

CHALLENGING THE PRACTICE OF SOLITARY CONFINEMENT IN IMMIGRATION DETENTION IN GEORGIA AND BEYOND

Azadeh Shahshahani†
Ayah Natasha El-Sergany††

CONTENTS

INTRODUCTION	244	R
I. BACKGROUND: INDIVIDUAL ACCOUNTS—THE EXPERIENCE OF SOLITARY CONFINEMENT IN IMMIGRATION DETENTION IN GEORGIA		
	245	R
1. <i>ACLU of Georgia Report: Prisoners of Profit</i>	246	R
2. <i>Arbitrary Use of Solitary Confinement</i>	247	R
3. <i>LGBTQ Individuals</i>	249	R
4. <i>Exacerbation of Underlying Mental Disabilities and “Prison Psychosis”</i>	251	R
II. THE CONSTITUTIONAL FRAMEWORK: THE DIFFERENCES BETWEEN PRISONS AND IMMIGRANT DETENTION CENTERS UNDER THE FOURTH, FIFTH, AND EIGHTH AMENDMENTS		
	253	R
1. <i>Courts Have Granted Relief to Convicted Prisoners Housed in Solitary Confinement</i>	255	R
2. <i>Courts Have Not Yet Had Occasion to Rule on Solitary Confinement of Immigrant Detainees</i>	255	R
3. <i>Challenges to Conditions of Confinement</i>	257	R
a. Lack of Sufficient Internal Grievance Procedures Makes Alternative Remedies Necessary.....	257	R
b. Means of Bringing a Federal Claim	260	R

† Azadeh Shahshahani directs the National Security/Immigrants’ Rights project at the American Civil Liberties Union Foundation of Georgia (ACLU of Georgia), promoting protection of the constitutional and human rights of immigrants living across the state, building solidarity and progress through community organizing, engaging in impact litigation, and advocating for broader policy reform. She also serves as President of the National Lawyers Guild.

†† Ayah Natasha El-Sergany is an attorney based in Seattle, Wash., and 2010 graduate of the University of North Carolina School of Law. She interned at the ACLU of Georgia on this project during law school and has since worked and volunteered at legal aid and immigration advocacy organizations across the South. The authors would like to thank Rachel Reed as well as the staff of the CUNY Law Review for their significant research assistance for this article.

III. ADVOCACY MECHANISMS UNDER INTERNATIONAL HUMAN RIGHTS LAW	262	R
1. <i>International Treaties Ratified by the United States</i>	262	R
2. <i>Regional Treaties</i>	264	R
3. <i>Special Rapporteurs</i>	266	R
CONCLUSION	268	R

“Segregation, isolation, separation, cellular, lockdown, Supermax, the hole, Secure Housing Unit . . . whatever the name, solitary confinement should be banned by States as a punishment or extortion technique.”¹

INTRODUCTION

Immigration and human rights advocates, the general public, and even federal government agencies are increasingly becoming aware of the horrors of solitary confinement in United States super maximum security (supermax) prisons.² More recently, the use of similar isolation practices in immigrant detention facilities has come into the spotlight,³ with new federal data revealing that on a

¹ *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS CENTRE (Oct. 18, 2011), http://www.un.org/apps/news/story.asp?NewsID=40097#UKK1fuOe_hU (quoting UN Special Rapporteur Juan Méndez).

² See, e.g., *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, N.Y. CIVIL LIBERTIES UNION (Feb. 19, 2014), <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement> (describing state taking immediate steps to remove vulnerable prisoner populations from extreme isolation); *ICE Detainees on Hunger Strike Released from Solitary Confinement*, ASSOCIATED PRESS (April 4, 2014, 7:28 PM), available at <http://www.katu.com/news/local/ICE-detainees-on-hunger-strike-released-from-solitary-confinement-253988741.html> (reporting on the release of detainees in solitary confinement); Dana Liebelson, *Lawsuit Alleges Cruel and Unusual Conditions for Mentally Ill in Montana*, MOTHER JONES (April 4, 2014, 9:40 AM), <http://www.motherjones.com/politics/2014/04/montana-solitary-confinement-lawsuit-mentally-ill-prisoners> (describing lawsuit brought in Montana by disability rights group alleging unconstitutional prison conditions); Carlos Alcalnt, *Public Safety Committee to Hear Ammanioia Solitary Confinement Bill*, SAN FRANCISCO BAY VIEW (April 8, 2014), <http://sfbayview.com/2014/public-safety-committee-to-hear-ammianos-solitary-confinement-bill/> (describing public support for a state assembly bill to reform solitary confinement practices in California); Don Thompson, *Judge: Using Pepper Spray on Mentally Ill Inmates ‘Horrific,’* ASSOCIATED PRESS (April 11, 2014), available at <http://blogs.kqed.org/newsfix/2014/04/11/california-mistreating-mentally-ill-inmates/> (explaining the outcome of a federal case where the court found that California prisons’ use of isolation of mentally ill persons amounted to constitutional violations).

³ See, e.g., *US Tortures Immigrants*, HUFFPOST LIVE (Mar. 26, 2013), <http://live.huffingtonpost.com/r/segment/immigration-solitary-confinement/514fa8222b8c2a7e630002ff>; Editorial, *Solitary Isn’t the Solution*, L.A. TIMES (Mar. 28, 2013), <http://articles.latimes.com/2013/mar/28/opinion/la-ed-solitary-confinement-immigrant-detainees-20130328>; Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html>; Edith Honan, *U.S. Bureau of Pris-*

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 245

given day, about 300 immigrants are held in solitary confinement across fifty of the largest U.S. immigration facilities.⁴ Alongside the groundswell of attention and public discomfort with what was previously a largely hidden issue, this article will shed light on the widespread practice of solitary confinement of immigrants in Georgia immigration detention centers, discussing potential domestic and international law strategies to advocate against the use of isolation.

Part I provides an overview of solitary confinement in immigration detention centers and the impact on those who are confined. Part II highlights ways in which isolation practices can be challenged under federal and constitutional law. And Part III gives an overview of advocacy mechanisms under international and regional human rights treaties. We conclude with a call to expand advocacy efforts in order to pressure the United States to adhere to human rights standards against solitary confinement, in hopes that the practice will be curtailed or even eliminated altogether.

I. BACKGROUND: INDIVIDUAL ACCOUNTS—THE EXPERIENCE OF SOLITARY CONFINEMENT IN IMMIGRATION DETENTION IN GEORGIA

The ACLU of Georgia has actively engaged with the immigrant community for several years, including investigating many claims of abuse against immigrants in detention. With the aim of shining a spotlight on conditions of detention in facilities in Georgia, the ACLU of Georgia released a report in 2012 describing abuses, lack of oversight, and the immigration detention-industrial complex in Georgia.⁵

The ACLU of Georgia report uncovered—through numerous interviews with those detained—the use of solitary confinement of immigrants in detention,⁶ a practice which, as reports by various advocacy groups⁷ and mainstream media outlets indicate,⁸ occurs

ons to Review Solitary Confinement, REUTERS (Feb. 4, 2013, 9:54 PM), <http://www.reuters.com/article/2013/02/05/us-usa-prisons-solitary-idUSBRE91404L20130205>.

⁴ See Urbina & Rentz, *supra* note 3.

⁵ See generally ACLU OF GEORGIA, PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA (2012) [hereinafter PRISONERS OF PROFIT], available at http://www.acluga.org/download_file/view_inline/42/244/.

⁶ See *id.*

⁷ See, e.g., NAT'L IMMIGR. JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION (2012) [hereinafter NIJC/PHR REPORT], [https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible in Isolation-The Use of Segregation and Solitary Confinement in Immigration Detention.September 2012_7.pdf](https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf). In collecting data for their report on segregation in U.S. immigration detention centers,

in immigration detention facilities nationwide. The co-authors of this article strongly advocate for the abolition of solitary confinement practices in immigration detention except in very limited circumstances and even then for strictly limited periods of time in line with international human rights norms, and for ending of contracts with corporations that profit from the suffering of detained immigrants, an increasingly widespread phenomenon to which the title of the ACLU of Georgia report alludes.⁹

1. *ACLU of Georgia Report: Prisoners of Profit*

The operation of immigration detention facilities is a multi-billion dollar industry.¹⁰ Whereas some facilities are operated by the Department of Homeland Security (DHS) with the cooperation of local and state detention facilities, DHS claims to save money by contracting with private prison corporations that provide bed space for detained immigrants.¹¹ Immigrants held in detention either have no criminal record (about half of detained immigrant individuals), or have served their sentences before landing in detention.¹² Yet, despite their official status as civil detainees, immigrants are routinely housed in facilities that “look, feel, and operate like jails.”¹³

Physicians for Human Rights (PHR) and the National Immigrant Justice Center (NIJC) sent open records requests to 250 facilities in the U.S. Results indicated poor recordkeeping, if any, on the use of isolation in these facilities, particularly in cases where immigrants are held in isolation for less than 30 days. *Id.* at 6. In related submitted testimony before the Senate Judiciary Committee, NIJC noted that “DHS has failed to track solitary policies and procedures” and that it is therefore “impossible to accurately assess the scope of the problem.” Written Testimony by Mary Meg McCarthy, Nat’l Immigr. Justice Ctr., to S. Judiciary Comm., Subcomm. on Constitution, Civil Rights, and Human Rights, 111th Cong., Hearing on Reassessing Solitary Confinement: the Human Rights, Fiscal and Public Safety Consequences 2 (June 19, 2012) [hereinafter *NIJC Solitary Confinement Testimony*], available at <http://solitarywatch.com/wp-content/uploads/2012/06/national-immigrant-justice-center.pdf>. Despite a lack of accurate official numbers, consistent reports from immigrants held in detention in Georgia and across the country indicate widespread use of solitary confinement. See PRISONERS OF PROFIT, *supra* note 5, at 47–109 (findings from detention centers across Georgia).

⁸ See generally *supra* note 2.

⁹ See PRISONERS OF PROFIT, *supra* note 5, at 1. See also *id.* at 42 (noting that “the longer a non-citizen is detained, the more profit the private prison company makes, since their contracts with ICE are on a per diem basis”); *id.* at 110 (recommending to the federal government the termination of contracts with facilities that fail to meet “strengthened” detention standards).

¹⁰ See *The History of Immigration Detention in the U.S.*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/node/2381> (last visited Oct. 8, 2013).

¹¹ *Id.*

¹² See PRISONERS OF PROFIT, *supra* note 5, at 21.

¹³ DETENTION WATCH NETWORK, *supra* note 10.

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 247

Notably, private corporations operate three out of the four immigration detention centers in Georgia.¹⁴ Abuse of power and lack of oversight have been rampant in these facilities.¹⁵ All four facilities have used some form of administrative segregation, isolation, or 23-hour solitary confinement to “protect” or discipline immigrants in detention.¹⁶ The organization documented the following about the “segregation units,” which actually refers to the practice of solitary confinement:

All four facilities have segregation units for administrative and disciplinary segregation. . . . [T]wo detainees at Stewart . . . said they had been kept in segregation in excess of 60 days, one for five months. At the [Atlanta City Detention Center] detainees expressed concerns about the sanitation of the segregation units, calling them “portable toilets.” . . . [There were] documented instances where detainees were denied privileges such as recreation, law library access, and phone access, and were given smaller portions at mealtime as a result of being placed in segregation. Detainees in segregation are allowed access to the shower less frequently than the general population. Finally, and most problematic, detainees with mental health problems are put in segregation in lieu of receiving treatment.¹⁷

2. *Arbitrary Use of Solitary Confinement*

ICE officials cite disciplinary or protective reasons for isolating immigrants from the general population, including minor “infractions,” such as not making the bed, or other nonviolent and harmless behavior such as translating for other immigrants in detention.¹⁸ The findings of the ACLU of Georgia report indicate that immigrants are sometimes placed into, or threatened that they will be placed into, solitary confinement for retaliatory reasons including complaining about water quality, filing grievances, speaking with the ACLU of Georgia regarding conditions of detention, or organizing a worker strike against unfair labor conditions.¹⁹ Per

¹⁴ PRISONERS OF PROFIT, *supra* note 5, at 12. North Georgia Detention Center is no longer used as an immigration detention facility. See “Officials to Close North Georgia Detention Center in Gainesville.” <http://wabe.org/post/officials-close-north-georgia-detention-center-gainesville> (last visited May 5, 2014).

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 16, 96; NIJC/PHR REPORT, *supra* note 7, at 9.

¹⁷ PRISONERS OF PROFIT, *supra* note 5, at 16.

¹⁸ *Id.* at 17, 96.

¹⁹ *Id.* at 19, 57, 64. See also Yana Kunichoff, “Voluntary” Work Program Run in Private Detention Centers Pays Detained Immigrants \$1 a Day, TRUTHOUT (July 27, 2012, 12:00 AM), <http://truth-out.org/news/item/10548-voluntary-work-program-run-in-private-detention-centers-pays-detained-immigrants-1-a-day/>.

accounts by immigrants in detention, retaliation against people exercising their human and religious rights²⁰ and those who speak out about conditions of detention²¹ or other abuses in detention is the true reason for placement in isolation.²² The various individual accounts relayed by immigrants held in solitary confinement in Georgia illustrate the lack of any rhyme or reason why and for how long immigrants are confined.²³

Another immigrant in detention who preferred to have his name kept private said in an interview that he was assaulted by a detention official, resulting in a damaged blood vessel in his arm.²⁴ Before he was treated for his injury, the officer who assaulted him sent him into solitary confinement for four to five hours.²⁵

Isolation is often erroneously defended as a needed disciplinary response, purportedly to reduce violence. However, contrary to this rationale, Mississippi attained national recognition for its

²⁰ See PRISONERS OF PROFIT, *supra* note 5, at 68 (“Jaime Lara was threatened with segregation [by guards at the Stewart Detention Center in Lumpkin, Georgia] if he refused to work less than eight hours per day.”). See also *NIJC Solitary Confinement Testimony*, *supra* note 7, at 5.

²¹ In 2009, Arman Garghani, a detainee who worked cleaning showers, told the ACLU of Georgia that when detainees complained that the shower water was dirty, the guards sent them to the segregation unit. *Id.* at 68. Another detainee, Mikyas Germachew, confirmed that this practice continued two years later. *Id.*

²² This detainee account is representative of some of the abuses by Corrections Corporation of America (CCA), a private corrections company:

Javan Jeffrey believes that as a result of [an] assault incident and because he filed a grievance, he has been targeted by guards. This was confirmed by another detainee who told [the ACLU of Georgia] that since Javan filed grievances, he is on the guards’ “radar” and everything he does gets him sent to the segregation unit. Javan had been in the segregation unit seven times in less than three months. Javan’s wife told us that right after the ACLU of Georgia visited with Javan, he was put back in the segregation unit for 29 days and was told that he could only make one phone call during the entire time he was in the segregation unit. That marks Javan’s eighth time in segregation. When asked to respond, CCA stated that Javan was in segregation for disciplinary reasons.

Id. at 67–68.

²³ See, e.g., *id.* at 68 (“Grzegorz Kawalec has been placed in segregation twice. Once, he had a dangerously high fever, but there was no room for him in the medical center, and so he was moved to the segregation unit. The second time he was sent to segregation, he stayed there for two weeks, and the guards would not tell him why he was there. After two weeks, he was moved back into the general population. ‘They said it was a mistake, and I hadn’t broken any rules.’ He said detainees are placed in segregation often. ‘Two, three weeks there is a short time. You go there for three weeks for talking back or being disrespectful.’” A month or two, he says, is standard for more serious violations.”).

²⁴ Interview with Anonymous Detained Immigrant, Irwin County Detention Center, Ocilla, Ga. (August 3, 2012).

²⁵ *Id.*

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 249

manner of handling violence without placing prisoners on 23-hour lockdown.²⁶ Additionally, a 2003 study covering Arizona, Illinois, and Minnesota suggests that solitary confinement is not effective at reducing prison violence.²⁷

In the immigration detention context, far from being a tool used only as a method of controlling violence, isolation is reportedly used for minor infractions that are not fully investigated and based on false accusations.²⁸ Isolation is frequently used in an arbitrary and inconsistent manner, as a weapon to retaliate against those who speak out, to single out members of the LGBTQ community, and as a substitute for mental health treatment.²⁹ Consistently, the reasons why immigrants are confined appear to involve abuse of power and unfettered discretion as well as discriminatory attitudes toward vulnerable populations.

3. LGBTQ Individuals

LGBTQ immigrants in detention are sometimes placed in solitary with little or no explanation. In a July 6, 2012 interview at the Stewart Detention Center with a transgender immigrant named Odalis, conducted in anticipation of this article, the ACLU of Georgia learned that after she was arrested for a nonviolent offense by law enforcement in Georgia, she was detained by Immigration and Customs Enforcement (ICE) and held for seven days in solitary confinement at the Hall County Immigration Detention Center in Gainesville, Georgia.³⁰ Odalis says she was sent “directly” to isolation without any explanation or information about how long the isolation would last.³¹ For seven days, Odalis was kept alone in a cell that was about eight by twelve feet and had a small slit for a window.³² Aside from being able to yell sometimes to another cell, her only contact with other human beings was getting

²⁶ See Editorial, *The Abuse of Solitary Confinement*, N.Y. TIMES (March 15, 2012), <http://www.nytimes.com/2012/03/16/opinion/the-abuse-of-solitary-confinement.html>.

²⁷ See Helen Vera, *Keeping Prisoners in Solitary Confinement Isn't Just Cruel, It's Ineffective*, NAT'L POST (Feb. 27, 2014, 2:18 PM), <http://fullcomment.nationalpost.com/2014/02/28/helen-vera-keeping-prisoners-in-solitary-confinement-isnt-just-cruel-its-in-effective/> (reporting on the 2003 study).

²⁸ See *NIJC Solitary Confinement Testimony*, *supra* note 7, at 4; see also PRISONERS OF PROFIT, *supra* note 5, at 67–68.

²⁹ See PRISONERS OF PROFIT, *supra* note 5, at 19. See also *NIJC Solitary Confinement Testimony*, *supra* note 7, at 1.

³⁰ Interview with Odalis (last name withheld), Irwin County Detention Center, Ocilla, Ga. (July 6, 2012).

³¹ *Id.*

³² *Id.*

escorted in handcuffs by guards to the bathroom and locked inside while they waited for her.³³ As there appeared to be no other reason for her to be placed in confinement, she believes that she was singled out for her gender identity.³⁴ She knows of other LGBTQ individuals who were held for much longer, including immigrants who were detained for two to three months and even up to nine months.³⁵ She says of her experience in solitary confinement: “[The cell was] very ugly, very isolated, shut closed. I was only allowed to shower every three days. You are stuck and closed in and can’t get to anything.”³⁶ After she was released into the general population, she says she felt safer than she did in isolation.³⁷ However, she says she now suffers from “insomnia, depression, anxiety, and fear,” which she has experienced since being detained.³⁸ Her story echoes similar reports across the country.³⁹

The National Immigrant Justice Center (NIJC) filed a complaint with the Department of Homeland Security in 2011 on behalf of seventeen detained LGBTQ individuals. LGBTQ individuals were told that they were held in long-term solitary confinement for their own protection and for their feminine appearance.⁴⁰ In response, thirty members of Congress, led by Jared Polis from Colorado and Michael Quigley from Illinois, wrote to the U.S. Government Accountability Office, calling for the Obama administration to comprehensively investigate the NIJC’s allegations, citing

³³ *Id.*

³⁴ *Id.*

³⁵ Interview with Odalis (last name withheld), Irwin County Detention Center, Ocilla, Ga. (July 6, 2012).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, e.g., Claudia Valenzuela, *Nightmare of Solitary Confinement*, NAT’L IMMIGRANT JUSTICE CTR. (Oct. 12, 2012, 10:58 AM), <http://www.immigrantjustice.org/staff/blog/these-lives-matter-nightmare-solitary-confinement> (depicting the testimony of a solitary confinement victim); Andrew Harmon, *Eight Months in Solitary*, ADVOCATE.COM (May 7, 2012, 7:42 AM), <http://www.advocate.com/news/news-features/2012/05/07/transgender-detainees-face-challenges-broken-immigration-system>; Cora Lively, *Documentary Outlines Deplorable Treatment of Transgender ICE Detainees*, IMMIGRATION EQUALITY (July 9, 2012), <http://www.immigrationequality.org/2012/07/harvard-law-documentary-outlines-deplorable-treatment-of-transgender-ice-detainees/>.

⁴⁰ See Memorandum Accompanying Redacted Civil Rights Complaints Regarding Mistreatment and Abuse of Sexual Minorities in DHS Custody from Mary Meg McCarthy, Exec. Dir., Nat’l Immigrant Action Ctr. to Margo Schlanger, Dep’t of Homeland Sec., at 5 (Apr. 13, 2011), available at <http://www.lgbtqnation.com/wp-content/uploads/2011/04/LGBT-Immigrant-OCRCL-Complaint-April-2011-Redacted2-1.pdf>; National Immigrant Justice Center, Announcement of Four Supplemental Complaints (Oct. 25, 2011), http://www.immigrantjustice.org/press_releases/human-rights-group-reports-continued-abuse-against-detained-lgbt-immigrants.

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 251

the complaint's reports of "long-term solitary confinement, and misuse of segregation due to sexual minority status."⁴¹

4. *Exacerbation of Underlying Mental Disabilities and "Prison Psychosis"*

Human rights experts recommend against long-term solitary confinement due to the profound negative impacts of isolation, which one expert calls "prison psychosis."⁴² This condition, seemingly unique to those placed in prolonged solitary confinement, can include "hyperresponsivity to external stimuli; perceptual distortions, illusions, and hallucinations; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts; overt paranoia; problems with impulse control, including random violence and self-harm."⁴³

In addition to negatively impacting the psychological well-being of individuals not already experiencing mental disabilities, the practice of isolating immigrants in detention has caused some immigrants to decide not to discuss existing mental issues with health professionals in detention for fear of being separated from the general population.⁴⁴ Accounts across the country highlight the disturbing practice of using solitary confinement as a substitute for medical treatment.⁴⁵

While ICE has acknowledged that solitary confinement exacerbates mental illness, the ACLU of Georgia report discusses numerous instances of detainees being isolated as a substitute for mental health treatment.⁴⁶ Detention centers in Georgia were found to be understaffed with inadequate medical care, as well as a stark absence of meaningful mental health resources.⁴⁷ One immigrant, Ermis Calderone, who was formerly detained at Stewart and suffers from bipolar disorder, panic attacks, addiction issues, and depression, described a lack of mental health services, as well as his experience of being held in solitary confinement:

I feel like I'm going crazy. My medicine is always changing and it makes me crazy. When I get upset, they just give me more

⁴¹ Letter from Jared Polis, et al., Members of Cong., to Gene Dodaro, Comptroller General, U.S. Government Accountability Office (Jan. 4, 2011), http://polis.house.gov/uploadedfiles/010512_gao_detention_letter.pdf.

⁴² See NIJC/PHR REPORT, *supra* note 7, at 12.

⁴³ *Id.*

⁴⁴ PRISONERS OF PROFIT, *supra* note 5, at 19.

⁴⁵ *Id.* at 16, 77, 95, 100; NIJC/PHR REPORT, *supra* note 7, at 16.

⁴⁶ See, e.g., PRISONERS OF PROFIT, *supra* note 5, at 63.

⁴⁷ *Id.* at 60, 62.

medicine. I can't tell them I'm really upset or they just put me in a helmet and handcuffs for a few days. That's torture! I don't see anybody. I don't really care about anything. I just want to get out and get into a program that will help me.⁴⁸

Despite recently issuing guidelines on solitary confinement⁴⁹ which comes as a much-needed step in the right direction, the U.S. has yet to set strict time limits on this practice even for vulnerable populations.⁵⁰

⁴⁸ *Id.* at 64.

⁴⁹ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 1 (2013), available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

⁵⁰ *Id.* At the second meeting of the Open-ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, human rights experts proposed changes to the Standard Minimum Rules (SMR), which have remained unchanged since 1955. See David Fathi, *UN Prisoners' Rights Meeting: US Puts the Brakes on Progress*, ACLU BLOG OF RIGHTS (Dec. 18, 2012, 1:48 PM), <http://www.aclu.org/blog/prisoners-rights/un-prisoners-rights-meeting-us-puts-brakes-progress>; see also Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, E.S.C. Res. 663C, Annex 1, at 11, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. A/CONF/611 (July 31, 1957), available at http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf. At the meeting, an ACLU representative made a statement specifically highlighting the need for protections against long-term solitary confinement, noting the severe harm caused not only to especially vulnerable individuals, such as children and individuals suffering from mental disabilities, but to any person subject to solitary confinement. See David Fathi, *US at UN Prisoners' Rights Meeting: Progress, but Still Wrong on Solitary Confinement*, ACLU BLOG OF RIGHTS (Dec. 12, 2012, 5:37 PM), <https://www.aclu.org/blog/prisoners-rights/us-un-prisoners-rights-meeting-progress-still-wrong-solitary-confinement>. The ACLU based its recommendation that any period of prolonged isolation (thirty days or more) should be prohibited on a series of studies that show that even seven days of solitary confinement are sufficient to alter an individual's brain chemistry, and that "no study of the effects of solitary . . . confinement that lasted longer than [sixty] days failed to find evidence of negative psychological effects." See ACLU, ABUSE OF THE HUMAN RIGHTS OF PRISONERS IN THE UNITED STATES: SOLITARY CONFINEMENT 2 (2011), available at https://www.aclu.org/files/assets/ACLU_Submission_to_HRC_16th_Session_on_Solitary_Confinement.pdf (submission to the 16th Session of the U.N. Human Rights Council). The draft report of the meeting group states that revisions to the SMR will "limit . . . in Rule 32(1), the imposition of punishment by solitary confinement to a disposition of last resort to be authorized by the competent authority, to be applied in exceptional circumstances only and for a short a time as possible . . ." Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, Draft Report on Meeting Held Dec. 11–13, 2012, at 5, U.N. Doc. CCPCJ/EG.6/2012/L.4 (Dec. 13, 2012). For progress of the Intergovernmental Expert Group meetings, see *IEG Standards*, U.N. OFFICE OF DRUGS AND CRIME, <http://www.unodc.org/unodc/en/justice-and-prison-reform/ieg-standards.html> (last visited Apr. 30, 2014).

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 253

II. THE CONSTITUTIONAL FRAMEWORK: THE DIFFERENCES
BETWEEN PRISONS AND IMMIGRANT DETENTION CENTERS
UNDER THE FOURTH, FIFTH, AND EIGHTH AMENDMENTS

Convicted prisoners are protected against cruel and unusual punishment by the Eighth Amendment.⁵¹ Immigrant detainees, like civil detainees, are protected by the Due Process Clause, and are entitled to conditions at least as favorable as those of convicted prisoners. In *Jones v. Blanas*, the Court of Appeals for the Ninth Circuit held that “a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive.”⁵² The court further held that under *Bell v. Wolfish*,⁵³ a restriction is “punitive” where it is intended to punish, or where it is “excessive in relation to [its non-punitive] purpose,” or is “employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.”⁵⁴

Civil detention centers in theory provide for the temporary holding of immigrants. Therefore, their practices must be distinguishable from prisons and jails. Yet in reality, there are few practical differences between correctional facilities and the facilities used to detain immigrants. Even the former director of the Department of Homeland Security’s Office of Detention Policy and Planning acknowledged that immigrant detention centers rely “primarily on correctional incarceration standards . . . and on correctional principles of care, custody, and control.”⁵⁵

While civil immigrant detention centers improperly replicate practices of prisons and jails, federal law has been relatively silent regarding forms of relief available to immigrants held in detention. Nevertheless, the Supreme Court has concluded that not only should immigrants be protected by the Due Process Clause—which “applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent”⁵⁶—but also that their civil detention raises serious constitutional questions vis-à-vis violation of their liberty interests.⁵⁷

If the condition of said detention constitutes “cruel and unusual punishment under the Eighth Amendment, it is [also] a pre-

⁵¹ U.S. CONST. amend. VIII.

⁵² 393 F.3d 918, 931–32 (9th Cir. 2004).

⁵³ 441 U.S. 520.

⁵⁴ *Id.*

⁵⁵ NIJC/PHR REPORT, *supra* note 7, at 11.

⁵⁶ *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

⁵⁷ *Id.* at 679–80.

sumptive denial of due process under the Fifth Amendment,”⁵⁸ effectively granting immigrant detainees two avenues for protection available to prisoners in correctional facilities: the Fifth and Eighth Amendments.

Over the last decade and in the face of growing detainee populations across the United States, some courts have begun to recognize the improper similarities between treatment of civil detainees versus those criminally committed, ruling that the conditions of civil confinement must be superior to the conditions in correctional facilities.⁵⁹

For the immigrant who has been confined, remedies are a complex issue due to the relatively uncharted legal territory. Nonetheless, there are separate legal standards regarding 1) prisoners seeking constitutional remedies for confinement, and 2) immigrant detainees seeking constitutional remedies for prolonged detainment. Coupled together, these areas illustrate avenues for how a detained immigrant may seek relief.

The starting point for those seeking relief for constitutional violations of any kind is *Bivens v. Six Unknown Fed. Narcotics Agents*,⁶⁰ in which the Supreme Court recognized an implied cause of action for damages against federal officers for alleged violations of the Fourth Amendment’s protection against unlawful searches and seizures. Since this seminal ruling in *Bivens*, the Court has extended the availability of such suits to violations of the Cruel and Unusual Punishment Clause and the Fifth Amendment Due Process Clause.⁶¹

In these later cases, the Eighth Amendment has been interpreted to impose duties on officers and officials administering prison facilities,⁶² requiring the provision of “humane conditions of confinement,” and specifically that “in-mates receive adequate

⁵⁸ Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 270, 292 (2008).

⁵⁹ *Id.* at 293.

⁶⁰ 403 U.S. 388, 397 (1971).

⁶¹ *See* *Carlson v. Green*, 446 U.S. 14, 17–19 (1980); *Davis v. Passman*, 442 U.S. 228, 230 (1979).

⁶² Courts have held that *Bivens* claims against prison officials do not apply to those employed by privately run detention centers when state tort remedies are also available. Even if contracted in partnership with the federal government, private corporations and their staff cannot be liable for violating a prisoner’s constitutional rights under *Bivens*. Rather, the only remedies extend from state tort claims. *See* *Minneci v. Pollard*, 132 S. Ct. 617 (2012); *Correctional Services Corp v. Malesko*, 524 U.S. 61 (2001); *Bell v Wolfish*, 441 U.S. 520 (1979); *Peoples v. CCA Det. Ctrs.*, 422 F.3d. 1090 (10th Cir. 2005).

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 255

food, clothing, shelter, and medical care” and are accorded “reasonable measures to guarantee [their] safety.”⁶³ Applying that interpretation to pre-trial and civil detention—which technically does not constitute “punishment” according to judicial and legislative language—denial of adequate food, clothing, shelter, and medical care qualifies as a presumptive violation of the Due Process Clause of the Fifth Amendment.⁶⁴

1. *Courts Have Granted Relief to Convicted Prisoners Housed in Solitary Confinement*

In a few cases, courts have granted relief to convicted prisoners housed in solitary confinement. In *Madrid v. Gomez*, the Court held that conditions of extreme social isolation and sensory deprivation of mentally ill prisoners in the Security Housing Unit of a Pelican Bay State Prison was in violation of the Eighth Amendment and was therefore unconstitutional.⁶⁵ In *Jones El v. Berge*, the Court granted a preliminary injunction to remove seriously mentally ill prisoners from a supermax facility after experts toured a Wisconsin correctional facility to document those prisoners’ treatment.⁶⁶

2. *Courts Have Not Yet Had Occasion to Rule on Solitary Confinement of Immigrant Detainees*

Despite this increased willingness on the part of judges to hear cases regarding constitutional violations pertaining to prison issues and beyond, courts have struggled for more than a century with the particular complexity of confinement. The U.S. Supreme Court’s view of solitary confinement has evolved – though certainly not in a linear, progressive way. Rather, the evolution of judicial thought on solitary confinement can be described as a push-pull relationship: while nearly outlawing solitary confinement as a form of torture in supermax facilities, the Court has ultimately upheld the practice under the Eighth Amendment.

In one of the first cases to grapple with the issue, the Supreme Court stated that solitary confinement “was an additional punishment of the most important and painful character” and struck it down as an ex post facto statutory change.⁶⁷ Yet one year later, in

⁶³ *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526–527 (1984)).

⁶⁴ *See Bell v. Wolfish*, 441 U.S. 520, 536–37 (1979).

⁶⁵ 889 F. Supp. 1146 (N.D. Cal. 1995); *see also* David Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 676–77 (2004).

⁶⁶ 374 F.3d 541 (7th Cir. 2004)

⁶⁷ *In re Medley*, 134 U.S. 160, 171 (1890).

McElvaine v. Brush,⁶⁸ the Court rejected “a direct 8th Amendment challenge to electrocution and solitary confinement by deferring to the New York legislature’s judgment.”⁶⁹ And over the next half century, judicial opinions vacillated between granting and denying constitutional protections to prisoners under the Eighth Amendment.

By 1978, the Supreme Court finally recognized that “confinement . . . is a form of punishment subject to scrutiny under Eighth Amendment standards.”⁷⁰ Despite this victory for the prisoner seeking relief, the Court has exclusively reviewed cases regarding *criminal* solitary confinement, effectively creating a noticeable gap in judicial opinion regarding immigrant confinement in detention centers.

In one of the most recent and highly applicable cases regarding correctional confinement, the New York Civil Liberties Union filed a lawsuit on behalf of Leroy Peoples in 2012 challenging New York prison officials’ system-wide policies and practices governing confinement.⁷¹ Mr. Peoples was locked inside a cell no bigger than an elevator with another prisoner for 24 hours a day for 780 days for engaging in behavior that was neither violent nor presented a threat to others.⁷² In reaction to his term in isolation, Mr. Peoples stated, “Life in the box stripped me of my dignity, and made me feel like a chained dog.”⁷³

Confinement, often used haphazardly for “administrative” or “disciplinary” reasons, has largely failed to pay regard to the various difficulties or needs of prisoners; and Mr. Peoples was no exception, suffering from mental illness. By 2008, the New York legislature acknowledged these failures and mandated that inmates who suffer from serious mental illness be placed in treatment programs rather than solitary confinement should they violate prison rules. That revelation greatly improved the treatment of such prisoners and broadened awareness of the particular problems of confining prisoners. Nevertheless, solitary confinement is still used across the state, as the NYCLU argued in the litigation on Mr. Peoples’ case,

⁶⁸ 142 U.S. 155 (1891).

⁶⁹ *U.S. Supreme Court Cases*, SOLITARY WATCH, <http://solitarywatch.com/resources/u-s-supreme-court-cases/> (last visited Feb. 22, 2014).

⁷⁰ *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

⁷¹ *NYCLU Lawsuit Challenges New York State’s Use of Solitary Confinement*, N.Y. CIV. LIBERTIES UNION (Dec. 6, 2012), <http://www.nyclu.org/news/nyclu-lawsuit-challenges-new-york-states-use-of-solitary-confinement>.

⁷² *Id.*

⁷³ *Id.*

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 257

as a punishment “for a broad range of the system’s 55,000 inmates.”⁷⁴

While voices of advocates grow stronger for confined prisoners seeking relief from their constitutional rights’ violations, there are still voiceless immigrants confined in ways far too similar to the correctional system.

3. *Challenges to Conditions of Confinement*

a. Lack of Sufficient Internal Grievance Procedures Makes Alternative Remedies Necessary

There is very little federal regulation addressing conditions of confinement for those detained by the federal government through ICE. DHS has set forth guidelines for ICE addressing the use of segregation units in the Detention Operations Manual.⁷⁵ A new directive, cited above, issued in September 2013 by ICE Acting Director John Sandweg, seeks to reinforce and expand upon these guidelines.⁷⁶ The directive sets out an updated policy stating that segregation should be used “only as a last resort,” and in such cases, as a limited measure.⁷⁷

One main detention reform goal in 2010 was to release new standards, finally published in 2011.⁷⁸ The stated purpose of Performance Based National Detention Standards 2011 (PBNDS) was “to improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with detainees with limited English proficiency, improve the process for reporting and responding to complaints, reinforce protections against sexual abuse and assault, and increase recreation and visitation.”⁷⁹ The PBNDS 2008, which were supposed to take effect in all ICE facilities by January 2010, created 41 performance-based national detention standards, all targeting oversight and well-being

⁷⁴ Editorial, *The Cost of Solitary Confinement*, N.Y. TIMES (Dec. 13, 2012), <http://www.nytimes.com/2012/12/14/opinion/the-cost-of-solitary-confinement.html>.

⁷⁵ Since ICE is a division of DHS, the Secretary of Homeland Security has the authority to regulate conditions of confinement for immigrants in detention. *See* 8 U.S.C. § 1103(a)(2) (2012).

⁷⁶ *See* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 1 (2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

⁷⁷ *Id.* at 8.

⁷⁸ *See* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 1 (2013), *available at* <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>.

⁷⁹ *Fact Sheet: ICE Detention Standards*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Feb. 24, 2012), <http://www.ice.gov/news/library/factsheets/facilities-pbnds.htm>.

of immigrants in custody while they awaited a determination in their removal proceedings or removal.⁸⁰ PBNDS are organized into seven categories: Safety, Security, Order, Care, Activities, Justice, and Administration and Management.⁸¹ Subsections of these categories address most aspects of detainee life including food, housing, recreation, medical care, and discipline.⁸² The September 2013 directive expands upon the guidelines of the PBDNS focusing specifically on the use of segregation: designating specific personnel with responsibilities of notification, reporting, review, and internal oversight of segregation cases; distinguishing procedures for administrative (or “non-punitive”) and disciplinary segregation; requiring review of all segregation cases lasting over fourteen days; requiring documentation of the basis for placement in segregation; and ordering additional protections for immigrants with “special vulnerabilities.”⁸³

Notwithstanding the strides forward made by the new directive, potentially troublesome aspects include: vague requirements to review “appropriateness” of placement of immigrants with mental illness in segregation, the lack of oversight requirements for instances of segregation lasting less than fourteen days, and the absence of a time limit on solitary confinement.⁸⁴ Furthermore, as internal policy documents, there is a question as to whether the standards or the September 2013 directive are binding or subject to meaningful external review.

Few provisions of the standards or the new directive relate to actual grievance procedures for detainees. The most significant, however, falls under Section 2.12 of the 2011 PBDNS, explicitly authorizing the use of “Special Management Units” (SMU) for purposes of administrative or disciplinary confinement.⁸⁵ The procedures here include: a disciplinary hearing panel to place immigrants in isolated, solitary rooms which greatly resemble correctional confinement conditions, in the event the panel finds an

⁸⁰ See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS (PBNDS) (2008), available at <http://www.ice.gov/detention-standards/2008/>.

⁸¹ See *id.*

⁸² See *id.*

⁸³ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 1–4, 6, 8 (2013), available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

⁸⁴ See generally *id.*

⁸⁵ See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2.12 SPECIAL MANAGEMENT UNITS 178 (2013), available at http://www.ice.gov/doclib/detention-standards/2011/special_management_units.pdf.

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 259

immigrant guilty of violating a rule or engaging in prohibited conduct characterized at a “greatest,” “high,” or “high-moderate level.”⁸⁶

Even with the benefit of more structured guidelines for ICE personnel ordered by the new directive, remedies for an immigrant placed in an SMU remain narrow. If an incident occurs which detention officials believe could warrant time in an SMU, detainees are often placed there throughout investigation of the potential infractions.

The 2011 standards provide that immigrants are afforded rights such as: “the right to protection from abuse; the right to freedom from discrimination; [and] the right to pursue a grievance.”⁸⁷ Immigrants can file informal, formal, and emergency grievances as well as appeal initial decisions.⁸⁸ However, if it is believed that an immigrant has “establishe[d] a pattern of filing nuisance complaints,” an ICE administrator can find that that immigrant is “one for whom not all subsequent complaints must be fully processed.”⁸⁹

As the ACLU of Georgia report highlighted, due process for these detainees is truncated: there is no opportunity to appeal, nor an avenue to present witnesses, nor present a challenge to an assignment to solitary confinement. Thus, the lack of appropriate internal grievance procedures makes it important to seek constitutional remedies. Still, advocates would be well-advised to carefully review the September 2013 directive and hold detention facilities accountable to their own guidelines. New internal data-tracking requirements open the door to the possibility of filing Freedom of Information Act requests to review the self-reported progress of detention facilities on limiting the use of segregation.⁹⁰ One useful strategy may be to create a questionnaire for immigrants placed in segregation, investigating the facility’s step-by-step compliance with appropriate internal procedures. Data from these surveys could be used to support clients with individual grievances, as well as to cre-

⁸⁶ See *id.* at 179.

⁸⁷ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 226 (2013), available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>.

⁸⁸ See *id.* at 168, 175.

⁸⁹ *Id.* at 399.

⁹⁰ See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 10 (2013), available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

ate shadow reports comparing data and highlighting any discrepancies with official reports.

b. Means of Bringing a Federal Claim

Though far from an exhaustive list, below are some legal avenues that have proven effective, in varying degrees, to challenge conditions of confinement or prolonged detention in federal courts.

Habeas Corpus Claims: The Supreme Court held in *Zadvydas v Davis*⁹¹ that under the federal habeas statute, “indefinite detention of an alien would raise a serious constitutional problem,”⁹² and that the detained immigrant should have the option of habeas corpus proceedings as a forum to challenge prolonged civil detention.⁹³

A victory for civil detainment challenges, the Court also rejected government arguments that civil detention assists the regulatory immigration and removal process by ensuring that 1) aliens indeed appear at future immigration proceedings, and 2) their detainment helps protect the broader community.⁹⁴ In rejecting both arguments, the Court has now made room for future claims by civil detainees who receive haphazard, prolonged detention for mere administrative reasons. Those subjected to administrative confinement can employ a similar rationale.

Constitutional Claims: The Supreme Court has held that immigrants have presumptively been denied their due process rights if “a condition constitutes cruel and unusual punishment under the Eighth Amendment.”⁹⁵ Yet courts have been reluctant to extend these rights too broadly and have not yet done so for an immigrant detainee who has been confined.

Currently, the exceptional case remains the Pelican Bay Prison class action suit, *Madrid v. Gomez*,⁹⁶ in which the federal district court in California recognized there is a degree of Eighth Amendment violation when prisoners with “pre-existing mental health conditions . . . [are] subjected to solitary confinement.”⁹⁷

⁹¹ 533 U.S. 678 (2001).

⁹² *Id.* at 690.

⁹³ *Id.* at 688.

⁹⁴ *Id.* at 690.

⁹⁵ Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 270, 292 (2008).

⁹⁶ 889 F. Supp. 1146 (N.D. Cal. 1995).

⁹⁷ JENNIFER WEDEKIND, SOLITARY WATCH, FACT SHEET: SOLITARY CONFINEMENT AND THE LAW I (2011), available at <http://solitarywatch.com/wp-content/uploads/2011/06/fact-sheet-solitary-confinement-and-the-law2.pdf>; see also *Madrid*, 889 F. Supp. at 1265–66.

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 261

Further, the Supreme Court has found that within the prison context, prisoners retain “only the most limited liberty interests and courts are exceedingly deferential to the decision of prison administrators.”⁹⁸ Should there be a liberty interest implicated, procedural due process must be provided for the confined individual so she is given notice of the factual basis for her confinement and provided an opportunity to respond.⁹⁹ Nevertheless, the relief available for immigrants confined remains narrow as the Supreme Court has stood by its holding in *Sandin v. Conner* in procedural due process terms insofar as prisoners subjected to solitary confinement are not granted liberty interests for remedy purposes: conditions in solitary “did not present a dramatic departure from the basic conditions of [the prisoner’s] sentence.”¹⁰⁰

Tort Claims: Another legal avenue may be the Federal Tort Claims Act (FTCA),¹⁰¹ which provides for the substitution of the United States for the individual federal official for most torts. Below is a brief sampling of case law showing under which circumstances a prisoner may or may not recover damages under this statute.

In *Ali v. Fed. Bureau of Prisons*,¹⁰² Abdus-Shahid M.S. Ali was being transferred across state lines to a different federal prison. Upon arrival, the inmate realized that several personal items were missing.¹⁰³ Ali alleged that BOP officers had lost his property and filed suit under the FTCA.¹⁰⁴ The Supreme Court held that the BOP officers were “law enforcement officers” within the meaning of the FTCA, and thus were excepted from waiver of federal sovereign immunity from liability for negligent or wrongful disposal of prisoner’s belongings—that is, the FTCA “forecloses lawsuits against the United States for the unlawful detention of property.”¹⁰⁵

In *Michtavi v. United States*,¹⁰⁶ Michtavi, an Israeli citizen and

⁹⁸ WEDEKIND, *supra* note 96, at 1; see *Hewitt v. Helms*, 459 U.S. 460 (1983), with respect to court deference to prison administrators regarding procedural due process. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985), the Court elaborated that substantive due process rights are rights that are reserved to a person, such as life, liberty, and freedom of speech, whereas procedural due process rights encompass procedures that are guaranteed to a person.

⁹⁹ See *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005).

¹⁰⁰ 515 U.S. 472, 486 (1995).

¹⁰¹ 28 U.S.C. §§ 1346, 2671–2680 (2012).

¹⁰² 552 U.S. 214 (2008).

¹⁰³ See *id.* at 216.

¹⁰⁴ *Id.* at 216–17.

¹⁰⁵ *Id.* at 228.

¹⁰⁶ 345 F. App’x 727 (3d Cir. 2009).

federal inmate, alleged fellow inmates plotted against him in an attempt to steal his personal effects and that prison officials accused him of involvement in prison wrongdoing and conspiring to cover up inmate plots.¹⁰⁷ The Third Circuit Court of Appeals held that a prisoner such as Michtavi may not, under either the FTCA or the Prisoner Litigation Reform Act, recover compensatory damages for exclusively mental or emotional injuries without also showing an accompanying physical injury.¹⁰⁸

In *Ashford v. United States*,¹⁰⁹ Edward Ashford knew he was going to be transferred to a different prison where gang members who had previously attacked him were being held; so Ashford notified prison officials of the risk of being housed with those individuals.¹¹⁰ Despite this notice, Ashford was housed with those gang members and was brutally attacked on his second day at the facility.¹¹¹ The Fifth Circuit Court of Appeals held that the discretionary-function exception to the FTCA would not apply if the inmate raised the safety concerns at his prison intake interview.¹¹²

III. ADVOCACY MECHANISMS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Where constitutional and federal law fail to provide a clear remedy for an immigrant in detention who is unable to successfully argue that she is being “punished” through the practice of solitary confinement, human rights standards can provide a set of principles that are broad enough to cover all circumstances, including solitary confinement of immigrants in detention.

1. *International Treaties Ratified by the United States*

Several human rights treaties ratified by the United States, including the International Covenant on Civil and Political Rights (ICCPR),¹¹³ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹¹⁴ and the Conven-

¹⁰⁷ See *id.* at 728.

¹⁰⁸ *Id.* at 729–30.

¹⁰⁹ 511 F.3d 501 (5th Cir. 2007).

¹¹⁰ See *id.* at 503.

¹¹¹ See *id.* at 504.

¹¹² *Id.*

¹¹³ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 31st Sess., Supp. No. 16, art. 7, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR] (entered into force Mar. 23, 1976), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination art. 2, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD], available at <http://>

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 263

tion Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹¹⁵ explicitly prohibit the use of treatment that rises to the level of torture and other cruel, inhuman, or degrading treatment.¹¹⁶ However, a majority of these treaties lack meaningful enforcement mechanisms. Although ratified by the United States, these treaties are not enforceable in U.S. domestic courts as they are not “self-executing.”¹¹⁷ “Non-self-executing” means that provisions of treaties are not domestically enforceable absent further implementation by U.S. legislation.¹¹⁸ As a result, immigrants who suffer conditions of solitary confinement in U.S. immigration detention centers cannot sue the U.S. for violations of these treaties in domestic courts. They must there-

www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf (prohibiting all forms of racial discrimination).

¹¹⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT], *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (prohibiting any acts of torture); *id.* art. 1 (“[T]he term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing him for an act . . . committed or . . . suspected of . . . commit[ing], or intimidating or coercing him . . . when such pain or suffering is inflict[ed] by or at the instigation of or with the consent or acquiescence of a public official.”).

¹¹⁶ Press Release, Physicians for Human Rights, On Human Rights Day, PHR Highlights Priorities for the Administration (Dec. 20, 2013), <http://physiciansforhumanrights.org/press/press-releases/on-human-rights-day-phr-highlights-priorities-for-the-administration.html> (noting that the Universal Declaration of Human Rights “is a landmark document that guarantees fundamental rights to all people”); *cf.* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR], *available at* <http://www.un.org/en/documents/udhr/> (prohibiting any acts that interfere with any rights and freedoms set forth in the Declaration); ICCPR art. 7 (prohibiting any acts that interfere with an individual’s right to freely determine his or her political status and freely pursue his or her social, economic, and cultural development); CAT art. 1 (qualifying “torture” to not “include pain or suffering arising only from, inherent in or incidental to lawful sanctions,” which is relevant to challenging prison conditions); *id.* art. 11 (“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”).

¹¹⁷ Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 53 (2012) (“In *Medellín v. Texas*, the Court reasoned that the treaties . . . were non-self-executing and thus not enforceable unless implemented into law by Congress.” (footnote omitted)); *id.* at 56 n.22 (“As the Court put it in *Medellín*, a treaty that is self-executing has automatic domestic effect as federal law upon ratification.”) (citation and internal quotation marks omitted).

¹¹⁸ MICHAEL J. GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 7 (2014), *available at* <http://www.fas.org/sgp/crs/misc/RL32528.pdf>.

fore avail themselves of alternate remedies and methods of advocacy.

Growing awareness around the impact of solitary confinement on incarcerated and detained individuals will prove useful to advocates seeking to hold the U.S. government accountable to its commitments under ICCPR, CERD, or CAT. Official reports documenting adherence to treaty principles are periodically released before treaty monitoring bodies for each of these treaties.¹¹⁹ To supplement official reports that could contain omitted, incomplete, or inaccurate information, non-governmental organizations often independently gather data and document cases related to treaty requirements and submit “shadow reports” to the treaty monitoring bodies.¹²⁰ Advocates seeking a way to use the language of these treaties to the advantage of clients held in solitary confinement are therefore encouraged to apply community pressure with the support of human rights oversight bodies and to file individual or group complaints to challenge solitary confinement practices.

2. *Regional Treaties*

Advocates may also find it useful to examine precedents set by recent cases under regional instruments, such as the European Convention of Human Rights¹²¹ and the American Declaration of

¹¹⁹ For a list of monitoring bodies, see *Human Rights Bodies*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last accessed April 23, 2014).

¹²⁰ See Report to the U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4, at 9 (Apr. 23, 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en (reporting on solitary confinement in the United States). See also JOHN MARSHALL L. SCH. & NAT’L IMMIGRANT JUSTICE CTR., CONCERNING THE USE OF SOLITARY CONFINEMENT IN IMMIGRANT DETENTION FACILITIES IN THE UNITED STATES OF AMERICA 4 (2013), available at <http://repository.jmls.edu/cgi/viewcontent.cgi?article=1000&context=whitepapers> (noting “the widespread use of solitary confinement in immigrant detention as it violates immigrant detainees’ rights to due process and judicial remedies, violations of minimum standards of the right to humane treatment, and the right to personal liberty”).

¹²¹ The European Court of Human Rights recently took on the question of whether solitary confinement constitutes torture under Article 3 of the European Convention on Human Rights, which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], available at http://www.echr.coe.int/Documents/Convention_ENG.pdf; cf. Vikram Dodd, *Abu Hamza Can Be Extradited to US, Human Rights Court Rules*, GUARDIAN (Apr. 10, 2012), <http://www.guardian.co.uk/uk/2012/apr/10/abu-hamza-extradited-us-court> (reporting on a European Court of Human Rights ruling

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 265

the Rights and Duties of Man,¹²² for strategies to challenge solitary confinement.

Since the U.S. never ratified the Inter-American Convention, individuals cannot bring legal action before the Inter-American Court,¹²³ however, the Inter-American Commission on Human Rights (IACHR) can make recommendations to the member state, adding to international pressure for the U.S. to conform to human rights standards with respect to solitary confinement practices. Individuals may petition the IACHR, alleging in a complaint that the United States is violating provisions of the American Declaration of the Rights and Duties of Man.¹²⁴ Complaints may be brought on the basis that the U.S. actively holds individuals in solitary confine-

holding that no violations under ECHR would occur if certain terrorism suspects were extradited to the United States).

¹²² The American Declaration of the Rights and Duties of Man (American Declaration), signed by the United States in 1948, provides for specific protections for non-criminal detainees. *See Basic Documents Pertaining to Human Rights in the Inter-American System*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://www.cidh.org/basicos/english/Basic1.%20Intro.htm> (last visited Apr. 23, 2014). The Inter-American Commission on Human Rights (IACHR) monitors the compliance of member states of the Organization of American States (OAS) with the American Declaration. *Id.* A 2011 IACHR Report examined immigration detention facilities in the United States and covered a range of problematic trends in the American immigration detention system. *Report on Immigration in the United States: Detention and Due Process*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://cidh.org/countryrep/USImmigration/Chap.IV.c.htm#IV.B1> (last visited Apr. 23, 2014). The IACHR was "deeply troubled" in particular about the use of solitary confinement against immigrants held in civil detention, particularly "in the case of vulnerable immigration detainees, including members of the LGBTQ community, religious minorities and mentally challenged detainees." *Report on Immigration in the United States: Detention and Due Process*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://cidh.org/countryrep/USImmigration/Chap.IV.d.htm> (last visited Apr. 23, 2014). "Using confinement to protect a threatened population amounts to a punitive measure. Equally troubling is the extent to which this measure is used as a disciplinary tool." *Id.* The IACHR's recognition of solitary confinement as torture in this report is consistent with its rulings on petitions filed against several member states alleging the use of solitary confinement. *See, e.g.,* Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Report No. 35/96, Inter-Am. Comm'n H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 821 (1997), *available at* <http://www1.umn.edu/humanrts/cases/1997/domrep35-96.html>; Suarez-Rosero v. Ecuador, Judgment and Merits, Inter-Am. Ct. H.R. (ser. C) (Nov. 12, 1997), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.pdf; Oscar Elias Biscet *et al.* v. Cuba, Case 12.476, Report No. 67/06, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.127 Doc. 4 rev. 1 (2007), *available at* <http://www1.umn.edu/humanrts/cases/67-06.html>; Victor Rosario Congo v. Ecuador, Case 11.427, Report No. 63/99, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 475 (1998), at ¶ 58–59, *available at* <http://www1.umn.edu/humanrts/cases/1998/ecuador63-99.html>.

¹²³ *See Basic Documents Pertaining to Human Rights in the Inter-American System*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://www.cidh.org/basicos/english/Basic1.%20Intro.htm> (last visited Apr. 23, 2014).

¹²⁴ *Id.*

ment, tacitly consents to the practice, or fails to act in a manner that would prevent this kind of treatment.¹²⁵

3. *Special Rapporteurs*

The most unequivocal condemnation of solitary confinement in recent memory amongst human rights experts has come from the current Special Rapporteur on Torture, Juan Mendez.¹²⁶ In his 2011 report to the U.N. Human Rights Commission (UNHRC),¹²⁷ Mendez recommends that any period of solitary confinement longer than fifteen days (“prolonged solitary confinement”) be considered torture and outlawed by all states that have signed onto CAT.¹²⁸

In support of the Special Rapporteur on Torture’s recommendations, the national ACLU issued a statement to the UNHRC in February 2012 urging the body to adopt his recommendations.¹²⁹ Specifically, the ACLU supported the chief recommendation to limit the use of solitary confinement to the most extreme cases, and even in such cases, limit the period of isolation as much as possible.¹³⁰ The ACLU also recommended that the Special Rapporteur on Torture be granted permission to visit United States facilities as soon as practicable.¹³¹

The prior Special Rapporteur on the Human Rights of Migrants noted in a report on his 2007 visit to the United States: “In some cases immigrant detainees spend days in solitary confinement, with overhead lights kept on [twenty-four] hours a day, and often in extreme heat and cold.”¹³² In his April 2012 report (not

¹²⁵ Cf. *Report on Immigration in the United States: Detention and Due Process*, INTER-AMERICAN COMM’N ON HUMAN RIGHTS, <http://cidh.org/countryrep/USImmigration/Chap.IV.d.htm> (last visited Apr. 23, 2014).

¹²⁶ See generally Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Rep. on Solitary Confinement, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan E. Méndez), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement>.

¹²⁷ *Id.*

¹²⁸ *Id.* ¶¶ 26, 76. See also Mike Corradini, *UN Advisor Says Solitary Confinement in the US is Torture*, PHYSICIANS FOR HUMAN RIGHTS BLOG (Oct. 16, 2012), <http://physiciansforhumanrights.org/blog/un-advisor-says-solitary-confinement-in-us-is-torture.html>.

¹²⁹ Written Statement Submitted by the Am. Civil Liberties Union to the Human Rights Council, U.N. Doc. A/HRC/19/NGO/31 (Feb. 17, 2012), available at http://www.aclu.org/files/assets/aclu.statement.solitary.confinement.unhrc_.19th.session.feb_.2012.pdf.

¹³⁰ *Id.* at 6.

¹³¹ *Id.*

¹³² Special Rapporteur on the Human Rights of Migrants, Rep. on Mission to the United States of Am. (Addendum), U.N. Doc. A/HRC/7/12/Add.2, at 2 (Mar. 5,

2013] SOLITARY CONFINEMENT IN GEORGIA & BEYOND 267

covering the United States) presented to the UNHRC,¹³³ the current Special Rapporteur on the Human Rights of Migrants, François Crépeau, did not mention solitary confinement per se; however, he did express concern at the detention of immigrants in “an irregular situation”¹³⁴ and recommended limiting the use of immigration detention in general¹³⁵ and harmonizing domestic law with the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in order to improve conditions of immigrants in detention.¹³⁶

Advocates for the abolition of solitary confinement can assist the Special Rapporteurs by supporting advocacy around ending prolonged isolation and speaking out in support of allowing inspection of U.S. detention centers (as the ACLU has done).

The offices of the Special Rapporteur on Torture also provide an accessible mechanism for advocates to directly report incidents of torture. Advocates may submit “allegation letters” on behalf of survivors of solitary confinement, reporting violations against specific groups, particular methods of isolation, and conditions of confinement.¹³⁷ In addition, advocates may report in these letters any legislation permitting the use of prolonged isolation or protecting or failing to punish its perpetrators.¹³⁸ Information on how to submit allegation letters is listed on the UN Office of the High Commissioner for Human Rights website,¹³⁹ including an address where urgent appeals may be sent, and a detailed questionnaire that may be used in interviewing an immigrant experiencing torture in the form of solitary confinement at the hands of U.S. officials. In response, the Special Rapporteur will investigate the allegation by requesting that the U.S. “clarify the substance of the allegations and to forward information on the status of any investigation,” such as “findings of any medical examination, the identity of the persons responsible for the torture, the disciplinary and

2008) (by Jorge Bustamante), *available at* <http://daccess-dds-ny.un.org/doc/UN-DOC/GEN/G08/112/81/PDF/G0811281.pdf?OpenElement>.

¹³³ Special Rapporteur on the Human Rights of Migrants, Rep. on Mission to Albania (Addendum), U.N. Doc. A/HRC/20/24/Add.1 (Apr. 10, 2012) (by François Crépeau), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24-Add1_en.pdf.

¹³⁴ *Id.* at 17–19.

¹³⁵ *Id.* at 23.

¹³⁶ *Id.* at 20.

¹³⁷ See *Allegation Letters*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Allegation.aspx> (last visited Apr. 24, 2014).

¹³⁸ *Id.*

¹³⁹ *Id.*

criminal sanctions imposed on them, and the nature and amount of compensation paid to the victims or their families[.]”¹⁴⁰

Communicating with the Special Rapporteur’s offices through letters documenting the solitary confinement of immigrants in detention and building on his recognition of the practice as torture could effectively pressure the U.S. government to abolish or severely limit its use in immigration detention centers.

CONCLUSION

Reports of the use of solitary confinement in immigration detention centers in Georgia reflect a disturbing trend of federal facilities isolating civil detainees across the United States for prolonged periods with limited oversight and accountability. The findings of the ACLU of Georgia report—the impetus for this Article—indicate that isolation is widespread, often arbitrarily practiced, and severely endangers the health of immigrants. While immigrants in detention have several means of raising federal claims—including actions through *Bivens* and FTCA—perhaps the greatest difficulty to surmount is securing meaningful representation. For while pursuing constitutional and statutory claims presents several challenges, achieving redress is only possible through effective advocacy. Broader advocacy on the human rights front may also pressure federal authorities in Georgia and elsewhere to adhere to international human rights standards that either seek to limit or abolish isolation of immigrants altogether.

¹⁴⁰ *Id.*