

**Prison (In)Justice: An Examination of the Deliberate Indifference Standard in 42 U.S.C. § 1983 Jail-Suicide Claims**

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**I. Introduction ..... 174**

**II. Historical and Theoretical Antecedents: The Road to Current Mental Health Care in Prisons ..... 178**

**III. Application of the Deliberate Indifference Standard in § 1983 Jail-Suicide Claims..... 186**

**A. Hazleton v. DeKalb County – Eleventh Circuit ..... 187**

**B. Baez v. Lancaster County – Third Circuit ..... 190**

**IV. Using International Law as a Guide to Reform Mental Health Care in Prisons and Resolve the Circuit Split ..... 192**

**V. Countervailing Considerations ..... 195**

**VI. Conclusion ..... 197**

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“It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”

–Nelson Mandela<sup>△</sup>

## I. INTRODUCTION

In the aftermath of recent mass shootings, journalists, social advocates, politicians, physicians and average American citizens broadly discussed the state of mental health care in this country.<sup>1</sup> When Ariel Castro, the man who kept three women imprisoned in his home for nearly a decade, committed suicide in his jail cell, people once again discussed mental health care, though more specifically, in the prison system.<sup>2</sup> Lindsay Hayes, of the National Center on Institutions and Alternatives, stated, “it was the responsibility of the mental health staff at the prison to send him (Castro) through a battery of tests and assessments to determine whether he was currently displaying any suicidal ideation or behavior” and suggested that Mr. Castro had not received such treatment.<sup>3</sup> Mr. Castro’s situation, including his death within the confines of his own prison cell, was not unique.

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<sup>△</sup> NELSON MANDELA, *LONG WALK TO FREEDOM: AUTOBIOGRAPHY OF NELSON MANDELA* 187 (1994).

<sup>1</sup> See, e.g., Phil Tenser, *128-Page Mental Health Report About Aurora Movie Theater Shooting Defendant James Holmes Finished*, ABC NEWS (Denver) (Sept. 9, 2013), <http://www.thedenverchannel.com/news/movie-theater-shooting/128-page-mental-health-report-about-theater-shooting-defendant-james-holmes-finished/>; Stephanie O’Neill, *Can Better Mental Health Care Prevent Mass Killings Like The Sandy Hook School Shootings?*, SOUTHERN CALIFORNIA PUBLIC RADIO (Dec. 19, 2012), <http://www.scpr.org/news/2012/12/19/35296/can-better-care-severely-mentally-ill-prevent-mass/>; Jason Cherkis, *Sandy Hook Mental Health: Program Gaps May Be Easier To Fix Than Gun Laws*, HUFFINGTON POST (Dec. 19, 2012), [http://www.huffingtonpost.com/2012/12/19/sandy-hook-mental-health-program\\_n\\_2334017.html](http://www.huffingtonpost.com/2012/12/19/sandy-hook-mental-health-program_n_2334017.html); Sydney Lupkin, *Newtown Shooting Put Spotlight on U.S. Mental Health Care – Again*, ABC NEWS (Dec. 19, 2012), <http://abcnews.go.com/Health/newtown-shootings-put-spotlight-mental-health-care/story?id=18001556> (noting that today, the largest mental health facilities are for inmates: Los Angeles County Jail in California, Cook County Jail in Illinois and Rikers Island off New York City); see also Paige St. John, *California Prisons Haven’t Improved Mental Healthcare Enough, Court Says*, L.A. TIMES (Apr. 5, 2013), <http://articles.latimes.com/2013/apr/05/local/la-me-ff-prisons-20130406>.

<sup>2</sup> Yamiche Alcindor and Donna Leinwand Leger, *Disdain, Questions Surround Suicide Of Ariel Castro*, USA TODAY (Sept. 4, 2013), <http://www.usatoday.com/story/news/nation/2013/09/04/castro-kidnapper-suicide-jail/2768207/>.

<sup>3</sup> *Id.*

Today, mental illness is endemic in prisons across this country.<sup>4</sup> A recent study published by Psychiatric Services, a journal of the American Psychiatric Association, reported that prisoners are two to four times more likely than members of the general population to develop serious forms of mental illness.<sup>5</sup> Additionally, the study reported that of the 20,000 inmates surveyed, 16.9 percent had a severe mental illness at the time of data collection.<sup>6</sup> The Bureau of Justice Statistics has estimated that the majority of state and federal prisoners suffer from the most serious forms of mental illness,<sup>7</sup> including schizophrenia, bipolar disorder and severe depression.<sup>8</sup> Additionally, Human Rights Watch has reported that approximately fifteen to twenty percent of inmates require psychiatric intervention during incarceration.<sup>9</sup> Instead of providing such treatment, however, some prisons officials move individuals with mental illness into solitary confinement.<sup>10</sup> Moreover, some officials ignore inmates, allowing them to sit in their own feces, become destructive or engage in self-mutilation.<sup>11</sup>

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<sup>4</sup> See Jacques Baillargeon et al., *Psychiatric Disorders and Repeated Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 1, 103 (2009); Antonia Moras, *Human Rights Watch: The Mentally Ill in U.S. Prisons—A Review*, 21 ALASKA JUSTICE F. 1, 2–4 (2004); see also *Mental Illness, Human Rights, and U.S. Prisons*, HUMAN RIGHTS WATCH (Sept. 22, 2009), <http://www.hrw.org/news/2009/09/22/mental-illness-human-rights-and-us-prisons>. “Mental illness” is described as “anxiety, depression, anger, cognitive disturbances, perceptual distortions, obsessive thoughts, paranoia, and psychosis.” *Id.* The lack of social interaction as well as structure within the prison system can create mental illness or prompt a reoccurrence. *Id.*

<sup>5</sup> Henry J. Steadman and Fred C. Osher, *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 6 (2009), available at <http://ps.psychiatryonline.org/article.aspx?articleID=100482>.

<sup>6</sup> *Id.*

<sup>7</sup> James R. P. Ogloff and Ronald Roesch, *Mental Health Research in the Criminal Justice System: the Need for Common Approaches and International Perspectives*, 18 INT. J. LAW PSYCHIATRY. 1, 1–14 (1995). The term “severe mental illness” is often linked to the acute psychopathology that some patients experience in state mental health facilities. *Id.*

<sup>8</sup> See *Mental Illness, Human Rights, and U.S. Prisons*, *supra* note 4.

<sup>9</sup> *Id.*

<sup>10</sup> Jeffrey L. Metzner and Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, HUMAN RIGHTS WATCH (Mar. 22, 2010), <http://www.hrw.org/news/2010/03/22/solitary-confinement-and-mental-illness-us-prisons>.

<sup>11</sup> See, e.g., *Young v. City of Augusta*, 59 F.3d 1160 (11th Cir. 1995). Young was arrested for stealing cigarettes and sentenced to serve a ninety-day sentence. *Id.* at 1163. Before being transported to the jail, Young was placed in a holding cell where she lit her shoes and underwear on fire. *Id.* As a result, she damaged the holding cell and was charged with damaging city property. *Id.* After serving her sentence, Young brought a 42 U.S.C. § 1983 action against jail officials, claiming that they showed deliberate indifference towards her serious medical needs. *Id.*

Consider the following case from Newark, New Jersey, where a woman was incarcerated for setting a fatal fire.<sup>12</sup> While in jail, prison psychiatrists diagnosed her as suffering from schizophrenia and multiple personality disorder.<sup>13</sup> According to her lawyers, “she deliberately cut her right arm and leg badly enough to require 28 stitches. Because self-mutilation violates prison rules, she was sentenced to 90 days in what is called administrative segregation, the solitary confinement unit at Northern State.”<sup>14</sup> “The mere process of putting someone who’s mentally ill in isolation for a long time will in itself cause most mentally ill prisoners to become even sicker,” said Patricia Perlmutter, former head of the Inmate Advocacy Law Clinic at the Seton Hall University School of Law’s Center for Social Justice.<sup>15</sup> “It’s like beating a dog and leaving it in a cage and making it as violent as you can . . .” said Dr. Grassian, a clinical psychiatrist from Harvard University.<sup>16</sup> “What do you think is going to happen when you open the cage?”<sup>17</sup>

Upon opening “the cage,” one may find that the prisoner has committed suicide. Prison officials often place the mentally ill in compromising situations that worsen psychiatric disorders, including one’s propensity to commit suicide.<sup>18</sup> Consider other recent examples from Arizona, where almost every day, one inmate attempts suicide.<sup>19</sup> Among those who died:

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<sup>12</sup> Andy Newman, *N.J. LAW: Filing Suit to Protect the Mentally Ill Who Are Behind Bars*, N.Y. TIMES (Apr. 21, 1996), <http://www.nytimes.com/1996/04/21/nyregion/nj-law-filing-suit-to-protect-the-mentally-ill-who-are-behind-bars.html>.

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

<sup>14</sup> *Id.*; see also STATE OF N.J. DEP’T OF CORRECTIONS (2013), <http://www.state.nj.us/corrections/>. Northern State is a correctional facility for male offenders located in Newark, New Jersey. *Id.*

<sup>15</sup> See Newman, *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; see also Jean Casella & James Ridgeway, *Louisiana Jail Locks Up Suicidal Prisoners in 3’x3’ Cages*, SOLITARY WATCH: NEWS FROM A NATION IN LOCKDOWN (Jul. 9, 2010), <http://solitarywatch.com/2010/07/09/louisiana-jail-locks-suicidal-prisoners-in-3-x-3-cages/>. The authors describe mentally ill prisoners placed in worse conditions than the minimum standard allowable for dogs. *Id.*

<sup>18</sup> U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORRECTIONS: NAT’L STUDY OF JAIL SUICIDE: 20 YEARS LATER 1, 11 (2010), available at <http://static.nicic.gov/Library/024308.pdf>. Upon incarceration, the prisoner may experience the loss of outside relationships, victimization, further legal frustration and physical and emotional breakdowns, among other emotions, that may cause suicide. *Id.* at 1.

<sup>19</sup> Bob Ortega, *Critics: ‘Maximum Security’ a Factor in Prison Suicide Rate*, THE REPUBLIC (Ariz.) (Jun. 2, 2012), <http://www.azcentral.com/news/articles/2012/06/02/20120602arizona-prison-suicide-rate.html>.

Tony Lester was diagnosed as mentally ill.<sup>20</sup> He bled to death after using a razor to slash his throat, arms and groin;<sup>21</sup>

Rosario Rodriguez-Bojorquez killed himself while alone in his cell after he was denied requests to move into another cell because he was paranoid of other inmates;<sup>22</sup>

Karot Phothong used a bed sheet to hang himself while in solitary confinement after he was denied the opportunity to visit with mental health professionals.<sup>23</sup>

Today, there is robust debate regarding how to treat the mentally ill in prison. Nation-wide, human rights advocates believe that a strong correlation exists between mental health care in prisons and the rate of suicide amongst inmates; as a result, they believe that prisons must adopt medically-supported practices for dealing with the mentally ill.<sup>24</sup> Corrections officials have generally defended their current practices, however, explaining that the use of certain measures, like solitary confinement, is necessary to protect the inmate and ensure prison safety.<sup>25</sup> The government has stated that these measures may be used as safeguards to ensure inmate safety.<sup>26</sup>

This debate, regarding how to treat the mentally ill in prison, has spilled over into the courts.<sup>27</sup> Today, when a family-member or loved one brings a 42 U.S.C. § 1983 claim against a correctional facility after an inmate has committed suicide, every circuit applies the deliberate indifference standard to adjudicate the dispute.<sup>28</sup> Yet, each circuit has interpreted the deliberate indifference standard differently, thus leaving room for different levels of mental health care in prisons.<sup>29</sup> This

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Jean Casella & James Ridgeway, *Prisoners With Mental Illness Suffer-and Die-in Arizona's Solitary Confinement Cells*, SOLITARY WATCH: NEWS FROM A NATION IN LOCKDOWN (May 7, 2012), <http://solitarywatch.com/2012/03/07/prisoners-with-mental-illness-suffer-and-die-in-arizonas-solitary-confinement-cells/>. The authors describe the conditions that some mentally ill prisoners face in Arizona prisons. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Scott Shane, *Obama Defends Conditions for Soldier Accused in WikiLeaks Case*, N.Y. TIMES (Mar. 1, 2011), available at <http://www.nytimes.com/2011/03/12/us/12manning.html>.

<sup>27</sup> See *infra* Part III and accompanying discussion.

<sup>28</sup> See *infra* Part III and accompanying discussion.

<sup>29</sup> See *infra* Part III and accompanying discussion.

Comment argues that the judiciary should adopt a new and more precise legal standard to remedy the current circuit split regarding 42 U.S.C. § 1983 jail-suicide claims; doing so will affect the type of mental health care that prisons provide to inmates.<sup>30</sup> Creating clear guidelines to protect the mentally ill in the courts is a legal imperative that will yield positive human rights reform.

First, this Comment briefly explores the historical and theoretical antecedents to current mental health care in the prison system. Second, it analyzes the multi-dimensional, multi-layered circuit split that exists with respect to the interpretation and application of the deliberate indifference in 42 U.S.C. § 1983 jail-suicide claims. This section then highlights two recent circuit court cases from the Eleventh and Third Circuits. Third, this Comment proposes that the deliberate indifference standard be eliminated in light of its vague meaning and unpredictable application and that a new, more precise legal standard rooted in international law be adopted. Finally, this Comment addresses important countervailing considerations in resolving the circuit split and closes by reaffirming that the United States should protect all of its citizens, including those deemed to be its “lowest.”

## II. HISTORICAL AND THEORETICAL ANTECEDENTS: THE ROAD TO CURRENT MENTAL HEALTH CARE IN PRISONS

During much of the twentieth century, the United States medical community had a limited understanding of mental illness and suicide.<sup>31</sup> Both issues seemed to play a taboo role in public discourse,<sup>32</sup> while the medical community was generally more focused on AIDs and cancer research.<sup>33</sup> Until the latter end of the century, medical experts postured that anyone who committed suicide necessarily had some long, pre-

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<sup>30</sup> See Eric Rosenthal and Clarence J. Sundram, *The Role of Int'l Human Rights in Nat'l Mental Health Legis.*, DEP'T OF MENTAL HEALTH AND SUBSTANCE DEPENDENCE, 1 WORLD HEALTH ORG. 18 (2005), available at [http://www.who.int/mental\\_health/policy/international\\_hr\\_in\\_national\\_mhlegislation.pdf](http://www.who.int/mental_health/policy/international_hr_in_national_mhlegislation.pdf).

<sup>31</sup> Ellen Holtzman, *A Home Away from Home*, 43 MONITOR ON PSYCHOLOGY 3 (2012).

<sup>32</sup> Mark Rice-Oxley, *Critics: We Need to Keep Talking About Depression*, THE GUARDIAN (U.K.) (Oct. 8, 2012), <http://www.guardian.co.uk/commentisfree/2012/oct/08/keep-talking-about-depression>.

<sup>33</sup> See generally *Pol'y Topics*, NAT'L ALLIANCE ON MENTAL ILLNESS (2012), <http://www.nami.org>.

existing mental illness.<sup>34</sup> Today, it is understood that a multitude of factors, including an extreme, sudden change in one's life, extreme psychological and sexual neglect and the removal or seclusion of oneself from society, either by personal choice or by force,<sup>35</sup> can give rise to suicide.<sup>36</sup> Significantly, these are all factors that an inmate may experience. Thus, in the context of the prison system, a prisoner who commits suicide may have done so on account of a pre-existing condition, the sudden changes that he experienced as a result of being in custody, or a combination of the two.

As the medical community published new studies on mental health and suicide, the human rights community moved for social and legal reform in these areas.<sup>37</sup> For example, in 1991, the United Nations General Assembly adopted the "Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care" (the "MI Principles").<sup>38</sup> While the MI Principles are non-binding in the United States, they set a standard for dealing with the mentally ill.<sup>39</sup> The MI Principles protect a wide range of duties owed to the mentally ill, such as protections against "harm, including unjustified medication, abuse by other patients, staff or others."<sup>40</sup> Moreover, the MI Principles require that medical facilities and correctional facilities monitor the mentally ill to ensure that their human rights are being protected and that their treatment is "based on an individually prescribed plan."<sup>41</sup>

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<sup>34</sup> Jose Manoel Bertolote, Alexandra Fleischmann, Diego De Leo & Danuta Wasserman, *Suicide And Mental Disorders: Do We Know Enough?*, BRITISH J. OF PSYCH. (2003), <http://bjp.rcpsych.org/content/183/5/382.full>.

<sup>35</sup> *Suicide and Suicidal Behavior*, U.S. NAT'L LIBR. OF MED. (2012), <http://www.nlm.nih.gov/medlineplus/ency/article/001554.htm>; see also Natalie Staats Reiss & Mark Dombeck, *Suicide: Other Factors Contributing to Suicide Risk*, MENTALHELP.NET, [http://www.mentalhelp.net/poc/view\\_doc.php?type=doc&id=13738](http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=13738) (last updated Oct. 24, 2007).

<sup>36</sup> See generally Idiko Suto, Dissertation, *Inmates Who Attempted Suicide in Prison: A Qualitative Study*, PAC. U. COMMON KNOWLEDGE PROJECT (2007), <http://commons.pacificu.edu/spp/46>.

<sup>37</sup> See PAHO/WHO Collaborating Center On Public Health Law and Human Rights, PAN AMERICAN HEALTH ORGANIZATION (2012), [http://www1.paho.org/English/D/Georgetown\\_CCenter\\_MRoses.htm](http://www1.paho.org/English/D/Georgetown_CCenter_MRoses.htm). See generally MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE (Michael Dudley et al. eds., 2012).

<sup>38</sup> See *The Role of Int'l Human Rights in Nat'l Mental Health Legis.*, supra note 30, at 12.

<sup>39</sup> *Id.* at 15, 21 (noting that the standards described here can apply to psychiatric facilities as well as non-psychiatric facilities for both mentally-ill and mentally-stable persons).

<sup>40</sup> *Id.* at 21.

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

In 1993, members of the World Conference on Human Rights in Vienna reaffirmed the belief that human rights law must protect people with mental disabilities and that governments must establish legislation to ensure protection of these rights.<sup>42</sup> Participants of the Vienna Convention affirmed in writing that “people with mental disabilities are protected by the same human rights law that protects all other individuals.”<sup>43</sup> Human rights advocates recognized that the mentally ill must have the right to the highest attainable standard of physical and mental health, that they must be protected against discrimination, that they must be protected against torture, inhuman or degrading treatment and must be treated like the rest of society.<sup>44</sup>

Against this backdrop, and with the advent of more scientific knowledge, the United States government promoted a policy shift in the 1990s to “deinstitutionalize” the mentally ill and have courts place these individuals amongst the mainstream prison population.<sup>45</sup> Yet, while the medical and human rights communities have taken significant steps to understand and protect the mentally ill over the last thirty years,<sup>46</sup> the United States prison<sup>47</sup> and justice<sup>48</sup> systems have both lagged far behind. Placing the mentally ill in the prison system may have actually frustrated mental health care reform.

Today, in correctional facilities across the country, the suicide rate is approximately two and a half times higher than the national average.<sup>49</sup> For an inmate with a serious mental illness, such as manic depression,

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<sup>42</sup> *Id.* at 18.

<sup>43</sup> *Id.* at 12.

<sup>44</sup> *See supra* note 30.

<sup>45</sup> U.S. DEP’T OF JUSTICE: NAT’L INST. OF CORRECTIONS, MENTALLY ILL PERSONS IN CORRECTIONS (Dec. 11, 2012), <http://nicic.gov/MentalIllness>.

<sup>46</sup> *See, e.g.*, *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (noting that “modern science has rejected the notion that mental or emotional disturbances are the products of afflicted souls, hence beyond the purview of counseling, medication and therapy”).

<sup>47</sup> *From Prisons to Hospitals and Back: The Criminalization of Mental Illness*, PRISON POL’Y INITIATIVE (2012), <http://www.prisonpolicy.org/scans/menbrief.html>.

<sup>48</sup> James R. P. Ogloff, Ronald Roesch & Stephen D. Hart, *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues*, 18 LAW & PSYCHOL. REV. 109, 119 (1994) (“Unfortunately, the Court has yet to decide a case that directly addresses the extent to which prison and jail inmates have the right to psychological or psychiatric assessment and treatment.”).

<sup>49</sup> *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, HUMAN RIGHTS WATCH (2003), <http://www.unhcr.org/refworld/docid/3fe482a57.html>; *see also* Jean Casella & James Ridgeway, “Epidemic” of Suicides in Massachusetts Prisons, SOLITARY WATCH: NEWS FROM A NATION IN LOCKDOWN (2010), <http://solitarywatch.com/2010/08/06/massachusetts-prisons-see-epidemic-of-suicides/> (describing how suicide in prison has become an epidemic).

the anguish associated with a life behind bars may exacerbate the health conditions he faces, lead him to act out and prompt serious contemplation of suicide.<sup>50</sup> Instead of providing appropriate medical treatment, many prisons treat the mentally ill like healthy inmates and move them into solitary confinement, removed from the general prison population.<sup>51</sup> Here, the inmate loses “good-time,”<sup>52</sup> programming and other privileges and often waits naked in his cell until his return to general population comes due.<sup>53</sup>

After completing nation-wide studies of inmate deaths from 2000–2009, the Bureau of Justice Statistics published a report stating that correctional facilities have a variety of tactics at their disposal to respond to the mentally ill beyond the use of solitary confinement; yet, in the case of state facilities, approximately two-thirds of all prisoners with mental health problems did not receive mental health care services after entering prison.<sup>54</sup> In addition, the Bureau’s report stated that the number of inmates committing suicide while in custody is on the rise.<sup>55</sup> Moving correctional facilities to provide mentally ill prisoners with adequate protection and treatment has been difficult<sup>56</sup> and courts have not helped the situation. Historically, courts have been reluctant to get involved in regulating the management of prisons<sup>57</sup> and they have not adopted clear, uniformed standards and procedures for dealing with mentally ill prisoners themselves.<sup>58</sup>

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<sup>50</sup> U.S. DEP’T OF JUSTICE: NAT’L INST. OF CORRECTIONS: PRISON SUICIDE: AN OVERVIEW AND GUIDE TO PREVENTION 37–38 (1995), <http://static.nicic.gov/Library/012475.pdf>.

<sup>51</sup> *Id.* at 7.

<sup>52</sup> “Good-time” is defined as time that will reduce the duration of the prisoner’s sentence. A prisoner may earn “good-time” for showing positive behavior in prison. *Good Time Credit Law and Legal Definition*, USLEGAL.COM (2013), <http://definitions.uslegal.com/g/good-time-credit/>.

<sup>53</sup> *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the S. Comm. on the Judiciary*, 112th Cong. 5 (2012).

<sup>54</sup> See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STAT., DATA COLLECTION: DEATHS IN CUSTODY REPORTING PROGRAM (2009), <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=243>.

<sup>55</sup> *Id.*

<sup>56</sup> See *Mental Illness, Human Rights, and U.S. Prisons*, *supra* note 4.

<sup>57</sup> *Prisoner’s Rights*, CORNELL U. L. SCHOOL (2012), [http://www.law.cornell.edu/wex/prisoners\\_rights](http://www.law.cornell.edu/wex/prisoners_rights).

<sup>58</sup> See *infra* Part III and accompanying notes; see also William Babcock, *Courts Return to Hands-off Policy in Prison Rights*, THE PHILADELPHIA INQUIRER (Jul. 31, 1989), [http://articles.philly.com/1989-07-31/news/26134493\\_1\\_legitimate-penological-prison-administrators-institutional-security](http://articles.philly.com/1989-07-31/news/26134493_1_legitimate-penological-prison-administrators-institutional-security).

Today, laws meant to protect mentally ill prisoners are vague and often inconsistently applied.<sup>59</sup> For example, the United States Code permits one person to bring suit against another who has subjected a citizen of the United States to the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”<sup>60</sup> When a prisoner has been deprived of mental health care or has committed suicide, a petitioner may, in what is commonly referred to as a § 1983 claim, rely on this provision in order to obtain a remedy against the jail.<sup>61</sup> This is the case even though the Supreme Court has yet to hear a § 1983 suit resulting from a jail-suicide<sup>62</sup> and has only generally acknowledged an inmate’s right to medical care.<sup>63</sup>

In *Estelle v. Gamble*, the Supreme Court held that in order to state a cognizable § 1983 claim for depriving an inmate of his Eighth Amendment rights, the petitioner must prove that the prison acted with deliberate indifference towards the inmate.<sup>64</sup> The Court acknowledged

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<sup>59</sup> See *infra* Part III and accompanying notes.

<sup>60</sup> See 42 U.S.C. § 1983 (2000). The statute provides, in relevant part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

*Id.*

<sup>61</sup> See *infra* Part III and accompanying notes.

<sup>62</sup> Daniel Goldman & Ryan Brimmer, *U.S. Supreme Court Cases*, SOLITARY WATCH: NEWS FROM A NATION IN LOCKDOWN (2012), <http://solitarywatch.com/resources/u-s-supreme-court-cases/>; see Ogloff, Roesch & Hart, *supra* note 48, at 119 (“Unfortunately, the Court has yet to decide a case that directly addresses the extent to which prison and jail inmates have the right to psychological or psychiatric assessment and treatment.”).

<sup>63</sup> *Estelle v. Gamble*, 429 U.S. 97, 104–5 (1976). The Supreme Court held that the Eighth Amendment provides the right to medical care because failure to provide adequate care constitutes cruel and unusual punishment. *Id.*

<sup>64</sup> See generally *Estelle*, 429 U.S. 97. In *Estelle*, the defendant-inmate who suffered intense back pain sought medical attention from several prison-doctors. *Id.* at 99. A physician prescribed defendant-inmate pain medication, advised him to refrain from heavy work, suggested that he remain in his cell, and ordered him to sleep on a lower bunk bed. *Id.* Prison officials refused to comply with the doctor’s orders. *Id.* In December, before defendant’s pain had subsided he was ordered to perform light work. *Id.* at 100. Defendant answered that he was in too much pain to work and prison officials subsequently placed him in administrative segregation for non-compliance. *Id.* In mid-December, defendant saw another doctor who prescribed him medication for intense pain.

that a prison's obligation to provide adequate medical care is rooted in "broad and idealistic concepts of dignity, civilized standards, humanity and decency"<sup>65</sup> and that consideration of "the evolving standards of decency that mark the progress of a maturing society"<sup>66</sup> is paramount. When an inmate is incarcerated, the Court reasoned, he is in the hands of the prison system and therefore, a standard must be established to determine whether a deprivation of the inmate's rights occurred.<sup>67</sup> The Court articulated a two-part test (the "*Estelle* test") to determine whether a prison deprived an inmate of proper medical care: a showing must be made to determine whether (1) the inmate had some serious medical need and (2) the prison showed any sign of "deliberate indifference."<sup>68</sup>

While the Supreme Court held that prisons are constitutionally required to provide medical care to inmates so they do not suffer "unnecessary and wanton infliction of pain,"<sup>69</sup> it left the issue of proper health care wide open, never clarifying what constitutes a "serious medical need" worthy of care nor addressing an inmate's right to mental health care.<sup>70</sup> While the need for medical care might be obvious if an inmate is suffering from some type of physical ailment,<sup>71</sup> the need for mental health care is far less clear.<sup>72</sup> An inmate's mental health may not

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*Id.* But the defendant did not receive his medication on time because the prison staff lost his prescription. *Id.* The defendant was moved in and out of segregation through December and January and ultimately into solitary confinement. *Id.* at 100–01. Days later, the defendant was hospitalized for an irregular heart-rhythm and placed on heart medication. *Id.* Shortly thereafter, the defendant asked to see another doctor, but the prison officials refused. *Id.* In all, the defendant made seventeen attempts to receive appropriate medical care for his injuries. *Id.* at 97.

<sup>65</sup> *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (1968)).

<sup>66</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>67</sup> *Id.* at 102–03.

<sup>68</sup> *Id.* at 104. For a more thorough discussion of both parts of the *Estelle* test, see *infra* (explaining the serious medical need requirement and the deliberate indifference requirement).

<sup>69</sup> *Estelle*, 429 U.S. at 103.

<sup>70</sup> Fred Cohen & Joel Dvoskin, *Inmates with Mental Disorders: A Guide to Law and Practice*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 339, 341 (1992); see also Ogloff, Roesch & Hart, *supra* note 48, at 119.

<sup>71</sup> *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203, 208 (1st Cir. 1990) (holding that a serious medical need is one "so obvious that even a lay person would easily recognize the necessity for a doctor's attention").

<sup>72</sup> Fred Cohen, *Captives Right to Mental Health Care*, 17 LAW & PSYCHOL. REV. 1, 21–22 (1993). Cohen points out the highly subjective nature of deliberate indifference, describing that "it is actually the clinicians' choice of the diagnostic terminology which will move these cases from no care to discretionary care or to mandated care." *Id.*; see also Johnathan Fish, *Overcrowding on the Ship of Fools: Health Care Reform, Psychiatry and the Uncertain Future of Normality*, 11 Hous. J. Health L. & Pol'y 181 (2012). Fish

be readily apparent and, if it is, it might not be exhibited regularly and consistently.<sup>73</sup> Notwithstanding these differences, many circuit courts have held that mental illness and physical illness are one and the same and have applied the *Estelle* test to examine whether an inmate received proper mental health care.<sup>74</sup>

With respect to the first prong of the *Estelle* test, circuit courts have interpreted what constitutes a “serious medical need” differently.<sup>75</sup> For example, in *Gaudreault v. Municipality of Salem*, the First Circuit defined serious medical need as a need that “has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention . . . the ‘seriousness’ of an inmate’s needs may also be determined by reference to the effect of the delay of treatment.”<sup>76</sup> Thus, a petitioner may claim a “serious medical need” exists by showing the existence of (1) a prior diagnosis and treatment or (2) an obvious need for treatment.<sup>77</sup> The Ninth Circuit, however, has defined “serious medical need” differently, as the “failure to treat a prisoner’s condition [that] could result in further significant injury or the unnecessary and wanton infliction of pain.”<sup>78</sup>

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affirms the highly subjective nature of mental illness in general, describing that the physician is the “arbiter of what is normal and what is not” and therefore, “mental illness is a “paradoxical reality of . . . fundamental skepticism coexisting with . . . triumphalist reductionism.” *Id.* at 220.

<sup>73</sup> Dean Keith Simonton, *Are Genius and Madness Related? Contemporary Answers to an Ancient Question*, PSYCHIATRIC TIMES (2005), <http://www.psychiatrictimes.com/display/article/10168/52456>.

<sup>74</sup> See *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir.1977); *Greason v. Kemp*, 891 F.2d 829, 834 (11th Cir.1990); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (holding that the same general “requirements apply to physical, dental and mental health”).

<sup>75</sup> See, e.g., *Gaudreault*, 923 F.2d at 208. See generally *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1992). In *McGuckin*, the plaintiff-inmate brought a § 1983 action against the Arizona Department of Corrections alleging that the prison officials were deliberately indifferent to his serious medical needs. *Id.* at 1052.

<sup>76</sup> See *Gaudreault*, 923 F.2d at 208 (citing *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346–47 (3d Cir. 1987)).

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

<sup>78</sup> See generally *McGuckin*, 974 F.2d 1050. John McGuckin, an inmate in an Arizona state correctional facility brought a § 1983 action against prison medical staff arguing that they were deliberately indifferent to his serious medical needs. *Id.* at 1052. McGuckin did not receive surgery to repair a physical injury he had suffered until after he filed his § 1983 claim against the prison. *Id.* at 1061–62.

Once a petitioner is able to prove that an inmate had a “serious medical need,”<sup>79</sup> he must then prove the second part of the *Estelle* test: that jailers were deliberately indifferent to the inmate’s needs.<sup>80</sup> While the first prong of the *Estelle* test might seem difficult to prove, the second prong is substantially more vague and unpredictable.<sup>81</sup> In *Estelle*, the Supreme Court held that “deliberate indifference to a prisoner’s serious illness or injury states a cause of action under 42 U.S.C. § 1983”<sup>82</sup> and can manifest in two ways: the correctional facility might take some inappropriate affirmative action in response to the prisoner’s needs or it might not act on the prisoner’s needs.<sup>83</sup> The court stated that deliberate indifference is “repugnant to the conscience of mankind” but failed to elaborate further.<sup>84</sup>

In 1994, the Supreme Court tried to clarify the deliberate indifference standard.<sup>85</sup> In *Farmer v. Brennan*, a transsexual who underwent an unsuccessful gender-reassignment surgery sued federal prison officials claiming that they had violated his Eighth Amendment rights.<sup>86</sup> Farmer was assigned a cell amongst the general prison population and was raped and beaten by another inmate.<sup>87</sup> The Court in *Farmer* spelled out what a prisoner must prove in order to bring suit against a correctional facility.<sup>88</sup> The Court ruled that a successful deliberate indifference claim requires a finding that the prison was subjectively aware of the inmate’s condition.<sup>89</sup> In other words, in order to prove deliberate indifference, the petitioner must show that the jailer *knew* of the prisoner’s serious medical need and effectively did nothing about it.<sup>90</sup> It also limited the scope of deliberate indifference by defining what constitutes a serious medical need.<sup>91</sup> Yet, the Supreme

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<sup>79</sup> See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>80</sup> *Id.*

<sup>81</sup> See *infra* Part III and accompanying discussion.

<sup>82</sup> *Estelle*, 429 U.S. at 105.

<sup>83</sup> *Id.* at 106.

<sup>84</sup> *Id.* (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947)).

<sup>85</sup> See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

<sup>86</sup> *Id.* at 831.

<sup>87</sup> *Id.* at 830.

<sup>88</sup> *Id.* at 841–46 (“Whether an official has knowledge of a particular need, however, is a question of fact that can be resolved in favor of the inmate if the trier of fact could conclude that the official must have known of the need from the very fact that it was so obvious.”).

<sup>89</sup> *Id.* at 845.

<sup>90</sup> *Id.* at 829, 845–46.

<sup>91</sup> *Farmer*, 511 U.S. at 843. The Court stated that a serious medical need is a “risk of serious damage to his future health.” *Id.*

Court in *Farmer* did not clarify how this standard would apply in cases where a prisoner is claiming a denial of adequate mental health care or where a petitioner is bringing a § 1983 jail-suicide action.<sup>92</sup>

Justice Stevens recognized that the deliberate indifference standard still lacks clarity.<sup>93</sup> He argued that the majority in *Estelle* gave the prison system too much authority to determine whether the inmate had a serious medical need and made it too easy for the prison to refute a claim of deliberate indifference.<sup>94</sup> While a petitioner might be able to prove the existence of a serious medical need, especially if an inmate's mental illness predated his incarceration, proving that a jail acted with deliberate indifference is complicated, if not nearly impossible.<sup>95</sup>

### III. APPLICATION OF THE DELIBERATE INDIFFERENCE STANDARD IN § 1983 JAIL-SUICIDE CLAIMS

Without any guidance from the Supreme Court, the circuit courts have interpreted and applied the deliberate indifference standard in a variety of ways in adjudicating § 1983 claims related to mental health care in prisons.<sup>96</sup> A look at the plain meaning of the words “deliberate” and “indifference” allows for various and conflicting interpretations of the standard.<sup>97</sup> Circuit courts have inconsistently interpreted deliberate indifference to mean either knowledge and a failure to act,<sup>98</sup> an inexcusable lack of due care,<sup>99</sup> criminal recklessness,<sup>100</sup> tortuous

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<sup>92</sup> *Id.* at 829, 845.

<sup>93</sup> Holly Boyer, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317, 332–33 (2003) (citing *Estelle v. Gamble*, 429 U.S. 97, 116 (1976)) (noting that Justice Stevens disagreed with the majority's decision to use the deliberate indifference standard, noting its highly subjective nature). In *Estelle*, Justice Stevens stated: “it is impossible to assess the quality of the medical attention [prisoner] received.” *Estelle*, 429 U.S. at 110.

<sup>94</sup> *Estelle*, 429 U.S. at 116 (Stevens, J., dissenting); see also Boyer, *supra* note 93, at 332–33.

<sup>95</sup> BOYER, *supra* note 93, at 332–33.

<sup>96</sup> See discussion *infra*.

<sup>97</sup> See generally Russel W. Gray, Comment, *Wilson v. Seiter; Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339 (1992).

<sup>98</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (establishing that prisons have a duty of care towards inmates). The Supreme Court ruled that a prison's failure to provide inmate with treatment and take reasonable steps to protect the inmate constituted deliberate indifference. *Id.* at 311. The Court found deliberate indifference despite there being no clear Constitutional authority on point. *Id.* at 330.

<sup>99</sup> *Morgan v. District of Columbia*, 824 F.2d 1049, 1057 (D.C. Cir. 1987).

recklessness,<sup>101</sup> callousness<sup>102</sup> or allowing systemic gross deficiencies.<sup>103</sup> In *Billman v. Indiana Dep't of Corrections*,<sup>104</sup> the Seventh Circuit articulated its own interpretation of “deliberate indifference” by stating:

If [the prison] place[s] a prisoner in a cell that has a cobra, but they do not know that there is a cobra there (or even that there is a high probability that there is a cobra there), they are not guilty of deliberate indifference even if they should have known about the risk, that is, even if they were negligent—even grossly negligent or even reckless in the tort sense—in failing to know. But if they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference.<sup>105</sup>

The circuit courts are extremely divided in their interpretation and application of the deliberate indifference standard when adjudicating 42 U.S.C. § 1983 jail-suicide actions.<sup>106</sup> This fissure is readily apparent when examining two cases, one from the Eleventh Circuit and the other from the Third Circuit.<sup>107</sup>

#### *A. Hazleton v. DeKalb County – Eleventh Circuit*

In *Hazleton v. DeKalb County*, Joshua Hazleton, a 19-year-old pretrial detainee, committed suicide in a Georgia jail.<sup>108</sup> Hazleton first arrived at the DeKalb County jail on January 24, 2006 to await his trial after being charged with murder.<sup>109</sup> The inmate went through an initial

<sup>100</sup> *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (holding that “gross negligence” is not enough to find deliberate indifference; rather, criminal negligence is the correct standard).

<sup>101</sup> *See Ayers v. Coughlin*, 780 F.2d 205, 209 (2d Cir. 1985) (holding that a prison acts with deliberate indifference if it recklessly disregarded an inmate’s right to be free from risk of harm); *Wright v. Jones*, 907 F.2d 848, 851 (8th Cir. 1990) (holding that reckless disregard is the measurable standard constituting deliberate indifference); *Berry v. City of Muskogee*, 900 F.2d 1489, 1495–96 (10th Cir. 1990) (holding that deliberate indifference occurs when a prison’s policy “disregards a known or obvious risk”).

<sup>102</sup> *Smith v. Wade*, 461 U.S. 30, 56 (1983) (holding that deliberate indifference is akin to “callous indifference to federally-protected rights”).

<sup>103</sup> *See Harris v. Thigpen*, 941 F.2d 1495, 1505–06 (11th Cir. 1991) (holding that a prison may act with deliberate indifference towards the inmate if shows systemic and gross deficiencies or a pattern of negligence).

<sup>104</sup> *Billman v. Ind. Dep’t of Corr.*, 56 F.3d 785 (7th Cir. 1995).

<sup>105</sup> *Id.* at 788 (citations omitted).

<sup>106</sup> *See infra* discussion accompanying footnotes 108–55.

<sup>107</sup> *See infra* discussion accompanying footnotes 108–55.

<sup>108</sup> *Hazleton v. DeKalb Cnty.*, 496 F. App’x 931 (11th Cir. 2012).

<sup>109</sup> *Id.* at 932.

medical screening and was assigned to the general population.<sup>110</sup> One month later, in February 2006, the jail's mental health staff evaluated Hazleton for the first time; he went through ten subsequent, independent evaluations until his death in January 2007.<sup>111</sup> In June 2006, Hazleton was diagnosed with "psychiatric disorder" by a jail psychiatrist and was prescribed anti-psychotic medication.<sup>112</sup> In October, jail officials placed Hazleton on suicide watch after he stated that he wanted to hurt himself.<sup>113</sup> That same month, a DeKalb County Superior Court judge declared Hazleton incompetent to stand trial and ordered that he be transferred to a hospital facility.<sup>114</sup> Hazleton never made it to that hospital. On January 9, 2007, he committed suicide.<sup>115</sup> None of the officers on watch that night had any information regarding Hazleton's mental state or previous medical history.<sup>116</sup> Shortly after his death, Hazleton's mother filed a § 1983 action against the officers, the county and other individuals, alleging that all defendants were deliberately indifferent to her son's mental health care needs.<sup>117</sup>

In *Hazleton*, the Eleventh Circuit ruled that to prevail on a § 1983 jail-suicide action, the plaintiff must show that defendants "displayed deliberate indifference to the prisoner's taking of his own life."<sup>118</sup> The court stated that a showing of "deliberate indifference requires that the defendant deliberately disregard[ed] a strong likelihood rather than a mere possibility that the self-infliction of harm will occur."<sup>119</sup> In this case, Hazleton was placed in general population, despite stating his intention to commit suicide.<sup>120</sup> On the night that Hazleton committed suicide, he sounded an emergency button several times, according to written statements by other inmates on the cell block, and no one responded to his call.<sup>121</sup> Notwithstanding these facts, the court ruled that the plaintiffs did not meet their evidentiary burden and affirmed the district court's ruling in favor of the prison officials.<sup>122</sup> According to the

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<sup>110</sup> *Id.*

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

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Hazleton*, 496 F. App'x at 932.

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

<sup>116</sup> *Id.* at 933.

<sup>117</sup> *Id.* at 932.

<sup>118</sup> *Id.* at 933.

<sup>119</sup> *Id.*

<sup>120</sup> *Hazleton*, 496 F. App'x at 932.

<sup>121</sup> *Id.* at 933.

<sup>122</sup> *Id.* at 934.

Eleventh Circuit, stating an intention to commit suicide and sounding the alarm button several times did not constitute a strong likelihood that the self-infliction of harm would occur.<sup>123</sup>

The Eleventh Circuit's ruling was significant in that it shaped the deliberate indifference standard based on probability and not on any rigid framework.<sup>124</sup> The court did not elaborate on what a "strong likelihood" means; it did not provide any metric system to quantify a "strong likelihood" and it did not explain how to distinguish between a "strong likelihood" versus a "mere possibility."<sup>125</sup> In addition, the court articulated a definition of deliberate indifference that only considered bodily harm, not mental illness.<sup>126</sup> A petitioner must prove that jail officials disregarded a strong likelihood that a prisoner would self-inflict physical harm as opposed to suffer some psychiatric consequence.<sup>127</sup> The court's definition did not create a rigid link between the jail's actions and the inmate's actions.<sup>128</sup> It only contemplated whether a strong chance existed that the prisoner would hurt himself.<sup>129</sup>

Curiously, the court held that a "strong likelihood" of harm did not exist in the *Hazleton* case despite facts in the record that might suggest otherwise.<sup>130</sup> This begs the question: who should be the judge of whether "strong likelihood" of harm exists in such matters and based on what evidence should such a determination be made?<sup>131</sup> Should a medical professional have to declare whether a strong likelihood exists that a prisoner will commit harm to himself? Should the prison facility make the determination itself? The Eleventh Circuit has equivocated on this issue<sup>132</sup> and, in doing so, has interpreted "deliberate indifference" in a

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 933.

<sup>125</sup> *Id.*

<sup>126</sup> *Hazleton*, 496 F. App'x at 933.

<sup>127</sup> *Id.*

<sup>128</sup> Note, for instance, that the court did not say, "If jailer acted in X way and prisoner reacted in Y way, then deliberate indifference shall be found to have existed." *Id.*

<sup>129</sup> *Id.*

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

<sup>131</sup> *Id.*

<sup>132</sup> See, e.g., *Harris v. Coweta Cnty.*, 21 F.3d 388, 393–94 (1994) ("[D]eliberate indifference could be inferred from an unexplained delay in treating a known or obvious serious medical condition" and "the contours of the legal norms on deliberate indifference to medical needs have been subsequently evolving."); see also *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (holding that deliberate indifference stems from a showing of whether or not prison officials were adequately trained).

manner inconsistent with its own precedent and with other jurisdictions.<sup>133</sup>

*B. Baez v. Lancaster County – Third Circuit*

In *Baez v. Lancaster County*, Marva Baez brought a § 1983 action against the Lancaster County Prison, alleging that the jailer acted with deliberate indifference towards her brother, Luis Villafane, an inmate who committed suicide.<sup>134</sup> Mr. Villafane was in the Lancaster County Prison after being arrested for rape, aggravated assault and other serious crimes.<sup>135</sup> After being committed to the Lancaster County Prison, Mr. Villafane met with a nurse who asked him a series of questions about his medical and mental history.<sup>136</sup> Mr. Villafane told the nurse that he had recently lost his mother and that he had nothing to look forward to and, as a result, he was placed on a suicide watch.<sup>137</sup> Mr. Villafane also met with a psychologist who provided medical services for the Lancaster County Prison.<sup>138</sup> The doctor spoke to Mr. Villafane and took him off of suicide-watch, but noted, “inmates who are taken off suicide status might still be suicidal.”<sup>139</sup> After a confrontation with prison guards, Mr. Villafane asked to be placed in a suicide-prevention cell because he was “stress[ing].”<sup>140</sup> Prison officials honored his request and gave him a smock to wear.<sup>141</sup> Three days later, prison officials downgraded Mr. Villafane’s suicide status and four days after that, they downgraded him even further to general observation.<sup>142</sup> Approximately ten days later, Mr. Villafane was transferred to a regular cell.<sup>143</sup> During the transfer, a fellow inmate testified that he heard Mr. Villafane say he was going to kill himself.<sup>144</sup> On November 18, 2008, Mr. Villafane ripped his bed sheets and hung himself inside his prison cell.<sup>145</sup>

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<sup>133</sup> See, e.g., *infra* discussion accompanying notes 137–58.

<sup>134</sup> *Baez v. Lancaster Cnty.*, 487 F. App’x 30 (3d Cir. 2012).

<sup>135</sup> *Baez v. Lancaster Cnty.*, CIV.A. 09-2745, 2011 WL 4948891, at \*1 (E.D. Pa. Oct. 18, 2011), *aff’d*, 487 F. App’x 30 (3d Cir. 2012).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See *Baez*, 2011 WL 4948891, at \*3.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at \*4.

On appeal, the Third Circuit examined how jailers treated Mr. Villafane and applied its own unique formulation of the deliberate indifference standard.<sup>146</sup> Specifically, the court examined whether “(1) the detainee had a ‘particular vulnerability to suicide,’ (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers ‘acted with reckless indifference’ to the detainee’s particular vulnerability.”<sup>147</sup> The court found that deliberate indifference calls for both *objective* and *subjective* scrutiny, and found that the officers did not know and *should not have known*, based on the evidence, of the inmate’s particular vulnerability to suicide.<sup>148</sup> Specifically, the court relied heavily on the third prong of the test and found that the jailers did not act recklessly when dealing with Mr. Villafane.<sup>149</sup> In using the term “reckless indifference,” the court created a high threshold to prove deliberate indifference, one akin to criminal liability.<sup>150</sup> In fact, the court stated that proving deliberate indifference requires “a level of culpability higher than a negligent failure to protect from self-inflicted harm.”<sup>151</sup>

Since the Supreme Court has yet to provide any guidance on how the deliberate indifference standard should apply to cases dealing with mental health care in prisons, circuit courts have inconsistently applied the standard in such disputes.<sup>152</sup> Within only a few weeks of each other, two circuit courts split on what the deliberate indifference standard means in the context of § 1983 jail-suicide claims.<sup>153</sup> Whereas in the Eleventh Circuit, a petitioner must rely heavily on speculation that a “strong likelihood” of self-harm will occur in order to prevail in his

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<sup>146</sup> See generally *Baez v. Lancaster Cnty.*, 487 F. App’x 30 (3d Cir. 2012).

<sup>147</sup> *Id.* at 31.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 32.

<sup>150</sup> MODEL PENAL CODE § 2.02 (2012). The Model Penal Code adopts recklessly as standard of criminal culpability, described as:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in the actor’s situation.

*Id.* (emphasis added).

<sup>151</sup> *Baez*, 487 F. App’x at 31.

<sup>152</sup> See *supra* discussion accompanying notes 96–107.

<sup>153</sup> See *supra* discussion accompanying notes 108–51.

claim, in the Third Circuit, a petitioner must rely on reckless indifference, a well-developed tort and criminal-based standard.<sup>154</sup>

This is problematic because if an inmate commits suicide while in custody, a petitioner's ability to prevail against a jail will vary significantly depending on where the suit is brought. For example, in the Third Circuit, it seems unlikely that a petitioner could prove that the jailer acted with reckless indifference or that the jailer grossly deviated from a more typical standard of care in the moments leading up to the prisoner's death. This has created a multitude of outcomes—a variation in the type of mental health care provided by prisons—among cases that are factually quite similar.<sup>155</sup> This split allows prisons across the country to offer different degrees of mental health care to inmates depending on which circuit the prison is located within.

#### IV. USING INTERNATIONAL LAW AS A GUIDE TO REFORM MENTAL HEALTH CARE IN PRISONS AND RESOLVE THE CIRCUIT SPLIT

As scientific advances and public interest in mental health issues grow, international law dealing with mental health issues has developed. Looking to international law may provide important guidance in creating legal clarity amongst the circuit courts and may help to create a uniformed standard of mental health care in prisons across the country.<sup>156</sup> According to the International Covenant on Civil and Political Rights (“ICCPR”), “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>157</sup> The United States should look to the ICCPR, as well as other international legal mechanisms, for guidance as they provide an alternative to the country's failed policies and promote the dignity of all human beings.<sup>158</sup> In fact, applying international human rights laws to solve domestic challenges is not a novel idea.<sup>159</sup> Various public law groups, individual attorneys and even Supreme Court justices have all advocated for applying international law to solve national issues.<sup>160</sup>

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<sup>154</sup> See *supra* discussion accompanying notes 108–51.

<sup>155</sup> See *generally* Part III and accompanying notes.

<sup>156</sup> See discussion *infra*.

<sup>157</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 10(1), 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976).

<sup>158</sup> Alvin Bronstein & Jenni Gainsborough, *Using International Human Rights Laws and Standards for U.S. Prison Reform*, 24 PACE L. REV. 811, 814 (2004).

<sup>159</sup> *Id.* at 815.

<sup>160</sup> *Id.* See *generally* *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003).

While not self-executing, international law such as treaties can trump state law and provide solid guidance on how to deal with prison conditions.<sup>161</sup> Domestic courts have cited the United Nations Standard for the Minimum Treatment of Prisoners,<sup>162</sup> for example, even though it is not binding.<sup>163</sup>

In addition, international human rights mechanisms like the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture (“IACPPT”) lay out clear prohibitions against inhumane treatment towards prisoners.<sup>164</sup> For example, Article Six of the IACPPT states that governments shall “take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.”<sup>165</sup> In other words, the United States should not just take *any* measure to prevent inhuman treatment towards prisoners. Rather, the government should take *effective* measures to ensure that prisoners are being treated with dignity and receiving an appropriate standard of care.<sup>166</sup>

Taking the IACPPT and other international mechanisms into consideration, the United States should first create some new protocol for prisons to meet basic human rights obligations towards the mentally ill and reduce the number of jail-suicides amongst inmates. The MI principles, promulgated in 1991 by the United Nations General Assembly, also provide an important framework for reform, outlining

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<sup>161</sup> See Bronstein & Gainsborough, *supra* note 158 at 817.

<sup>162</sup> *Standard Minimum Rules for the Treatment of Prisoners*, E.S.C. Res. 633C (XXIV) U.N. ESCOR, Annex 1, U.N. Doc. A/CONF/611 (1950), U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended by* E.S.C. Res. 2076, (LXII), U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977).

<sup>163</sup> See, e.g., *Sterling v. Cupp*, 290 Or. 611, 622 (1981); *Jordan v. Arnold*, 408 F. Supp. 869, 874 (M.D. Pa. 1976); *Bott v. DeLand*, 922 P.2d 732, 740 (Utah 1996).

<sup>164</sup> The American Convention on Human Rights is available at <http://www.oas.org/juridico/English/treaties/b-32.html>. The Inter-American Convention to Prevent and Punish Torture is available at <http://www.oas.org/JURIDICO/ENGLISH/Treaties/a-51.html>.

<sup>165</sup> See Inter-American Convention to Prevent and Punish Torture, *supra* note 164. Article 7 states:

The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

*Id.*

<sup>166</sup> *Id.* The convention incorporates four primary goals; the prevention, investigation, sanction and reparation of human rights violations.

that the mentally ill have: (1) a right to individualized treatment; (2) a right to rehabilitation and treatment that enhances autonomy; (3) a right to independence and social integration; (4) a right to least restrictive services and (5) a right to community-based services, amongst others.<sup>167</sup> This framework is clear and, were the United States to apply it, those with mental illness in custody would likely receive greater protection than they do now.

In addition to reforming the current prison system through on-the-ground measures, the United States should revise its current legal framework with respect to adjudicating jail-suicide claims, as it has negatively impacted mental health care in prisons. The deliberate indifference standard, currently used by courts, is confusing and has caused a split amongst the circuit courts.<sup>168</sup> It has created a system where prisons across the country are held to different variations of the legal standard and those challenging the prison have an unclear, inconsistent chance at obtaining a remedy.<sup>169</sup> In order to create predictability amongst the circuits and uniformly and positively impact mental health care in prisons, the judiciary should adopt a clearer standard to adjudicate § 1983 jail-suicide claims: one of due diligence.

The due diligence standard has long been a part of international jurisprudence and references to the standard can be found in declarations from the ancient Roman Empire.<sup>170</sup> Under this standard, a state is required to prevent, investigate, punish and provide remedies for human rights violations.<sup>171</sup> In 1988, the Inter-American Court of Human Rights revisited the due diligence standard in the landmark case *Velásquez Rodríguez v. Honduras*, which concerned the disappearance of Manfredo Velásquez.<sup>172</sup> The court held that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the

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<sup>167</sup> *Id.*

<sup>168</sup> *See supra* discussion Part III.

<sup>169</sup> *See supra* discussion Part III.

<sup>170</sup> *See* Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT’L L. & POL. 265, 278 (2004).

<sup>171</sup> Yakin Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61 (2006).

<sup>172</sup> *Velásquez Rodríguez v. Honduras*, (Ser. C) No. 4, Inter-American Court of Human Rights (1988), <http://www.refworld.org/docid/40279a9e4.html>.

lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>173</sup> The *Velásquez* case defined the due diligence standard as a mechanism to prevent attacks on a person’s life, physical integrity or liberty from degrading and negligible practices.<sup>174</sup> In recent years, due diligence has been invoked, though sparingly, to help drive prison reform and prevent these sort of attacks on inmates.<sup>175</sup>

Whereas under the deliberate indifference standard, a prison may easily be able to escape liability, a standard of due diligence is more difficult to overcome, requiring something extra and more specific on the part of the prison.<sup>176</sup> This is an affirmative defense: the jail can escape liability only by proving by a preponderance of the evidence that a high managerial agent—a prison official—acted with “due diligence” to prevent an offense from occurring.<sup>177</sup> In the context of § 1983 jail-suicide claims, a due diligence standard would require a prison to show all of the affirmative steps it took to prevent an inmate from committing suicide, which would likely entail some measure of mental health care.

#### V. COUNTERVAILING CONSIDERATIONS

Several obstacles exist in adopting and applying international legal and human rights standards to reform domestic laws and practices. For centuries, the United States has generally viewed international human rights laws, standards and norms as a tool to put other less compassionate, less welcoming nations on notice of democratic values.<sup>178</sup> This nation has believed that its own Constitution, supplemented by strong laws, guarantees far more rights than those conferred by international human rights laws.<sup>179</sup>

In addition, the United States justice system has generally considered the prison system to be a “dark world” and as such, courts are apt to take a “hands off approach” to prison reform.<sup>180</sup> In fact, this

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<sup>173</sup> *Id.* at ¶172.

<sup>174</sup> *Id.* at ¶ 166.

<sup>175</sup> See Marni von Wilpert, *Holland v. Florida: A Prisoner’s Last Chance, Attorney Error, and the Antiterrorism and Effective Death Penalty Act’s One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 FORDHAM L. REV. 1429, 1431 (2010).

<sup>176</sup> *Hoffman v. Estabrook & Co.*, 587 F.2d 509, 519 (1st Cir. 1978) (explaining that due diligence requires something more than just passive waiting).

<sup>177</sup> *III. Standards of Liability*, 92 HARV. L. REV. 1243, 1257–58 (1979).

<sup>178</sup> See generally Bronstein and Gainsborough, *supra* note 158.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 812.

country's bout with frivolous lawsuits served to undermine prison litigation, often allowing harsh prison conditions to go unnoticed and even dismissed in the most conservative courts.<sup>181</sup> Such a climate prompted the passage of the Prison Litigation Reform Act, 42 U.S.C. § 1997(e), for example, which has limited inmates' access to the courts and has restricted the judiciary's ability to reform harsh prison conditions.<sup>182</sup> However, one look at the prison system – and over thirty years of litigation challenging the system – makes plain that the Constitution and domestic practices are simply failing to protect prisoners.<sup>183</sup>

Furthermore, opponents may raise concerns regarding the public/private dichotomy in international human rights law and domestic law, both of which were founded upon a minimalist conception of the State.<sup>184</sup> International law, like domestic law, has often held the “private” sphere to be off limits to State intervention.<sup>185</sup> Adopting a stringent, uniform, due diligence standard to adjudicate § 1983 jail-suicide claims and enacting necessary reforms might be difficult, considering the increasingly vast number of private for-profit prisons in this country.<sup>186</sup> Private prisons have eroded the government's federal prison policies, wielding extreme influence over legislators and criminal justice policies in order to create a market for their products.<sup>187</sup> These for-profit entities have championed pro-incarceration policies and have challenged prison reform through vigorous judicial appeal, lobbying and political advocacy.<sup>188</sup> Private prisons would likely challenge the adoption of any standard that places greater restrictions on the prison system as a whole. However, creating a uniform system of mental health care in prisons and adopting a more precise legal definition to adjudicate

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<sup>181</sup> *Id.* at 813–14.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 812.

<sup>184</sup> See Ertürk, *supra* note 171.

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

<sup>186</sup> See *Richardson v. McKnight*, 521 U.S. 410 (1997) (holding that prison guards who are employees of a private prison are not entitled to the same governmental protections held by employees of government operated prisons, nor are employees of private prisons subject to the same restrictions as employees of public prisons); *Private Prison Companies Want You Locked Up*, JUSTICE POL'Y INST. (2011), <http://www.justicepolicy.org/news/2615>.

<sup>187</sup> *Gaming the System: How The Political Strategies Of Private Prison Companies Promote Ineffective Incarceration Policies*, JUSTICE POL'Y INST. (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf).

<sup>188</sup> *Id.*

§ 1983 jail-suicide claims based on international standards would likely have a positive effect on these prisons by creating a more rigid operational framework and greater predictability in mental health care and suicide-related proceedings.

#### VI. CONCLUSION

The United States must address mental health care in prisons. Today, there is no standard protocol for providing adequate mental health care to individuals behind bars and notably, jail-suicides are increasing.<sup>189</sup> Moreover, the justice system has adopted an imprecise standard for adjudicating § 1983 jail-suicide claims, creating a circuit split amongst the courts and more uncertainty in jailhouse practices.<sup>190</sup> Adoption of a precise due diligence standard would reform jail practices and avert human rights violations by placing greater emphasis on affirmative practices, which the current deliberate indifference standard fails to achieve.<sup>191</sup> This would help ensure that mentally ill prisoners are receiving adequate mental health care prior to reentry and enable the United States to protect all its citizens, from top to bottom.

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<sup>189</sup> *See supra* discussion Parts I, II.

<sup>190</sup> *See supra* discussion Parts I, II.

<sup>191</sup> *See supra* discussion Part IV.