling in the shower in a state correctional facility do not hold because he was never in the custody of the U.S. government).

119. While these two interpretative tools can be said to coincide with the two major interpretative approaches—textualism and purposivism—the analysis is not intended to be articulated along the division between the two camps. Rather, given that the two approaches can and often do overlap, this Note emphasizes that the primary tools for interpreting statutes favor concluding that the DTA applies to immigrant detainees. For an analysis of purposivist methods, see *The Rise of Purposivism and Fall of* Chevron*: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227 (2017). For an overview of the evolution of the different strands of textualism, see Tara Leigh Grove, *Which Textualism?,* 134 HARV. L. REV. 265 (2020).

protections to civil detention. Section II.A will begin by dissecting the Act's text while Section II.B explores the legislative history underpinning its enactment.

### A. The Letter of the Act Reflects the DTA's Applicability

As always, we begin with the text of the statute.[120]

Following the Court's blueprint, this Section first examines the meaning of the key statutory terms in Section 1003,[121] before assessing how they impact the meaning of Section 1003 as a whole and its applicability to noncitizens in detention.

The first subsection of Section 1003 reads:

> IN GENERAL.—No **individual** in the **custody** or **under the physical control** of the United States Government, regardless of **nationality** or **physical location**, shall be subject to cruel, inhuman, or degrading treatment or punishment.[122]

The key terms and phrases of the subsection, as highlighted in the text, are "individual," "custody," "under the physical control," and "cruel, inhuman, or degrading treatment or punishment."

Merriam-Webster defines *individual,* noun, as "a particular being or thing as distinguished from a class, species, or collection," such as "a single human being as contrasted with a social group or institution," or a "particular person."[123] *Custody* is defined as "immediate charge and control (as over a ward or a suspect) exercised by a person or an authority."[124] Thus, if someone is in the custody of

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120. Limtiaco v. Camacho, 549 U.S. 483, 488 (2007).

121. Given the impossibility of finding a 2005 edition of Merriam-Webster's dictionary, this Section relies on the most recent edition, the online edition updated in 2023. Since the DTA was enacted relatively recently, and given that there are probably no substantial differences between the two editions, the author believes using the more recent one will not negatively impact the analysis.

122. DTA § 1003(a) (emphasis added).

123. *Individual*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/individual [https://perma.cc/28CK-5GTB]. Similarly, Oxford Dictionary defines "individual" as "single human being, as distinct from a particular group, or from society in general." *See Individual*, OXFORD ENGLISH DICTIONARY, https://doi.org/10.1093/OED/6599272371 (on file with the *Columbia Human Rights Law Review*).

124. *Custody*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/custody [https://perma.cc/84DX-WSSD]. Oxford Dictionary provides both a broader and a narrower definition. The broader definition reads, "The charge or care of something or someone; protection, defence; guardianship . . . also more generally: possession. Chiefly with of, specifying

another, they are under the immediate *charge* and *control* of that person. *Charge,* noun, means "management, supervision."[125] *Control,* noun, embodies the act of *controlling,* meaning "to exercise restraining or directing influence over" something or someone, or "to have power" over someone or something.[126] Since *physical* is defined as "of or relating to the body,"[127] *physical control* refers to the act of exercising restraint or directing influence over someone's body, or having power over someone's body.

Therefore, Section 1003 is not limited to military detainees. It covers people not based on who they are but based on their relation to the U.S. government. Those persons over whom the federal government exercises power or influence—be it in the form of supervision or restraint over their physical bodies—are included within the Act. The statute clarifies its broad scope, as it applies "regardless of nationality or physical location."[128] The phrase serves to clarify that individuals will not be excluded from Section 1003's protections based on them not being American citizens, nor based on where they are held.

Immigrants in detention are thus clearly protected by Section 1003. First, immigrants are, despite the repeated use of the term "aliens" in American jurisprudence,[129] people.[130] Second, immigrants

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either the custodian, or the thing or person in his or her charge." The narrower definition is more closely tailored to the context at hand, stating, "The state of being detained by the police or other law enforcement officers; esp. confinement in a prison, police station, etc." *See Custody*, OXFORD ENGLISH DICTIONARY, https://doi.org/10.1093/OED/1144026790 (on file with the *Columbia Human Rights Law Review*).

125. *Charge*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/charge [https://perma.cc/UW66-3DM9].

126. *Control*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/control [https://perma.cc/8F83-TV52]. Similarly, Oxford Dictionary defines "control" as "[t]he fact or power of directing and regulating the actions of people or things; direction, management; command." *See Control*, OXFORD ENGLISH DICTIONARY, https://doi.org/10.1093/OED/8104960479 [https://perma.cc/H29F-S2Q8].

127. *Physical*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/physical [https://perma.cc/YEM4-S8GH]. Oxford Dictionary provides an identical definition: "Of or relating to the body." *See Physical*, OXFORD ENGLISH DICTIONARY, https://doi.org/10.1093/OED/9349674178 (on file with the *Columbia Human Rights Law Review*).

128. DTA § 1003(a).

129. *See e.g.*, Demore v. Kim, 538 U.S. 510, 513 (2003) (using the term "alien" throughout the entire opinion); Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101) (employing the term "alien" as a legal category).

in ICE detention are either in the U.S. government's custody, under its physical control, or both. Included within the meaning of U.S. government are all the federal agencies that carry out the different administrative functions of the State, including DHS and its enforcing arm, ICE.[131] ICE detains immigrants pursuant to congressional authority.[132] Once detained, immigrants are physically prevented from escaping custody by being placed in detention centers that effectively function as correctional facilities.[133] They are not allowed to leave pending the resolution of their removal proceedings.[134] The fact that immigrants are not U.S. citizens is irrelevant, as is whether they are held in private detention centers or ICE-managed facilities. In both cases, DHS is the agency either directly handling their custody or contracting out the physical facet to their custody; ipso facto, immigrants' presence in detention centers directly stems from DHS' power over them.

The specific protections afforded to those covered by Section 1003 are captured by the other key phrase in the first subsection: "cruel, inhuman, or degrading treatment or punishment."[135] Subsection (d) directs the interpreter on how this phrase ought to be understood. Subsection (d) reads:

> In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms

130. The term "alien" in American jurisprudence has served to construe noncitizens as an institutionalized other, separate from the American citizen "us" or "we." For an extended analysis of the implications of the use of the term "alien", see Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 292 (1996).

131. *Immigration and Customs Enforcement*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/publications-library/immigration-and-customs-enforcement [https://perma.cc/CC7V-92WE].

132. INA § 236. For the mechanisms of immigration detention, see *supra* Section I.A.

133. Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 613 (2010).

134. INA § 236(c). For a thorough explanation, see *supra* Section I.A.

135. DTA § 1003(a).

> of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.[136]

Section 1003, therefore, does not provide a static laundry list of protections, nor does it prohibit a monolithic series of treatment against detainees.[137] Instead, Section 1003 reproduces the obligations under CAT and, as is fundamental to the purposes of this Note, mirrors the standards required or the treatments prohibited under the Eighth Amendment. As such, Section 1003's text demonstrates that the provision not only encompasses immigrants in detention but, further, is imbued with Eighth Amendment protections.

### B. The Spirit Behind the DTA: Congress Understood the Far Reach of the Act

The words articulating the text of the DTA were not penned in a vacuum. Section II.B now turns to the spirit animating the passage of the Act—congressional records, records of congressional hearings,[138] and Congressional Research Service (CRS) reports—to

136. DTA § 1003(d). Subsection (d)'s reference to the Convention Against Torture serves to reemphasize the U.S. commitment to CAT and does not set forth a different definition for what will be considered 'cruel or degrading treatment'. Indeed, in signing CAT, the U.S. established that it "considers itself bound by the obligation . . . to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term . . . means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." *See* 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990).

137. While irrelevant to a text-focused inquiry, this is supported by the congressional history of the DTA's enactment. *See* LEE WOOD, CONG. RSCH. SERV., RS22312, OVERVIEW AND ANALYSIS OF SENATE AMENDMENT CONCERNING INTERROGATION OF DETAINEES 4 (2005) ("The scope of the Fifth, Eighth, and Fourteenth Amendment prohibitions upon harsh treatment or punishment is subject to evolving case law interpretation and constant legal and scholarly debate. The types of acts that fall within 'cruel, inhuman, or degrading treatment or punishment' contained in the McCain amendment may change over time and may not always be clear.").

138. The available records of congressional discussions do not include any references to Section 1003. *See* Dep't of Def. Authorization for Appropriations for Fiscal Year 2005: Hearing on S. 2400 Before the S. Comm. on Armed Servs., 108th Cong. (2004); Dep't of Def. Appropriations for 2006, Part 2: Hearing Before Subcomm. of the H. Comm. on Appropriations, 109th Cong. (2006); Dep't of Def. Appropriations for 2006, Part 1: Hearing Before Subcomm. of the H. Comm. on Appropriations, 109th Cong. (2006); Dep't of Def. Authorization for Appropriations for Fiscal Year 2006: Hearing Before the S. Comm. on Armed Servs., 109th Cong. (2005); Detainee Operations at Guantanamo Bay: Hearing Before the H. Comm. on Armed Servs., 109th Cong. (2005); Def. Health Program Overview: Hearing

show that the statute's plain meaning was anticipated and sanctioned by the enacting lawmakers.

An examination of all the available legislative documents reveals a clear thread through every official recorded discussion of the DTA. Two main goals drove the passage of the Act, and one major concern shaped its limitations. Congress sought to (1) establish uniform standards for detainee treatment and (2) provide a public facing response to the abuses committed at Abu Ghraib. This was joined by a persisting concern to limit "terrorists" ability to seek redress in federal court.

The most significant objective behind the Act, judging by the prevalent debate over its implications, was the provision of uniform standards for detainee interrogation.[139] Congressional records on the matter repeatedly addressed this aspect of the Act, embodied by Section 1002,[140] focusing on two potential consequences of its enactment. Detractors of the DTA highlighted the impact that standardized interrogation practices may have on the United States' ability to effectively gather intelligence during the War on Terror.[141] At times, these detractors almost suggested that treatment toeing the line of torture ought to be permissible insofar as it allowed for intelligence collection.[142] Supporters of Section 1002, on the other hand, emphasized how uniform interrogation practices would actually

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Before the Mil. Pers. Subcomm. of the H. Comm. on Armed Servs., 109th Cong. (2005); Funding Needs for Pandemic Influenza Preparedness, Hearing Before Subcomm. of the S. Comm. on Appropriations, 109th Cong. (2005); Dep't of Labor, Health and Human Services, Education, and Related Agencies Appropriations for Fiscal Year 2006: Subcomm. of the S. Comm on Appropriations, 109th Cong. (2005).

139. *See* 151 Cong. Rec. S14257 (2005); 151 Cong. Rec. H11580 (2005); 151 Cong. Rec. S11062 (2005); *President's Statement on the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006*, WHITE HOUSE (Dec. 30, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051230-9.html [https://perma.cc/DYV9-ATWG].

140. *See* DTA § 1002 ("No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.").

141. 151 Cong. Rec. S14273 (2005).

142. *See, e.g.*, 151 CONG. REC. S14273 (2005) (statement of Sen. John Cornyn) ("Although I adamantly oppose torture, I believe we must use every legal means—including aggressive interrogation methods that some may find objectionable—to get intelligence that will save American lives.").

*strengthen* American intelligence reports, arguing that torturous treatment does not produce reliable intelligence.[143] Insofar as they solely focused on intelligence collection, neither clarified how Section 1003 ought to be understood.

Despite this, some of the rebuttals of Section 1002's supporters reveal one of the animating principles behind Section 1003. Supporters of Section 1002 anchored the case for uniform interrogation standards in the lack of clear guidance provided to the military, asserting almost a congressional obligation to clarify to troops what conduct the legislature deemed permissible.[144] Their arguments, however, were not always limited to the context of interrogation. Senators and Congressmen frequently asserted that military personnel needed and deserved clear guidelines as to how detainees generally ought to be treated.[145] In this light, Section 1003 would gain form as a statute that, along with Section 1002, seeks to clarify what kind of treatment may not be inflicted on detainees by providing benchmarks for what is prohibited.[146]

This interpretation of the spirit behind Section 1003 is in line with the DTA's second major objective: providing a public facing response to the abuses committed at Abu Ghraib.[147] Throughout the

143. *See, e.g.*, 151 CONG. REC. H11580 (2005) (statement of Rep. John Murtha) ("Furthermore, torture, cruelty and abuse are not effective methods of interrogation. Torture may not yield reliable actionable information and can lead to false confessions.").

144. *See, e.g.*, 151 CONG. REC. H11581(2005) (statement of Rep. Ellen Tauscher) ("Such clarity in treatment of detainees is vitally needed as continuing revelations of abuse of prisoners in our custody damages the reputation of our Armed Forces abroad, undermines the trust of our allies, and threatens the lives of U. S. service men and women who might be captured by the enemy."); 151 CONG. REC. S11075 (2005) (statement of Sen. Ted Kennedy) (attributing the atrocities in Abu Ghraib to lack of "directions to regulate that treatment").

145. *See, e.g.*, 151 CONG. REC. H11581 (2005) (statement of Rep. Ellen Tauscher) ("We owe it to the rank and file who fight our Nation's wars and who defend our flag around the world to adopt the McCain/Harman language."); 151 CONG. REC. S11070 (2005) (statement of Sen. Chuck Hagel) ("I cosponsored this amendment because the men and women making sacrifices to defend our country deserve clear standards for the treatment of detainees under U.S. control.").

146. *See, e.g.*, 151 CONG. REC. S11062 (2005) (statement of Sen. John McCain) ("Several weeks ago, I received a letter from CPT Ian Fishback . . . . Over 17 months, he struggled to get answers from his chain of command to a basic question: What standards apply to the treatment of enemy detainees? . . . In his remarkable letter, he pleads with Congress, asking us to take action to establish standards to clear up the confusion . . . .").

147. *See* 151 CONG. REC. S14254 (2005) (statement of Sen. Patrick Leahy ("I am encouraged that more than 18 months after the revelation of atrocities at Abu

discussions surrounding the Act, Congress repeatedly referenced the need to send an unequivocal message to the international community, particularly the Arab and Muslim world, in the wake of the Abu Ghraib pictures.[148] Supporters and opponents of the DTA alike appeared concerned with preserving the legitimacy of the War on Terror in the aftermath of revelations of American abuses.[149] All seemed to agree that the Act provided a way of signaling that the United States would respect its obligations under CAT and the Geneva Convention to not unlawfully mistreat detainees and other POWs.[150] Significantly, recorded discussions of how this would be

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Ghraib, we are finally willing to confront this issue."); CONG. REC. H11580 (2005) (statement of Rep. John Murtha) ("This amendment would restore our credibility, honors our war fighters and affirms the value of this great country, the values that belong to the United States of America."); 151 CONG. REC. S11063 (2005) (statement of Sen. John McCain) ("These and other distinguished officers believe the abuses at Abu Ghraib, Guantanamo, and elsewhere took place in part because our soldiers received ambiguous instructions.") ; 151 CONG. REC. H4773 (2005) (statement of Rep. Lynn Woolsey) ("Prisoners have been tortured in Iraq, Afghanistan, and Guantanamo Bay. Considering the widespread use of torture, no one can claim that these are isolated incidents.").

148. *See* 151 CONG. REC. S14272 (2005) (statement of Sen. John Kerry) ("This failure on the part of the administration has sullied our reputation as a Nation, and hurt our efforts to promote democracy and human rights in the Arab and Muslim worlds."); 151 CONG. REC. S11255 (2005) (statement of Sen. Russell Feingold) ("I was proud to vote for Senator McCain's amendment on interrogation policy because it should help to bring back some accountability to the process and restore our great Nation's reputation as the world's leading advocate for human rights."); CONG. REC. H4774, (2005) (statement of Rep. Lynn Woolsey) (emphasizing that "[a]t a time when the U.S. is courting the support of the international world—particularly the Arab world—the torture of foreign prisoners . . . gives the world's extremists what they believe to be a legitimate reason to hate the United States" and thus "[t]here has been no better recruiting tool for al Qaeda than preemptively attacking Iraq and the events at Abu Ghraib prison in Iraq").

149. *See* 151 CONG. REC. S11063 (2005) (sharing statement contained in a letter by a coalition of supporters about how "[t]he abuse of prisoners hurts America's cause in the war on terror, endangers U.S. service members who might be captured by the enemy, and is anathema to the values Americans have held dear for generations"); 151 CONG. REC. H11580 (2005) (statement of Rep. John Murtha) ("The United States of America and the values we reflect abhor human rights violators and uphold human rights. No circumstance whatsoever justifies torture. No emergencies, no state of war, no level of political instability.").

150. *See* 151 CONG. REC. H11582 (2005) (statement of Rep. Ed Markey) ("We need to send a signal to the administration and the rest of the world that we will not dodge our treaty obligations to our international allies under the U.N. Convention Against Torture."); 151 CONG. REC. S14262 (2005) (statement of Sen. Lindsey Graham) ("We have given them more process than our own soldiers and

achieved did not go further than mentioning the DTA as some sort of magical mechanism that would ensure compliance. Beyond condemning the horrors of Abu Ghraib,[151] and at times recognizing the systemic nature of the abuses committed,[152] the debate on the Act did not delve into the sort of treatment that would be considered acceptable under the DTA.[153] In fact, the conversations focused more on the Act's positive repercussions for American soldiers. Proponents and opponents of the DTA alike highlighted how direct compliance with CAT or the Geneva Convention would guarantee better treatment was afforded to American POWs by enemy forces. At times, this impact was even presented as one of the objectives behind providing better treatment to those detained by the United States.[154]

The goals of providing uniform interrogation standards and a blanket recognition that torture would not be used by American

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marines would enjoy under the Geneva Convention."); 151 CONG. REC. S11064 (2005)(statement of Senator Theodore Stevens) ("They are telling us that they know the [CAT] requires the United States to ensure that torture is a crime . . . or to prevent any of the entities that are under the control of the United States from any acts of cruel, inhumane, or degrading treatment or punishment.").

151. *See, e.g.*, 151 CONG. REC. H11580 (2005) (statement of Rep. James Moran) ("In the wake of the scrutiny and embarrassment . . . endured following the treatment of detainees at Abu Ghraib and Guantanamo Bay, it is imperative that we proclaim to the rest of the world that this policy reflects the law of the land and the conscience of our country.").

152. For example, Representative Woolsey gave the following statement:

> Prisoners have been tortured in Iraq, Afghanistan, and Guantanamo Bay. Considering the widespread use of torture, no one can claim that these are isolated incidents, that it's merely the work of 'a few bad apples.' The fact that torture occurred in separate places, and under the command of different interrogators, leads me to believe that a more systemic failure took place, a system that starts from the very top, not from a few misguided enlisted personnel.

151 CONG. REC. H4773 (2005) (statement of Rep. Lynn Woolsey). *See also* MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL33655, INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT 1 (2007) ("Amidst controversy regarding U.S. treatment of enemy combatants and terrorist suspects detained in Iraq, Afghanistan, and other locations, Congress recently approved additional guidelines concerning the treatment of persons in U.S. custody and control.").

153. *See* 151 CONG. REC. S11063 (2005); CONG. REC. H11582 (2005); 151 CONG. REC. S14262 (2005).

154. *See e.g.,* CONG. REC. H11582 (2005) (statement of Rep. Ed Markey) ("If we do not approve [the DTA], we will set a precedent that torture is okay for all and open up our own troops to face torture at the hands of our enemies. Our troops already face enough risks. Shouldn't we protect them any way we can?").

forces were curtailed by a generalized agreement that the DTA should not provide "terrorist" detainees with either a private cause of action or the constitutional guarantee to bring a habeas corpus petition in federal court.[155] Discussions of the importance of proscribing habeas petitions dominated most of the congressional conversations on the Act,[156] further suggesting that the objective of improving detainee treatment was primarily self-serving.[157]

The broad objectives of the DTA—to address repercussions of the War on Terror and the treatment of POWs and other conflict related detainees—do not, however, contradict that Section 1003's reach covers *all* detainees, not only those held in Guantanamo, Iraq, or Afghanistan. First, congressional records reflect at least two instances in which this ample reach was pointed out. Senator Stevens highlighted the Section's breadth, emphasizing that it "deal[s] with anyone who is intercepted now anywhere in the world who, regardless of nationality or physical location, is in custody or physical control of the United States."[158] Congressman Levin similarly remarked that the DTA "provides a single standard—'cruel, inhuman, or degrading treatment or punishment'—without regard to what agency holds a detainee, what the nationality of the detainee is, or where the detainee is held."[159] That neither these characterizations of

155. *See e.g.,* 151 CONG. REC. S14262 (2005) (statement of Sen. Samuel Brownback) ("I supported the [DTA]—I think that it is important to ensure that detainees are treated humanely. But I would not support allowing those detainees to file lawsuits against our armed forces."); 151 CONG. REC. S11066 (2005) (statement of Sen. Lindsey Graham) (discussing the importance of including a habeas stripping provisions within the DTA by arguing "it is absurd that an enemy combatant, noncitizen terrorist has habeas corpus rights, and the reason they do is because we are giving no guidance to the courts about how we want these people treated"). A discussion of this apparent congressional view that noncitizens deserve fewer constitutional protections that citizens is unfortunately outside the scope of this Note, but it is important to highlight in the immigration context, particularly in light of recent Supreme Court decisions such as *Demore v. Hyung Joon Kim*, 538 U.S. 510, 513 (2003), *supra* note 37, which seem to suggest that noncitizens may not deserve the same protections as citizens.

156. *See* e.g., 151 CONG. REC. S14257 (2005) (statement of Sen. Lindsey Graham) ("We have provided a fair alternative judicial process [to a full judicial process in federal court] for the detainees with our provisions. In fact, we have been more than fair. We have given them more process than our own soldiers and marines would enjoy under the Geneva Convention.").

157. WHITE HOUSE, *supra* note 139 ("As the sponsors of this legislation have stated, however, they do not create or authorize any right for terrorists to sue anyone, including our men and women on the front lines in the war on terror.").

158. 151 CONG. REC. S11062 (2005).

159. 151 CONG. REC. S14257 (2005).

Section 1003 nor its literal letter were contradicted or questioned by other members of Congress suggests that the understanding of the Section as all-encompassing was widely accepted at the time of the DTA's enactment.[160] In fact, the way in which the Act was represented during congressional debates on the passage of the Military Commissions Act of 2006 (MCA)—the successor to the DTA[161]—further supports this interpretation of the legislature's understanding.[162]

Second, the Act's own objectives, as reflected by congressional records, arguably require the broad reach of Section 1003. The DTA was undeniably a response to U.S. actions during the War on Terror. One of President Bush's key actions in the aftermath of the September 11th attacks was the creation of the administrative infrastructure that currently governs immigrant detention, DHS, and its subsidiary, ICE.[163] In its goal to "safeguard the American homeland,"[164] the new agency served to systematically target immigrant communities and led to an explosion in the number of immigrant detainees to the daily numbers seen today.[165] In fact, DHS's creation administratively connected immigration enforcement with antiterrorism efforts, increasing funding for the new brand of security-driven immigration enforcement that facilitated the soar in detention rates.[166] Thus, the War on Terror did not only sweep up detainees abroad, but also directly led to innocent individuals being deprived of their freedom at home.[167]

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160. There is a general absence of statements contradicting these characterizations. *See* 151 CONG. REC. H4773 (2005); 151 CONG. REC. S11062 (2005); 151 CONG. REC. S11255 (2005); CONG. REC. H11582 (2005); 151 CONG. REC. S14265 (2005).

161. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

162. *See* CONG. REC. S10354 (2006) (statement of Sen. Carl Levin) ("Last year, this Congress took an important stand for the rule of law by enacting the Detainee Treatment Act, which prohibits the cruel, inhuman or degrading treatment of detainees in the custody of any U.S. agency anywhere in the world."). Note the Senator's emphasis on the fact that the DTA applies to *any agency*, no matter the physical location.

163. *Who Joined DHS*, DEP'T OF HOMELAND SEC. (Feb. 27, 2023), https://www.dhs.gov/who-joined-dhs [https://perma.cc/UE3W-GUDG].

164. WHITE HOUSE, THE DEPARTMENT OF HOMELAND SECURITY 497 (2023).

165. Naureen Shah, *20 Years Later, It's Time to Overhaul the Department of Homeland Security*, ACLU (Nov. 23, 2022), https://www.aclu.org/news/civil-liberties/20-years-later-its-time-to-overhaul-the-department-of-homeland-security [https://perma.cc/3MB4-VZ87].

166. *Id.*

167. *Id.*

If one of the DTA's objectives was to ensure compliance with humane standards over the course of the War on Terror and, if further development of the detention machine was a product of the War on Terror, it would be illogical for Congress to seek to exclude immigrants in detention from the Act's protections. The idea that Congress would simultaneously desire to ensure humane conditions for "terrorists"[168] while denying them to immigrants seems counterintuitive.

The analysis of the DTA's legislative history thus demonstrates the contention that Congress both understood and endorsed the far-reaching implications of Section 1003, supporting its applicability to immigrants in detention.

## III. THE DTA AND SOLITARY CONFINEMENT: A CASE STUDY ON THE ACT'S POTENTIAL IMPACT ON IMMIGRANTS' RIGHTS IN DETENTION

That a certain legal standard applies to a given practice is only the first step in determining whether said practice is impermissible. Thus, the DTA's application to immigration detention, and the subsequent incorporation of Eighth Amendment protections to this confinement context, does not necessarily prohibit placing asylum seekers in solitary confinement per se. To argue that the Eighth Amendment, through the link forged by the DTA, bars subjecting asylees to segregated isolation, one must establish that such use of solitary confinement constitutes an "unnecessary and wanton infliction of pain."[169]

Section III.A provides a summary of salient case law on solitary confinement, referring to the underlying scholarship concerning the Eighth Amendment.[170] Section III.B then turns to the

168. The term "terrorists" is placed in quotation marks to emphasize the fact that many of the victims of the American War on Terror, including a concerningly high number of those held in Guantanamo, were never informed of any formal charges against them or, in the case of those who were, many of the charges were proven to be bogus. *See* Hina Shamsi, *20 Years Later, Guantánamo Remains a Disgraceful Stain on Our Nation. It Needs to End*, ACLU (Jan. 11, 2022), https://www.aclu.org/news/human-rights/20-years-later-guantanamo-remains-a-disgraceful-stain-on-our-nation-it-needs-to-end [https://perma.cc/3WDN-Z86N] (discussing that the majority of men and boys at Guantanamo are held without charges or trial, and explaining the meaning of Guantanamo as a symbol of American "injustice […] and disregard for the rule of law.").

169. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

170. *See also supra* Section I.C (examining the Eighth Amendment jurisprudence underlying the *Estelle* test).

psychological impacts of segregated isolation, conceptualizing them as a tangible form of pain that consistently afflicts those subjected to solitary confinement. This Section seeks to establish two interconnected premises. First, the risk of causing harm through solitary confinement is high, and the kind of harm caused is severe. Second, there is widespread institutional knowledge of the risk and type of harm created. Finally, Section III.C integrates Sections III.A and III.B, applying the *Estelle* test for Eighth Amendment violations to the case of asylum seekers in segregated isolation. Section III.C thus shows that subjecting asylum seekers to solitary confinement violates the standard set forth by *Estelle*,[171] thereby also violating the Eighth Amendment and breaching the DTA.

### A. Courts on Solitary Confinement as Unnecessary and Wanton Infliction of Pain

Most relevant developments on the constitutionality of solitary confinement have not unfolded under the Supreme Court's guiding hand but have blossomed across various district court and circuit court decisions. In fact, beyond its articulation of the two-pronged *Estelle* test for the "unnecessary and wanton infliction of pain"[172]—objective deprivation of a right or need and subjective indifference to the harm—the Court has only once touched upon the issue of segregated isolation. In *Hutto v. Finney*, the Court adopted the district court's language in recognizing that solitary confinement could be unconstitutional "depending on the duration of the confinement and the conditions thereof."[173] Significantly, the Court neither questioned nor contradicted the lower court's finding that

171. While this Note and this particular Section focuses specifically on segregated isolation, this is but one application of the DTA to immigration. Besides striving to undermine the lawfulness of an inhumane practice, the argument that solitary confinement is impermissible under *Estelle* serves the functional purpose of fleshing out the connection woven by the DTA between detained immigrants' rights and Eighth Amendment protections. The case against segregated isolation thus simply completes the argument of DTA applicability; any other practice subject to Eighth Amendment scrutiny could take its place in the reasoning.

172. *Estelle*, 429 U.S. at 104 (defining the inquiry to determine whether a prison condition or practice is permissible under the Eighth Amendment); *see also supra* Section I.C (examining the Supreme Court's Eighth Amendment jurisprudence).

173. Hutto v. Finney, 437 U.S. 678, 685 (1978). The Court pointed out that both parties accepted the district court's finding of an Eighth Amendment violation and at no point in the opinion sought to correct this understanding. *Id.*

indefinitely holding detainees in overcrowded, segregated cells without enough beds while starving them violated the prohibition against cruel and unusual punishments.[174] Since *Hutto*, the Court has repeatedly refused to dive into the subject of solitary confinement.[175] Lower courts, however, have not had that option. In applying the minimal guidance provided by the Supreme Court, some lower courts have expressed concerns about detainees' well-being akin to those voiced by Justice Sotomayor in *Apodaca v. Raemisch*.[176] Some lower courts have conceptualized the mental anguish caused by solitary confinement and its impact on detainees' mental well-being as a harm that implicates the Eighth Amendment.[177] The timid jurisprudential trend favoring this line of argument helps answer this Note's second legal question: how does subjecting asylum seekers to solitary confinement constitute "unnecessary and wanton infliction of pain" as courts have defined that standard under the Eighth Amendment?

Perhaps the breakthrough case in carefully articulating how solitary confinement might unconstitutionally harm an individual's mental well-being was the 1995 California case of *Madrid v. Gomez*.[178] In *Madrid*, the district court examined a correctional

174. *Id.*

175. *See, e.g.*, Johnson v. Prentice, 601 U.S. ___, ___ (2023), *denying cert.*, 29 F.4th 895 (7th Cir. 2022) (Jackson, J., dissenting) (raising the issue of whether punitively denying a prisoner in solitary confinement almost all exercise for three years despite the absence of a security justification violates the Eighth Amendment); Petition for Writ of Certiorari at 1, Hope v. Harris, 143 S. Ct. 1746 (2023) (No. 20-40379), *denying cert.*, 861 F. App'x 571 (5th Cir. 2021) (asking the Court to resolve the existing circuit split on whether solitary confinement can ever run afoul of the Eighth Amendment); Apodaca v. Raemisch, 586 U.S. 931, 931 (2018), *denying cert.*, 864 F.3d 1071 (10th Cir. 2017) (rejecting a petition asking the Court to consider whether prison officials may permanently deprive inmates in solitary confinement of outdoor recreational activities without a security rationale).

176. *See Apodaca*, 586 U.S. at 931–35 (Sotomayor, J., concurring) (respecting the Court's denial of certiorari but explaining that members of the Court have repeatedly emphasized the concerning psychological effects of solitary confinement).

177. *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1231–32 (N.D. Cal. 1995) (discussing the psychological impact of solitary confinement on mentally ill individuals); Ind. Prot. & Advoc. Servs. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-CV-01317-TWP, 2012 WL 6738517, at *11–*17 (S.D. Ind. Dec. 31, 2012) (focusing on the toll of segregation on mentally ill incarcerated individuals); Ruiz v. Johnson, 37 F. Supp. 2d 855, 911–15 (S.D. Tex. 1999), *rev'd and remanded on other grounds sub nom.*, Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001) (highlighting isolation's effect on mentally ill detainees).

178. *Madrid*, 889 F. Supp.

facility's practice of subjecting mentally ill individuals to solitary segregation.[179] The court found that the defendant prison officials had presented no security reasons to justify the practice.[180] After determining that the conditions of solitary confinement were likely to exacerbate underlying health conditions, the court concluded that segregated isolation deprived inmates of a minimal level of civilized health.[181] The court thus held that the harm created by segregation was sufficiently serious to satisfy the objective prong under *Estelle*.[182] Similarly, after considering evidence of officials' awareness of the impact of solitary segregation on mentally ill individuals, the court found that officials' failure to improve confinement conditions pointed to deliberate institutional indifference, satisfying the subjective prong under *Estelle*.[183] The conditions challenged in *Madrid* are generally inherent to the implementation of solitary confinement: complete isolation for periods of almost twenty-four hours, curtailed visitation privileges, and limited access to recreational activities. These same restrictions are still prevalent forms of enforcing isolated segregation in prisons and detention facilities across the country.[184] The conditions of segregation did not, in and of themselves, trigger the holding of the *Madrid* court; instead, the court was concerned with the particular effect of solitary confinement on a specific subset of the

179. *Id.*

180. *Id.* at 1266.

181. *Id.*

182. *Id.* at 1266–67.

183. *Id*. The court highlighted how despite "defendants' knowledge that RES [reduced environmental stimulation] conditions have the potential for adversely affecting inmate mental health, defendants made no effort to investigate or address whether SHU [special housing unit] conditions were adversely affecting inmates suffering from serious psychiatric problems." *Id.* at 1237. Further, inmates who were suffering severe effects from conditions in isolation were generally "simply medicated with psychotropic drugs or ignored." *Id.*

184. *See, e.g.*, David H. Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 20 (2015) (explaining how detainees in solitary are generally deprived of most face-to-face contact with other human beings, only allowed out of their cells for one hour a day, and denied educational and job training opportunities afforded to other incarcerated individuals); *US: Look Critically at Widespread Use of Solitary Confinement*, HUM. RTS. WATCH (June 18, 2012), https://www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement [https://perma.cc/32VN-RAV9] (describing how detainees in solitary confinement "typically spend 22 to 24 hours a day locked in small, sometimes windowless, cells" and how "[t]hey lack opportunities for meaningful social interaction with other prisoners" since "most contact with staff is perfunctory and may be wordless" while "[p]hone calls and visits by family and loved ones are severely restricted or prohibited").

inmate population, as well as the kind and degree of the consequent harm.[185]

At least two other district courts have espoused this identical concern and line of reasoning. The courts in *Ruiz v. Johnson*[186] and *Indiana Protection and Advocacy Services Commission v. Commissioner, Indiana Department of Correction*[187] both examined the detrimental psychological impact of solitary confinement on mentally ill inmates. In both cases the courts determined that the predictable outcome of segregation was well-known by the officers and institutional players responsible for its implementation, just as the *Madrid* court had done.[188] Both courts therefore held that subjecting mentally ill individuals to solitary confinement violated the Eighth Amendment.[189] Their agreement with the *Madrid* court does not constitute an anomaly: almost every federal district court that has considered the constitutionality of placing mentally ill individuals in solitary confinement has ruled against it.[190]

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185. *Id. (*distinguishing mentally ill detainees and detainees at serious risk from other detainees placed in isolation and holding that placing the former in solitary constituted an Eighth Amendment violation).

186. Ruiz v. Johnson, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd and remanded on other grounds sub nom.*, Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001).

187. Ind. Prot. & Advoc. Servs. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-CV-01317-TWP, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012).

188. *Ruiz*, 37 F. Supp. 2d at 915; *Ind. Prot. & Advoc. Servs. Comm'n*, 2012 WL 6738517, at *22–23.

189. *Ruiz*, 37 F. Supp. 2d at 915 (holding that, as to mentally ill detainees in segregated isolation, "the severe and psychologically harmful deprivations of its administrative segregation units are, by our evolving and maturing society's standards of humanity and decency, found to be cruel and unusual punishment"); *Ind. Prot. & Advoc. Servs. Comm'n*, 2012 WL 6738517, at *22–23 (finding that conditions in the segregation unit did not per se violate the Eighth Amendment but holding that specifically placing detainees who were at a particular risk of suffering severe injury to their mental health *did* violate the Amendment).

190. *See* Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001) (finding plaintiffs' claim that the conditions of solitary confinement violated the Eighth Amendment rights of mentally ill inmates had a more than negligible chance of succeeding upon trial); Coleman v. Wilson, 912 F. Supp. 1282, 1320–21 (E.D. Cal. 1995) (finding that the policy of placing individuals with serious mental disorders in administrative segregation and in segregated housing units violated the Eighth Amendment); Casey v. Lewis, 834 F. Supp. 1477, 1549–50 (D. Ariz. 1993) (finding Eighth Amendment violation when mentally ill inmates were routinely transferred to isolated units despite knowledge of the harm this would cause to them); Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence of officials' failure to screen out from segregated housing

In contrast to the trend at the district court level towards carving out Eighth Amendment protection for mentally ill inmates, the only circuit court decision to date to have found that solitary confinement violated the Eighth Amendment did not focus on this particular subset of the incarcerated population.[191] In *Porter v.*

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individuals who, due to their mental illness, "are likely to be severely and adversely affected by placement there" warrants an Eighth Amendment claim).

191. *See* Porter v. Clarke, 923 F.3d 348, 354, 364 (4th Cir. 2019) (upholding lower court's grant of summary judgment based on undisputed evidence that "conditions of confinement on Virgina's death row—particularly inmates' prolonged periods of isolation—'created, at the least, a significant risk of substantial psychological or emotional harm'" (quoting Porter v. Clarke, 290 F. Supp. 3d 518, 533 (E.D. Va. 2018))). While *Porter v. Clarke* is the only decision from a federal court of appeals to have found an Eighth Amendment violation in a case of solitary confinement, at least four other circuits have also either suggested a willingness to recognize Eighth Amendment violations in cases of segregated isolation or expressed concerns as to the Eighth Amendment implications of the mental anguish caused by solitary confinement. *See, e.g.*, Clark v. Coupe, 55 F.4th 167, 181 (3d Cir. 2022) (reversing the district court's dismissal of plaintiff's Eight Amendment claim, and finding that allegations that officials imposed segregated isolation conditions they knew carried a substantial risk of psychological harm and caused plaintiff debilitating pain that served no penological purpose triggers Eighth Amendment scrutiny and protection); Porter v. Pa. Dep't of Corr., 974 F.3d 431, 447 (3d Cir. 2020) (holding that summary judgment was not warranted on the plaintiff's Eighth Amendment claim given the genuine issues as to whether subjecting an individual on death row to solitary confinement for thirty-three years created a substantial risk of serious psychological and physical harm and whether prison officials knew of and disregarded said risk); Gonzalez v. Hasty, 802 F.3d 212, 224 (2d Cir. 2015) (finding that solitary confinement can violate the Eighth Amendment based on the duration and conditions of confinement); Walker v. Shansky, 28 F.3d 666, 673 (7th Cir. 1994) (holding that "prolonged confinement in administrative segregation may constitute cruel and unusual punishment in violation of the Eighth Amendment."); Sheley v. Dugger, 833 F.2d 1420, 1429 (11th Cir. 1987) (finding that solitary confinement would violate the Eighth Amendment where "it shocks the conscience, is grossly disproportionate to the offense, or is totally without penological justification"); Jackson v. Meachum, 699 F.2d 578, 584–85 (1st Cir. 1983) (finding that in cases where the incarcerated individual faced "the threat of substantial, serious, and possibly irreversible psychological illness" from segregated isolation, the Constitution would require prison officials to consider feasible alternatives). Three circuits, however, hold the position that solitary confinement can *never* violate the Eighth Amendment. *See* Grissom v. Roberts, 902 F.3d 1162, 1174–75 (10th Cir. 2018) (finding no Eighth Amendment violation as long as incarcerated individual can communicate with others and has regular access to outside recreation spaces, reading materials, and medical care); Harden-Bey v. Rutter, 524 F.3d 789, 795–96 (6th Cir. 2008) (noting that solitary confinement cannot violate the Eighth Amendment because "placement in segregation is a routine discomfort that is part of the penalty that criminal offenders pay for their offenses against society, [so] it is insufficient to

*Clarke*, the Fourth Circuit examined the conditions of segregation imposed on Virginia death row inmates, including isolation for over twenty-three hours a day, continuous lighting inside their cells, and extremely limited visitation rights.[192] Citing psychological experts' testimonies and literature on solitary confinement, the court inferred that such conditions of isolated segregation inexorably led to severe psychological deterioration, thus satisfying *Estelle*'s objective harm requirement.[193] Unlike the district court decisions, the *Porter* court did not solely rely on direct evidence of officials' awareness to determine that the subjective prong of *Estelle* had been satisfied.[194] Rather, the circuit court emphasized that circumstantial evidence, including extensive scholarly literature and the professional background of correctional officers, established that the risk of harm was so obvious that the officers must have known it existed.[195]

The *Porter* decision, coupled with the district court decisions examined above, elucidates two takeaways about the status of Eighth Amendment jurisprudence on solitary confinement. First, psychological harm can be a cognizable and sufficiently serious form of harm to satisfy *Estelle*'s objective component. In evaluating whether conditions of segregation are unconstitutional, one must focus on the impact of said psychological harm on a specific subset of the detained population. Second, circumstantial evidence can serve to establish the institutional deliberate indifference required for *Estelle*'s subjective prong.

## B. The Psychological Impacts of Solitary Confinement

> A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[196]

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support an Eighth Amendment claim"); Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995) (arguing that "administrative segregation, even in a single cell for twenty-three hours a day, is within the terms of confinement ordinarily contemplated by a sentence").

192. *Porter*, 923 F.3d at 354.

193. *Id.* at 360–61.

194. *Id.* at 361–62.

195. *Id.*

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

Numerous medical studies have scrutinized the psychological and physiological consequences of solitary confinement since the explosion of isolated segregation as the model for standard inmate housing in the mid- to late-1800s, producing overwhelming scientific consensus that the practice is directly detrimental to individuals' mental health.[197] In the United States, such studies have had considerable influence on the legal and political process. Most recently, the Department of Justice reviewed the implementation of solitary confinement,[198] and the Senate introduced a bill to reduce and reform the use of segregated housing in correctional facilities.[199]

As these studies demonstrate, common adverse reactions to solitary confinement range from more moderate physiological and psychological responses—such as stress-related changes in appetite, shaking or sweating hands, and heart palpitations—to extreme psychiatric symptoms, including suicidal ideation, hallucinations, paranoia, and cognitive dysfunction.[200] Clinical depression, anxiety, psychosis, and self-mutilation have also been associated with segregated isolation,[201] as have symptoms ostensibly specific to the nature of the practice, including perceived loss of identity and sensory hypersensitivity.[202] Multiple psychologists have similarly documented

197. Extreme isolation of inmates was a practice first adopted by the Pennsylvania penitentiary system and later exported to European countries. Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 622, 623 (2008). The serious psychological damage that isolation caused incarcerated individuals eventually led to its decline as the standard practice of housing. *Id.* at 622–23. For a historical overview of early European and American studies on the impacts of solitary confinement, see Stuart Grassian, *Psychiatric Effects of Solitary Confinemen*t, 22 WASH. U. J.L. & POL'Y 325 (2006).

198. U.S. DEP'T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 1 (2016), https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing [https://perma.cc/A5EF-KF6R].

199. Solitary Confinement Reform Act, S. 5038, 117th Cong. (2022); *see also* 168 CONG. REC. NO. 158 (2022) (statement of Sen. Dick Durbin) ("I know that Director Peters understands that solitary confinement can cause severe mental anguish for adults in custody.").

200. Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 371–72 (2018).

201. Arrigo & Bullock, *supra* note 197, at 628.

202. Keramet Reiter et al., *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States*, 2017–2018, 110 AM. J. PUB. HEALTH S56, S56 (2020).

clinically distinct syndromes associated with solitary confinement.[203] Reported symptoms range from perceptual distortions, intrusive obsessional thoughts, and acute confusional states,[204] to inexplicable concentration and memory issues[205] and the belief among inmates that they are "going mad"[206] or being persecuted.[207] The catalog of segregated isolation's side effects almost feels never-ending.[208]

An individual need not be confined in solitary for years on end to experience the described side effects. Numerous studies attest to how even a few days of isolated segregation can produce abnormal patterns of "stupor and delirium" among inmates.[209] Similarly, while many symptoms tend to abate once a subject is removed from solitary, research suggests a pattern of long-lasting psychological damage may persist for years after confinement.[210] The symptoms of long-term harm include post-traumatic stress disorder (PTSD) and personality changes, particularly in the form of lasting social withdrawal.[211]

The effect is particularly acute for persons already dealing with mental illness. Studies have confirmed that mentally ill inmates often experience rapid psychological deterioration when placed in segregated isolation, which can manifest in anything from engaging in extreme forms of self-harm—swallowing razor blades or repeatedly

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203. Grassian, *supra* note 197, at 335–36.

204. *Id.*

205. Ida Koch, *Mental and Social Sequelae of Isolation: The Evidence of Deprivation Experiments and of Pretrial Detention in Denmark*, *in* THE EXPANSION OF EUROPEAN PRISON SYSTEMS 119, 124–25 (Bill Rolston & Mike Tomlinson eds., 1986).

206. *Id.*

207. Haney, *supra* note 200, at 373–74 (citing Reto Volkart et al., *Eine Kontrollierte Untersuchung uber Psychopathologische Effekte der Einzelhaft* [*A Controlled Investigation on Psychopathological Effects of Solitary Confinement*], 42 PSYCHOLOGIE 25 (1983) (Switz.)).

208. Other symptoms have included uncontrollable rage, bodily weakness, chronic fatigue, headaches, mood disorders, and social withdrawal. For a compilation of these and other possible symptoms, see Liat Tayer et al., *The Long-Term Effects of Solitary Confinement from the Perspective of Inmates*, 101 PRISON J. 652, 654 (2021).

209. Grassian, *supra* note 197, at 331; *see also* Arrigo & Bullock, *supra* note 197, at 630–31 (summarizing studies on the psychological impacts of short-term administrative segregation).

210. Grassian, *supra* note 197, at 353; KAYLA JAMES & ELENA VANKO, VERA INST. OF JUST., THE IMPACTS OF SOLITARY CONFINEMENT 2 (2021), https://www.vera.org/publications/the-impacts-of-solitary-confinement [https://perma.cc/7RBM-TRG3].

211. Grassian, *supra* note 197, at 353.

smashing their heads against the wall[212]—to suffering a litany of other intense psychiatric symptoms.[213] Not only does solitary confinement exacerbate preexisting underlying mental illnesses, but mentally ill detainees are also at a higher risk of suffering the acute psychiatric and physiological conditions described above.[214]

The medical and psychiatric community has not withheld information on the effects of solitary confinement on detainees from the institutions implementing it. Not only do courts frequently refer to studies on segregated isolation when evaluating the practice's permissibility,[215] but experts on the subject have frequently offered their testimony both in court[216] and before the American legislature.[217]

Extensive research on the psychological impacts of solitary confinement thus cements two fundamental premises. First, segregation entails a significant risk of causing harm that is extreme both in kind and degree. Second, there is clear and widespread institutional knowledge of this risk.

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212. ACLU, THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT IN THE UNITED STATES 6 (2014), https://www.aclu.org/publications/dangerous-overuse-solitary-confinement-united-states [https://perma.cc/3EVC-CWJE].

213. *Id.* at 6–7.

214. Arrigo & Bullock, *supra* note 197, at 632; JAMES & VANKO, *supra* note 210, at 2.

215. *See, e.g.*, Davis v. Ayala, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring) ("[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.").

216. *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1158 (N.D. Cal. 1995) (mentioning that Dr. Stuart Grassian, psychiatrist and professor, provided his testimony in the case as to the effects of subjecting individuals to segregated isolation).

217. In fact, the Senate Committee on the Judiciary has held two hearings investigating the impacts of solitary confinement, which included the testimony of experts on mental health such as psychology professors. *See Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Const., C.R. & Hum. Rts. of the S. Comm. on the Judiciary*, 113th Cong. 529–30 (2014) (statement of Psychologists for Social Responsibility); *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Const., C.R. & Hum. Rts. of the S. Comm. on the Judiciary*, 112th Cong. 20–22 (2012) (statement of Craig Haney, Professor of Psychology, University of California).

### C. Solitary Confinement of Asylum Seekers: Applying the *Estelle* Test

The permissibility of subjecting asylum seekers to segregated isolation under the DTA directly hinges on the practice's permissibility under the standards set forth by *Estelle*'s two-fold test.[218] *Estelle*'s objective prong requires a showing that a prison condition or practice results in an actual deprivation, or substantial risk thereof, of a basic right or need[219]—that is, a showing that solitary confinement of asylum seekers either actually denies or likely will deny them a minimal level of mental health. *Estelle*'s subjective prong calls for evidence of officials' deliberate indifference to the harm created by said condition or practice[220]—here, evidence that officials are aware of the psychological effects of segregation on asylees. By analogizing to the district court decisions that have previously found solitary confinement to violate the Eighth Amendment, this Section contends that the confinement of asylum seekers in isolated segregation satisfies both prongs of the *Estelle* test.

To determine whether segregation meets *Estelle*'s objective prong, lower courts have examined the characteristic defining a specific subset of the incarcerated population and the type of harm inflicted on them.[221] Using both elements, courts have established that isolating certain individuals deprives them of, or risks depriving them of, a serious right—namely, their right to a minimal civilized level of health.[222] Courts have asserted that the psychological state distinguishing detainees with underlying mental illnesses (as well as those who are significantly likely to develop them) from other detainees contributes to a substantial risk of heightened psychological damage when officials place these individuals in

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218. Estelle v. Gamble, 429 U.S. 97, 104 (1976). For the series of cases that clarified and fully fleshed out the *Estelle* doctrine, see *supra* Section I.C.

219. *See* Jaech, *supra* note 101, at 1091 ("To satisfy the objective component of the test, plaintiffs must show that there is an actual and serious deprivation of their basic rights or needs.").

220. *Id*.

221. The following discussion relies on several relevant examples of this judicial reasoning, including *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995); *Ind. Prot. & Advoc. Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, No. 1:08-CV-01317-TWP, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012); and *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd and remanded on other grounds sub nom.*, *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001).

222. *Madrid*, 889 F. Supp. at 1266; *Ind. Prot. & Advoc. Servs. Comm'n*, 2012 WL 6738517, at *23; *Ruiz*, 37 F. Supp. 2d at 913–15.

solitary confinement.[223] It is the increased risk of psychological harm that isolation poses to these detainees, as compared to healthy individuals, that courts have held meets the objective component under *Estelle*.[224]

Asylees are analogously situated as a group to the subset of mentally ill incarcerated individuals, or those highly likely to suffer a mental illness, considered by the lower courts. Therefore, the same legal reasoning can be applied to them. While branding all asylum seekers as mentally ill overstates the correlation between asylee status and mental health, studies show that an association does exist. Even accounting for differences in terms of the size of the asylee population studied or the data analyzed, reports consistently identified a dramatically high prevalence of psychological distress and serious mental health issues such as PTSD, anxiety, and depression among asylees.[225] As the World Health Organization has

223. *Madrid*, 889 F. Supp. at 1235 (finding that detainees' underlying mental illnesses were likely to be aggravated in conditions of segregation); *Ind. Prot. & Advoc. Servs. Comm'n*, 2012 WL 6738517, at *22 (stating that, for these individuals, "placing them in [isolated segregation] is the mental equivalent of putting an asthmatic in a place with little air to breathe") (quoting *Madrid*, 889 F. Supp. at 1265); *Ruiz*, 37 F. Supp. 2d at 911 (finding "[e]ven more disturbing" that "administrative segregation is used to warehouse mentally ill patients who need medical and psychiatric attention").

224. *Madrid*, 889 F. Supp. at 1265–67 (distinguishing mentally ill detainees and detainees at serious risk from other detainees placed in isolation and holding that placing the former in solitary constituted an Eighth Amendment violation); *Ind. Prot. & Advoc. Servs. Comm'n*, 2012 WL 6738517, at *22–23 (finding that conditions in the segregation unit did not per se violate the Eighth Amendment but holding that specifically placing detainees who were at a particular risk of suffering severe injury to their mental health *did* violate the Amendment); *Ruiz*, 37 F. Supp. 2d at 915 (holding that, as to mentally ill detainees in segregated isolation, "the severe and psychologically harmful deprivations of its administrative segregation units are, by our evolving and maturing society's standards of humanity and decency, found to be cruel and unusual punishment").

225. Charlotta van Eggermont Arwidson et al., *Living a Frozen Life: A Qualitative Study on Asylum Seekers' Experiences and Care Practices at Accommodation Centers in Sweden*, 16 CONFLICT & HEALTH 1, 2 (2022), https://conflictandhealth.biomedcentral.com/articles/10.1186/s13031-022-00480-y [https://perma.cc/FN7H-VDNR] (analyzing interviews with fourteen asylum seekers from diverse backgrounds and age groups in two different centers in Sweden); Rebecca Blackmore et al., *The Prevalence of Mental Illness in Refugees and Asylum Seekers: A Systematic Review and Meta-Analysis*, 17 PLOS MED. 1, 9 (2020), https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1003337 [https://perma.cc/8A94-TVNA] (reviewing twenty-six studies in which the mental well-being of at least fifty asylum seekers was clinically evaluated to infer general patterns about the mental health of asylee populations); Giulia Turrini et

pointed out, mental health conditions are substantially more prevalent among asylees than among the host populations of the countries where they seek asylum.[226] For instance, whereas around 18% of all U.S. adults have reported ever being diagnosed with depression[227] and around 6% will experience PTSD at some point in their lives,[228] studies on asylees' mental health suggest that at least 30% of asylees suffer from depression and over 20% from PTSD.[229]

Even though the available data does not undeniably demonstrate that all asylum seekers suffer from a preexisting mental illness, it does establish that asylees are at a higher risk than the average population of developing a mental health condition. This pattern makes sense given the experiences that lead people to seek asylum. Studies have found that asylees' lived circumstances significantly increase their risk of suffering from psychological distress.[230] Pre-migration experiences with potentially traumatic

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al., *Common Mental Disorders in Asylum Seekers and Refugees: Umbrella Review of Prevalence and Intervention Studies*, 11 INT'L J. MENTAL HEALTH SYS. 1, 2 (2017), https://ijmhs.biomedcentral.com/articles/10.1186/s13033-017-0156-0 [https://perma.cc/9B6S-NE7D] (reviewing thirteen reports on mental disorders among asylee population); Martina Heeren et al., *Mental Health of Asylum Seekers: A Cross-Sectional Study of Psychiatric Disorders*, 12 BMC PSYCHIATRY 1, 2 (2012), http://www.biomedcentral.com/1471-244X/12/114 [https://perma.cc/49WZ-VMSK] (assessing the mental health status of eighty-six asylees in Switzerland); Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155, 162, 171 (2001); Niall Crumlish & Pat Bracken, *Mental Health and the Asylum Process*, 28 IRISH J. PSYCH. MED. 57, 58 (2011).

226. *Mental Health and Forced Displacement*, WORLD HEALTH ORG. (Aug. 31, 2021), https://www.who.int/news-room/fact-sheets/detail/mental-health-and-forced-displacement [https://perma.cc/T6B5-GEW2].

227. *Major Depression*, NAT'L INST. OF HEALTH, https://www.nimh.nih.gov/health/statistics/major-depression [https://perma.cc/2746-UZ4X].

228. *PTSD: National Center for PTSD*, U.S. DEP'T OF VETERAN AFFS., https://www.ptsd.va.gov/understand/common/common_adults.asp [https://perma.cc/2YL7-ET2P].

229. Heeren et al., *supra* note 225, at 1; *see also* Blackmore et al., *supra* note 225, at 3 (summarizing prior research finding that anywhere from 5% to 40% of asylees reported major depressive disorder while 9% to 43% of asylees reported PTSD); Turrini et al., *supra* note 225, at 3 (summarizing prior research finding that anywhere from 5% to 100% of asylees in high-income countries reported depression while 9% to 50% reported PTSD).

230. For an in-depth analysis of existing studies and of the mental health risks faced by asylees, see Domenico Giacco, *Identifying the Critical Time Points for Mental Health of Asylum Seekers and Refugees in High-Income Countries,* 29 EPIDEMIOLOGY & PSYCHIATRY SCIS. 1, 1 (2019),

events—such as witnessing or suffering abuse, violence, conflict, or torture—have been consistently linked to a high likelihood of developing PTSD or other mental illnesses.[231] Further, reports have associated the dangerous travel routes pursued by asylum seekers, as well as their separation from family members, with negative impacts on asylees' mental health.[232] Studies have also found that the risk of

https://pmc.ncbi.nlm.nih.gov/articles/PMC8061286 [https://perma.cc/D7MT-NJ7L]. *See also* Corrado Barbui et al., *Risk Factors for Mental Disorder Development in Asylum Seekers and Refugees Resettled in Western Europe and Turkey: Participant-Level Analysis of Two Large Prevention Studies,* 69 INT'L J. SOC. PSYCHIATRY 664, 670 (2022) (finding "a positive relationship between exposure to potentially traumatic events and risk of mental disorder development"); Trine Filges et al., *The Impact of Detention on the Health of Asylum Seekers: An Updated Systematic Review*, 20 CAMPBELL SYSTEMATIC REVS. 1, 15, 23 (2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11228430 [https://perma.cc/XJQ9-4QZB] (analyzing fourteen quantitative studies—including a total of 27,797 asylee participants—on the effects of detention on asylees' mental health and finding "an independent adverse impact of detention on [asylum seekers'] mental health"); Masao Ichikawa et al., *Effect of Post-Migration Detention on Mental Health Among Afghan Asylum Seekers in Japan*, 40 AUSTL. & N.Z. J. PSYCHIATRY 341, 344 (2006) (finding that "post-migration detention was associated with worsened mental health status among Afghan asylum seekers in Japan"); Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721, 1721–22 (2003) (analyzing the impact of detention on the mental well-being of seventy asylum seekers detained in New York, New Jersey, and Pennsylvania and finding that "detaining asylum seekers exacerbates symptoms of depression, anxiety, and post-traumatic stress disorder" ).

231. Jihane Ben Farhat et al., *Syrian Refugees in Greece: Experience with Violence, Mental Health Status, and Access to Information During the Journey and While in Greece*, 16 BMC MED. 1, 1 (2018), https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-018-1028-4 [https://perma.cc/3UWL-BX6U]; Domenico Giacco et al., *Prevalence of and Risk Factors for Mental Disorders in Refugees*, 77 SEMINARS CELL & DEVELOPMENTAL BIOLOGY 144, 147 (2018); Michaela Hynie, *The Social Determinants of Refugee Mental Health in the Post-Migration Context: A Critical Review*, 63 CAN. J. PSYCHIATRY 297, 298 (2018); Elisa Kaltenbach et al., *Course of Mental Health in Refugees—A One Year Panel Survey*, 9 FRONTIERS PSYCHIATRY 1, 2 (2018), https://www.frontiersin.org/journals/psychiatry/articles/10.3389/fpsyt.2018.00352/full [https://perma.cc/5E6Q-5GDV]; Suzan J. Song et al., *Predicting the Mental Health and Functioning of Torture Survivors*, 206 J. NERVOUS & MENTAL DISEASE 33, 33 (2018).

232. *See* Ben Farhat et al., *supra note* 231, at 6–10 (finding that many asylee respondents reported experiencing at least one violent event during their journey and reporting high rates of anxiety disorders among asylees); Alexander Miller et al., *Understanding the Mental Health Consequences of Family Separation for Refugees: Implications for Policy and Practice*, 88 AM. J. ORTHOPSYCHIATRY 26, 34 (2018) (finding that numerous asylee participants cited the distance from their family members as the greater source of emotional distress); *see also* Danielle N.

developing a mental condition is aggravated when asylees face post-migration adversities in the country of arrival; long processing times, inadequate accommodation, and a lack of access to information generate stress and uncertainty that may exacerbate certain mental health conditions.[233] In short, asylum seekers' experiences with conflict, abuse, or torture, as well as the act itself of abandoning their homeland and everything known to them, generate emotional and psychological stressors that place them at a substantial risk of psychological distress.

Asylees are therefore some of the most vulnerable immigrants; their increased susceptibility to developing psychological conditions sets them apart from other detainees. It was precisely this characteristic—a heightened risk of psychological damage—that the courts in *Madrid*, *Ruiz*, and *Indiana Protection and Advocacy Services Commission* found to sufficiently distinguish the subset of mentally ill incarcerated individuals from the rest of the prison population, thereby raising Eighth Amendment concerns.[234]

Research on the consequences of detention on asylees indicates that any form of confinement contributes to the further deterioration of asylees' preexisting mental health conditions.[235]

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Poole et al., *Major Depressive Disorder Prevalence and Risk Factors Among Syrian Asylum Seekers in Greece*, 18 BMC PUB. HEALTH 1, 7 (2018), https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-018-5822-x [https://perma.cc/K3AT-QTCU] (finding that asylees' gender, number of children, and length of time spent in the asylum process were significant risk factors for major depressive disorder).

233. Ben Farhat et al., *supra* note 231, at 9–10; Poole et al., *supra* note 232, at 6–7; Song et al., *supra* note 231, at 36–37; Cindy-Lee Dennis et al., *Postpartum Depression Risk Factors Among Recent Refugee, Asylum-Seeking, Non-Refugee Immigrant, and Canadian-Born Women: Results from a Prospective Cohort Study*, 52 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 411, 419 (2017).

234. *See supra* Section III.A (summarizing lower court cases finding that solitary confinement of certain incarcerated persons violates the Eighth Amendment).

235. Filges et al., *supra* note 230, at 23–24; Keller et al., *supra* note 230, at 1722; Katy Robjant et al., *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194 BRIT. J. PSYCHIATRY 306, 310 (2009) (conducting a systematic review of ten studies on the impact of detention on asylum seekers); Peter Hallas et al., *Length of Stay in Asylum Centres and Mental Health in Asylum Seekers: A Retrospective Study from Denmark*, 7 BMC PUB. HEALTH 1, 5 (2007), https://bmcpublichealth.biomedcentral.com/articles/10.1186/1471-2458-7-288 [https://perma.cc/RTW3-TFD4] (analyzing 4,516 records of asylum seekers in Danish asylum centers to compare the length of stay in the asylum centers and overall rates of referral for mental disorders); Ichikawa et al., *supra* note 230, at 342–45 (comparing the mental health prognosis of Afghan asylum seekers in

Many such studies suggest that even *non*-isolated detention exacerbates symptoms of, among others, depression, PTSD and anxiety, and indicate that the adverse impacts continue even after the asylee has been released from detention.[236] Even asylum seekers who do not struggle with underlying preexisting mental illnesses find themselves at increased risk of developing them if placed in detention.[237] In *Madrid*, *Ruiz*, and *Indiana Protection and Advocacy Services Commission*, the courts identified this exact type of harm—psychological distress—as the concerning consequence of solitary confinement.[238] The distinctively negative effect of isolation on asylees as a specific subgroup of detainees thus results in—or at the very least involves a substantial risk of causing—a serious deprivation of their right to a minimal level of health, satisfying the objective component of *Estelle*.

The reasoning employed by the *Porter* court to establish the subjective prong of the *Estelle* test applies well to asylum seekers. In *Porter*, the court did rely exclusively on direct proof of officials' knowledge of the harm created by the practice; rather, the court asserted that the available circumstantial evidence was enough to prove that there was knowledge of the risk, and that such knowledge was recklessly ignored.[239]

Following the *Porter* court's reasoning, one can point to relevant circumstantial evidence to argue that there *must* be awareness, both at the institutional and individual officer level, of the risk posed by subjecting asylum seekers to solitary confinement. Four

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Japan who had been subjected to detention with Afghan asylum seekers who had not).

236. Filges et al., *supra* note 230, at 22–24; Robjant et al., *supra* note 235, at 310–11; Hallas et al., *supra* note 235, at 3–5; Ichikawa et al., *supra* note 230, at 344–45; Keller et al., *supra* note 230, at 1722.

237. *See, e.g.*, Filges et al., *supra* note 230, at 23–24 (finding evidence that detention has an independent adverse effect on the mental health of asylees); Ichikawa et al., *supra* note 230, at 345 (finding that pre-migration trauma and detention had comparable negative effects on asylees' mental health); *see also* Keller et al., *supra* note 230, at 1721–22 (finding that the length of asylees' detention was significantly correlated with symptoms of anxiety, depression, and PTSD).

238. *See supra* notes 222–224 and accompanying text (discussing the reasoning adopted by U.S. courts in finding that administrative segregation violates the Eighth Amendment in certain contexts).

239. Porter v. Clarke, 923 F.3d 348, 361–62 (4th Cir. 2019) (stating that *Estelle*'s subjective prong may be satisfied by proving "by circumstantial evidence that a risk was so obvious that it had to have been known" (quoting Makdessi v. Fields, 789 F.3d 126, 136 (4th Cir. 2015))).

sources furnish key circumstantial evidence in the asylee case: (1) the overwhelming number of reports on the mental health impacts of isolation; (2) the reports ordered by DHS on the conditions inside ICE detention centers; (3) legislative and executive movements against solitary confinement; and (4) slight changes in ICE's own policies of segregated isolation.

Institutional and individual awareness may be inferred from the myriad independent and governmental reports on the risks associated with segregated isolation. In *Porter*, the court noted that extensive scholarly literature on the risks and effects of solitary confinement provided sufficient circumstantial evidence that the risk of harm was so obvious that it had to be known by prison officials.[240] The same logic applies to the argument for asylum seekers. As Section III.B's overview on existing research into the psychological impacts of segregated isolation shows, there is extensive scholarly consensus as to the risks posed by the practice.[241] The multiple reports ordered by DHS into the conditions inside ICE detention centers bolster the claim of institutional and individual awareness.[242] Those reports provide excruciating detail about the pervasive misuse of solitary confinement in detention centers, including the targeting of mentally ill detainees and the use of isolation as a tool to administratively manage, rather than treat, mental illnesses.[243] These reports evince DHS' and ICE's knowledge of the alarming implementation of the practice.[244]

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240. *Id*. at 361.

241. *See supra* Section III.B (discussing the impacts of solitary confinement and detention on asylum seekers).

242. *See* Dreisbach, *supra* note 3 (providing details on DHS reports that documented numerous serious abuses by officials against individuals in ICE detention and quoting an ACLU attorney as stating that these reports "show how the government's own inspectors can see the abuses and the level of abuses that are happening in ICE detention"); Martinez & Schwellenbach, *supra* note 3 (providing more details about a batch of DHS reports finding serious deficiencies at ICE facilities across the country over the course of at least a decade). For an overview of the reports, see *supra* Section I.B.

243. *See supra* Section I.B (summarizing DHS reports).

244. A 2009 report by a former ICE Director of the Office of Detention Policy and Planning explicitly points to this knowledge, bluntly stating that segregation is "not conducive [to mental health] recovery." DORA SCHRIRO, IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 27 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/F96C-ZKT4].

Further, efforts by members of the legislative and executive branches to push against solitary confinement attest to how widely known the detrimental effects of isolation are. From the Obama-administration's decision to ban solitary confinement of minors in federal prisons,[245] to the introduction of the Stop Solitary Confinement bill,[246] there has been an institutional shift towards openly recognizing the deleterious impact of segregation and reducing its use.[247] Finally, slight changes within ICE's own approach to the implementation of solitary confinement reflect the extent to which the agencies executing the practice are acutely aware of its risks. Then-Secretary of Homeland Security Janet Napolitano's decision to review ICE's policies regarding segregated isolation following media reports of their misuse unequivocally manifests awareness of the practice's impact.[248] The subsequent publication of new ICE guidelines providing additional oversight and protections for vulnerable detainees, such as those with mental illness, demonstrates this awareness even further.[249]

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245. Barack Obama, Opinion, *Barack Obama: Why We Must Rethink Solitary Confinement,* WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html (on file with the *Columbia Human Rights Law Review).* In his opinion piece, the former President explained his decision to ban solitary confinement in federal prisons for minors and as a response to low-level infractions. The former President highlighted the "devastating [and] lasting psychological consequences" of isolated segregation, emphasizing how it can "worsen existing mental illnesses and even trigger new ones." *Id.*

246. Solitary Confinement Reform Act, S. 5038, 117th Cong. (2022).

247. The legislature's concerns over the use of solitary confinement are also reflected by the two congressional hearings that have been held on the practice. *See Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Const., C.R. & Hum. Rts. of the S. Comm. on the Judiciary*, 113th Cong. 1–4 (2014) (statement of Sen. Dick Durbin, Chairman, S. Subcomm. on the Const., C.R. & Hum. Rts.) (discussing some of the rights-related issues associated with the use of solitary confinement); *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Const., C.R. & Hum. Rts. of the S. Comm. on the Judiciary*, 112th Cong. 1–4 (2012) (statement of Sen. Dick Durbin, Chairman, S. Subcomm. on the Const., C.R. & Hum. Rts.) (summarizing many of the problems associated with the use of solitary confinement in U.S. prisons).

248. Ian Urbina, *Officials to Review Immigrants' Solitary Confinement*, N.Y. TIMES (Mar. 26, 2013), https://www.nytimes.com/2013/03/27/us/immigrants-solitary-confinement-to-be-reviewed.html (on file with the *Columbia Human Rights Law Review*).

249. U.S. Immigr. & Customs Enf't, Directive 11065.1: Review of the Use of Segregation for ICE Detainees ¶ 5.2 (Sept. 4, 2013),

And yet, despite the widespread and general knowledge of the detrimental effects of solitary confinement upon vulnerable detainees, including asylum seekers, ICE's current policies continue to authorize placing immigrants with diagnosed mental health issues in segregated isolation.[250] In fact, ICE's regulations allow officials to place inmates in solitary confinement indefinitely,[251] showing a

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https://www.ice.gov/doclib/foia/policy/directive11065.1.pdf [https://perma.cc/MG54-WV89]. While the new guidelines purported to create robust monitoring and reporting mechanisms for the implementation of solitary confinement, a 2021 memorandum by the DHS Office of Inspector General revealed that ICE had failed to abide by its own guidelines. Memorandum from Joseph V. Cuffari, Inspector Gen., Off. of Inspector Gen., Dep't of Homeland Sec., to Tae Johnson, Acting Director, U.S. Immigr. & Customs Enf't 3–4 (Oct. 13, 2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-10/OIG-22-01-Oct21.pdf [https://perma.cc/FAA3-KGW6]; *see also* Carl Takei, *New Limits Announced on ICE's Solitary Confinement of Immigrants*, ACLU (Sept. 6, 2013), https://www.aclu.org/news/immigrants-rights/new-limits-announced-ices-solitary [https://perma.cc/52PT-N75U] (discussing the promulgation of Directive 11065.1); Patrick Taurel, *Internal Watchdog Finds ICE Violations of Solitary Confinement Policy*, ACLU (Oct. 21, 2021), https://www.aclu.org/news/immigrants-rights/internal-watchdog-finds-ice-violations-of-solitary-confinement-policy [https://perma.cc/8R34-PJ6K] (summarizing the Office of Inspector General's report on ICE officials' failure to comply with the rules governing the use of solitary confinement or segregation).

250. *See* ICE, INS Detention Standard (Administrative*), supra* note 66, at 1-2 (permitting ICE to hold detainees in administrative segregation for a variety of reasons including where an individual "require[es] separation for medical reasons"); ICE, INS Detention Standard (Disciplinary), *supra* note 68, at 4 (providing specific policies for detainees in disciplinary segregation who exhibit symptoms of certain mental disorders).

251. Note that while ICE's policy of "disciplinary segregation" includes a maximum limit of sixty days in segregation, ICE's policy of "administrative segregation" does not include a limit to how long an inmate may be separated from the rest of the facility's population. *Compare* ICE, INS Detention Standard (Disciplinary), *supra* note 68, at 2 ("A maximum sanction of 60 days in disciplinary segregation shall apply to violations associated with a single incident."), *with* ICE, INS Detention Standard (Administrative)*, supra* note 66, at 4–5 (implying that a detainee may be subject to administrative segregation indefinitely by requiring reviews of a detainee's segregation "at least every 30 days" after the first month). Most significantly, ICE's policy states that a detainee may be placed in administrative segregation immediately following time in in disciplinary segregation, effectively eliminating any limits there may be to use of segregation for punitive purposes. *See* ICE, INS Detention Standard (Administrative)*, supra* note 66, at 3 ("The [Institutional Disciplinary Panel] may order a detainee into administrative segregation following disciplinary segregation after determining that releasing the detainee into the general population would pose a threat to the security and orderly operation of the facility.").

deliberate indifference to how segregated isolation works to deprive individuals of a minimal civilized level of mental health. *Estelle*'s subjective component is therefore satisfied.

Placing asylum seekers in solitary confinement therefore meets both prongs of the *Estelle* test for the "unnecessary and wanton infliction of pain"; consequently, the practice violates the Eighth Amendment protections bestowed upon detained asylees by the DTA.

## CONCLUSION

Exhuming the DTA from the shadows of its *Hamdan-Boumediene* past, this Note contends that the Act forges a direct connection between immigrant detainees and the Eighth Amendment, affording the former the protections enshrined in the latter. Through this connection, this Note has argued that it is impermissible to subject asylum seekers to solitary confinement under the Eighth Amendment.

The DTA's Section 1003 covers immigrant detainees and, if applied, will have immediate and promising legal ramifications. Virtually overnight, a whole host of Eighth Amendment protections would become applicable not just to immigrants in detention, but to all civil detainees under the custody or physical control of the American government.

In the early hours of one May morning in 2017, Jean Jimenez-Joseph hanged himself in the solitary confinement cell where he had been placed twenty days before.[252] He had written, "*Hallelujah The Grave Cometh*," in dark bold letters on the wall.[253] The cruelty inflicted upon Jean by ICE officials, the brazen ignorance of ample warnings of his dire mental state, and the blatant disregard of potential options for medical treatment, are not exceptional. As detention operations continue to be expanded across the country and the use of solitary confinement intensifies,[254] untold numbers of individuals face the inhumane treatment that led Jean to take his own life. The longer we allow the practice to ravage on unchecked, the more vulnerable lives will be lost to Jean's fate. No words can fully capture the magnitude of ICE's egregious failures in the handling of immigrant detention centers, the horrors suffered by the victims of

252. Schwellenbach et al., *supra* note 70.

253. *Id.*

254. HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM & PHYSICIANS FOR HUM. RTS., *supra* note 3.

the agency's systemic errors, or the pain of those who have fallen through the cracks. Words might, however, help fathom a solution.