GHASTLY SIGNS AND TOKENS: A CONSTITUTIONAL CHALLENGE TO SOLITARY CONFINEMENT

CHRISTOPHER LOGEL*

ABSTRACT

Since its popular reemergence in the 1980s, courts have not placed significant restrictions on the use of solitary confinement. One small exception has appeared. Lower courts have held that placing prisoners with preexisting severe mental illness in solitary confinement violates the Cruel and Unusual Punishment Clause.[1] *Can this relatively limited rule be expanded to abolish solitary confinement altogether?*

This Comment argues that it can. A large body of diverse research demonstrates that prolonged solitary confinement causes severe mental illness in most prisoners, regardless of their medical history.[2] *By extension, because there is no principled basis for distinguishing between preexisting and confinement-induced mental illness, solitary confinement must end for all prisoners.*

TABLE OF CONTENTS

Abstract 365
I. Introduction 365
II. Prolonged Solitary Confinement in the United States 367
A. The Scope and Effect of Prolonged Solitary Confinement 367
B. Previous constitutional attacks on solitary confinement 371
1. Solitary Confinement and the Due Process Clause 371
2. Solitary Confinement and the Cruel and Unusual Punishment Clause 375
C. Psychological Harm and the Eighth Amendment 376
III. The Constitutional Defect in Prolonged Solitary Confinement 3784
A. The Categorical Argument 378
B. The Harm Argument 380
IV. Conclusion 381

I. INTRODUCTION

> I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their

* Associate Attorney at Pinix Law. The author thanks his wife Santhi Logel for her love and support; Professor Cecelia Klingele for sharing her legal wisdom; and Shelley Fite and Joseph Bugni for their support and mentorship.

1. *See infra* notes 125–127 and accompanying text.
2. *See infra* notes 25–37 and accompanying text.

> faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore the more I denounce it, as a secret punishment which slumbering humanity is not roused up to stay.[3]

Solitary confinement—the segregation of an inmate for at least 22 hours per day in a cell without social interaction—is a cruel but not unusual punishment in contemporary American prisons.[4] Many inmates relegated to solitary confinement are in "prolonged solitary confinement," which the UN has classified as torture.[5] Yet, despite bipartisan calls to end the practice, prolonged solitary confinement is still widespread in the United States.[6] Worse yet, solitary confinement has emerged almost entirely unscathed from constitutional challenges.[7] However, these challenges have not been entirely futile—they have revealed one significant limitation on the use of solitary confinement. Specifically, all courts addressing the issue have held that a prison may not put inmates with preexisting severe mental illness into prolonged solitary confinement.[8] For those courts, the presence of a severe mental illness raises an ordinarily permissible practice into one that violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.[9]

This comment advances a logical extension of the rule against placing prisoners with severe mental illness in solitary confinement. It argues that the justification for prohibiting the use of solitary confinement on prisoners with *preexisting* severe mental illnesses cannot be rationally limited to only those prisoners. A large body of research demonstrates that prolonged solitary confinement *causes* severe mental illness in most prisoners, even those without a

---

3. Charles Dickens, American Notes for Gen. Circulation 51 (Peterson's uniform ed. of Dickens' works 1859).

4. *See infra* Part I.A; *see also* Sharon Shalev, *A Sourcebook on Solitary Confinement*, London Mannheim Centre for Criminology, London School of Economics and Political Science (2008), http://solitaryconfinement.org/uploads/sourcebook_web.pdf.

5. The UN classifies solitary confinement in excess of fifteen days as torture. *See* Juan E. Méndez (Special Rapporteur of the Human Rights Council), *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 21, U.N. Doc. A/66/268 (Aug. 5, 2011) [hereinafter *UNHRC Report*].

6. *See, e.g.*, George F. Will, *The Torture of Solitary Confinement*, Wash. Post (Feb. 20, 2013), https://www.washingtonpost.com/opinions/george-will-the-torture-of-solitary-confinement/2013/02/20/ae115d74-7ac9-11e2-9a75-dab0201670da_story.html; Barack Obama, *Why We Must Rethink Solitary Confinement*, Wash. Post (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

7. *See infra* Part I.B, I.C.

8. *See infra* notes 113 and accompanying text.

9. *See infra* notes 102–104 and accompanying text.

history of mental illness.[10] And because there is no principled basis for distinguishing between preexisting and solitary-confinement-caused mental illness, the ban on solitary confinement must be extended to protect both groups of prisoners. This comment proceeds in two parts. Part I provides background on the current state of prolonged solitary confinement in the United States. This includes information on solitary confinement practices, the medical effect of those practices on prisoners, and a discussion of the current state of the law. Part II draws on this background information to advance arguments against solitary confinement. The Comment concludes with practical suggestions for advancing anti-solitary confinement litigation.

II. PROLONGED SOLITARY CONFINEMENT IN THE UNITED STATES

Attacks against prolonged solitary confinement have largely been ineffective. Legal progress—where it exists—has been scarce, and the core of the practice remains intact.[11] As a result, at any given moment more than four-and-a-half percent of the American prison population is in solitary confinement.[12] This part describes the use of solitary confinement in the United States today and the history of previous challenges to its use.

A. The Scope and Effect of Prolonged Solitary Confinement

Today, roughly 60,000 prisoners in the United States are housed in solitary confinement.[13] Some are confined in so-called "supermax" prisons, others in local jails.[14] The reasons for placement in solitary confinement include but are not limited to: incapacitation (preventing the prisoner from harming others or vice-versa); deterrence (discouraging future bad behavior); punishment (making prisoners suffer because of past bad behavior); and necessity (such as a shortage of cells in other parts of the system).[15]

---

10. *See infra* notes 12–45 and accompanying text.

11. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209 (2005).

12. THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 4 (2018) [hereinafter ASCA-LIMAN 2018].

13. *Id.* at 4–6. In past years, similar studies by the same body have placed the number of prisoners in solitary confinement at between 80,000–100,000. *See* THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, TIME-IN-CELL THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 10 (2015).

14. *See generally* ASCA-LIMAN 2018, *supra* note 13, at 4–6; *Wilkinson*, 545 U.S. at 213–14 (discussing solitary confinement conditions in an Ohio "Supermax" prison).

15. See Lindley A. Bassett, Note, *The Constitutionality of Solitary Confinement: Insights from Maslow's Hierarchy of Needs*, 26 HEALTH MATRIX: J. L. MED. 403, 412 (2016); Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism,* 47 U. MICH. J. L. REFORM 495, 500–501 (2014). In some overcrowded jails, prisoners start in solitary confinement until a spot opens in general population. At other times, a shortage of juvenile facilities necessitates the use of solitary confinement. See Taylor Elizabeth Eldridge, *Rikers Doesn't Put Teens in Solitary. Other New York Jails Do,* THE MARSHALL PROJECT (Oct. 4, 2019, 5:15 PM), https://www.themarshallproject.org/2018/03/28/rikers-doesn-t-put-teens-in-solitary-other-new-york-jails-do.

As the term is used in this comment, solitary confinement is defined as isolating a prisoner in a small cell for at least twenty-two hours per day.[16] Beyond this baseline, the conditions of confinement vary greatly among different prison systems.[17] For example, in some facilities, prisoners in solitary confinement can purchase televisions, radios, and books.[18] The conditions in other facilities are much worse:

> Inmates on Level One at the State of Wisconsin's Supermax Correctional Institution in Boscobel, Wisconsin spend all but four hours a week confined to a cell. The "boxcar" style door on the cell is solid except for a shutter and a trap door that opens into the dead space of a vestibule through which a guard may transfer items to the inmate without interacting with him. The cells are illuminated 24 hours a day. Inmates receive no outdoor exercise. Their personal possessions are severely restricted: one religious text, one box of legal materials and 25 personal letters. They are permitted no clocks, radios, watches, cassette players or televisions. The temperature fluctuates wildly, reaching extremely high and low temperatures depending on the season. A video camera rather than a human eye monitors the inmate's movements. Visits other than with lawyers are conducted through video screens.[19]

But regardless of the details, the common feature of solitary confinement is extreme isolation. Generally, prisoners spend days—or even months—alone in their cells, without the ability to communicate or interact with other human beings.[20]

The psychological effects of this profound isolation are not uniform.[21] In general, people with higher intelligence and better socialization have a lower incidence of adverse reactions to social isolation.[22] Differences in the conditions accompanying isolation as well as the perceived purpose for being in isolation also affect individual responses.[23] But almost universally, a prisoner's experience in prolonged solitary confinement rises far above the level of simple unhappiness.[24]

---

16. *See* ASCA-LIMAN 2018, *supra* note 13, at 4 (using the same definition).

17. *See, e.g.*, *id.* at 14–15 (surveying length of time in restrictive housing).

18. AMNESTY INT'L, USA, *Cruel Isolation: Amnesty International's Concerns About Conditions in Arizona Maximum Security Prisons*, 4–5 (2012) (describing conditions in Arizona's Eyman prison complex). Differences in privileges are often a function of a prisoner's disciplinary posture. *See, e.g.*, *id.*

19. Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001).

20. ASCA-LIMAN 2018, *supra* note 13, at 4–6.

21. See Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 474–75 (2006); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325, 358 (2006) (discussing studies on the effects of social isolation on polar explorers).

22. *See* Grassian, *supra* note 22, at 358.

23. *See id.* at 346–49.

24. *UNHRC Report*, *supra* note 6, at 21 (finding that "solitary confinement beyond 15 days constitutes torture or cruel, inhuman, or degrading treatment or punishment."). Clearly, American courts do not agree with this characterization or they would have long ago held that solitary confinement was impermissible under the Cruel and Unusual Punishment Clause. *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) (holding that the Eighth Amendment prohibits torture).

More often than not, prolonged solitary confinement causes severe mental illness in otherwise healthy prisoners.[25]

When solitary confinement first became popular in nineteenth- century America, it was a pioneering development in prison systems.[26] The gold standard among penitentiaries was in Philadelphia, and this method of incarceration became known as the "Philadelphia System."[27] The prison was open to the public and international observers, such as Alex de Tocqueville (France), Charles Dickens (England), and Nicholas Julius (Prussia), famously toured and later wrote about American prisons.[28] Importantly, the Philadelphia System relegated nearly all prisoners to solitary confinement.[29] The international observers reported that prisoners in solitary confinement suffered from a myriad of severe psychological problems including self-mutilation, "circular insanity," and psychosis.[30]

When European countries began to experiment with variants on the Philadelphia System, contemporary scientific literature confirmed what observers had reported. Between 1854 and 1909, German doctors published nearly forty studies documenting psychological illness amongst inmates both in general population and solitary confinement.[31] These studies concluded that solitary confinement caused a variety of severe mental problems in inmates such as hallucinations, persecutory delusions, hyperresponsiveness to stimuli, acute confusion, and memory disturbances.[32]

In contrast to the nineteenth century, studying solitary- confinement-caused mental illness in the twentieth and twenty-first centuries has proved difficult.[33] First, the primary method of research is interviewing prisoners.[34] But interviewing a prisoner relieves the pressure of the social isolation that causes their problems in the first place, thereby affecting the validity of the resulting research.[35] Second, there are various methodological issues with existing studies, including but not limited to: possible researcher bias, small sample size, lack of replication, institutional incentives for prisoners to downplay their symptoms, and an absence of control groups.[36]

---

25. *See generally* Smith, *supra* note 22.
26. Grassian, *supra* note 21, at 328, 340–41.
27. *Id.* at 328.
28. *Id.* at 340–41.
29. Id. at 328.
30. Grassian, *supra* note 212, at 338–43, 367–73; Smith, *supra* note 212, at 451. The psychological descriptors of the day were not nearly as precise as modern statistically based taxonomy.
31. Grassian, *supra* note 212, at 367.
32. *Id.* at 367–72.
33. See Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250, 1250 n.4, 1265–67 (2015) [hereinafter *The Psychology of Cruelty*].
34. *See generally*, Grassian, *supra* note 212.
35. *See* Smith, *supra* note 212, at 478–79.
36. *See id.* at 476–87.

Notwithstanding these issues, the overwhelming corpus of research shows that prolonged solitary confinement causes severe mental illness.[37] In a thorough review of the existing literature, scholar Peter Scharff Smith concluded:

[T]he overall conclusion must be that solitary confinement—regardless of specific conditions and regardless of time and place—causes serious health problems for a significant number of inmates. The central harmful feature is that it reduces meaningful social contact to an absolute minimum: a level of social and psychological stimulus that many individuals will experience as insufficient to remain reasonably healthy and relatively well functioning.[38]

And the judiciary seems to agree—as one district court observed:

> Confinement in a supermaximum security prison . . . is known to cause severe psychiatric morbidity, disability, suffering and mortality. *Prisoners in segregated housing units who have no history of serious mental illness and who are not prone to psychiatric decompensation (breakdown) often develop a constellation of symptoms known as "[Segregated Housing Unit] Syndrome."* Although SHU Syndrome is not an officially recognized diagnostic category, it is made up of official diagnoses such as paranoid delusional disorder, dissociative disorder, schizophrenia and panic disorder. The extremely isolating conditions in supermaximum confinement cause SHU Syndrome in relatively healthy prisoners who have histories of serious mental illness, as well as prisoners who have never suffered a breakdown in the past but are prone to break down when the stress and trauma become exceptionally severe. Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment; a high number attempt suicide.[39]

Although the overall effect of prolonged solitary confinement on prisoners is clear, methodological variance among studies precludes absolute statements about the universal occurrence of particular symptoms.[40] Nonetheless, common symptoms include: delirium,[41] hyperresponsiveness to stimuli,[42] physiological symptoms,[43] confusion and impaired concentration,[44] hallucinations and

---

37. See *id.* at 475.
38. *Id.* at 503.
39. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1101–02 (W.D. Wis. 2001) (emphasis added). It should be noted that "supermaximum" prisons house their prisoners in solitary confinement. *See*, Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1506–07 (2004) ("Supermax prisons are uniquely harsh, high-tech facilities that house inmates typically identified as the 'worst of the worst.' Inmates are characteristically kept in solitary confinement for twenty-three hours a day, in cells designed to minimize sensory stimulation and human contact.").
40. *See* Smith, *supra* note 212, at 493–94.
41. As verified by electroencephalogram (EEG) readings. *See* Grassian, *supra* note 212, at 331.
42. *Id.* An unfortunate side-effect of this condition is that prisoners tend to either withdraw into themselves, increasing the severity of their mental illness, or in the alternative to act out—sometimes violently—which provides prison officials with ample justification for keeping them in solitary confinement. *See id.*
43. *See* Smith, *supra* note 212, at 488–90. Reported physical symptoms include but are not limited to: severe headaches, heart palpitations, gastro-intestinal problems, loss of appetite, and dizziness. *Id.*
44. *See id.* at 490; Grassian, *supra* note 212, at 332, 335–37.

paranoia,[45] adverse impulses,[46] and lethargy and debilitation.[47] Rarer symptoms—such as self-cannibalism—can be far worse.[48] The rate at which prisoners suffer from these symptoms varies wildly according to the source and the reported symptom.[49] But regardless of the details, the general trend is that symptoms are both common and severe.

The onset of solitary confinement-induced mental harm is surprisingly fast.[50] It only takes a few days before many adverse symptoms appear in prisoners.[51] For example, researchers have measured the co-occurrence of solitary confinement and neurological effects.[52] They found that "even a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium."[53] And after confinement begins, the consensus is that each additional day in solitary confinement ratchets up the risk of developing new symptoms and increases the severity of existing ones.[54]

B. Previous constitutional attacks on solitary confinement

Challenging conditions of confinement based on the psychological harm they cause is difficult—if not impossible—from a federal statutory perspective. The Prison Litigation Reform Act (PLRA) broadly precludes such litigation. In relevant part, the PLRA states "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, *for mental or emotional injury suffered while in custody* without a prior showing of physical injury or the commission of a sexual act."[55] But there are two provisions of the Constitution that might invalidate contemporary solitary confinement practices—the Due Process[56] and Cruel and Unusual Punishment Clauses.[57] This subpart provides a brief overview of the applicable law in each of these areas.

1. Solitary Confinement and the Due Process Clause

The Due Process Clause is implicated when an individual's life, liberty, or property interest is threatened by government action.[58] Consequently, procedural

---

45. *See* Smith, *supra* note 212, at 488–91; Grassian, *supra* note 212, at 332, 335–37.
46. *See* Smith, *supra* note 212, at 488–92; Grassian, *supra* note 212, at 336.
47. *See* Smith, *supra* note 212, at 488–93.
48. *See* Grassian, *supra* note 212, at 351.
49. *See* Grassian, *supra* note 212, at 332, 335–37; Smith, *supra* note 212, at 488–91.
50. *See infra* notes 51–54.
51. Smith, *supra* note 212, at 494–95.
52. Grassian, *supra* note 212, at 331.
53. Id.
54. Smith, *supra* note 212, at 495. Fortunately, most prisoners eventually get better after they are released from solitary confinement. *Id.* at 495–96.
55. 42 U.S.C. § 1997e(e) (2013) (emphasis added).
56. U.S. CONST. amend. V.
57. U.S. CONST. amend. VIII.
58. Dent v. West Virginia, 129 U.S. 114, 124 (1889).

due process challenges usually involve answering two questions: (1) does the challenged government action implicate a protected interest; and if so, (2) does the procedure protecting that interest satisfy the requirements of due process?[59] Because solitary confinement is not an inherent feature of sentences, due process litigation has challenged the institutional process by which prison officials place inmates in solitary confinement.[60] Litigants advancing this theory contend that inmates have a liberty interest in avoiding solitary confinement and that the process afforded them to protect that interest was constitutionally inadequate.[61]

While the liberty interests of a prisoner are not coextensive with those of a free person,[62] relegation to solitary confinement will often implicate a liberty interest within the ambit of the Due Process Clause.[63] Whether a stay in solitary confinement violates a cognizable liberty interest under the Court's precedent turns on (a) the particular conditions of solitary confinement, (b) the duration of stay within those conditions, and (c) the difference between the solitary confinement conditions and those generally prevailing in the rest of the prison system.[64] Thus, a transfer to a supermax prison will implicate a liberty interest,[65] while a thirty day stay in four-hour-per-day administrative segregation will not.[66] In 2017, more than 60,000 Americans were confined in individual cells for at least twenty-two hours a day for consecutive stretches of at least fifteen days.[67] These supermax-like conditions fit within a Supreme Court announced liberty interest. Having established a liberty interest, the question then becomes: is the process afforded solitary confinement prisoners constitutionally sufficient?

Whether a procedure meets the requirements of the Due Process clause is governed by a "*Mathews* factors" analysis:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[68]

In *Wilkinson v. Austin*, the Supreme Court applied the *Mathews* factors to solitary confinement transfer procedures.[69] In that case, prisoners who were

59. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209; 209 (2005); Vitek v. Jones, 445 U.S. 480 (1980); Mathews v. Eldridge, 424 U.S. 319 (1976).

60. *See, e.g.*, *Wilkinson*, 545 U.S. at 209.

61. *See id.* at 220–21.

62. "[T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

63. *Wilkinson*, 545 U.S. at 223–24.

64. *See generally id.*

65. *Id.*

66. Sandin v. Conner, 515 U.S. 472, 485–87 (1995).

67. *See* ASCA-LIMAN 2018, *supra* note 123, at 4, 7.

68. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

69. 545 U.S. at 224–25.

transferred into the Ohio State Penitentiary Supermax Prison (OSP) filed a suit alleging that their transfer violated the Due Process Clause.[70] The 504-inmate capacity prison consisted entirely of single-inmate cells, wherein all prisoners were confined for at least twenty-three hours per day.[71] Inmates were placed in OSP based on their security level classification within the Ohio Prison system: Level one was the lowest risk level; level five was the highest. [72] All level five prisoners were confined at OSP.[73] Prisoners were classified when they first entered the prison system based on their characteristics such as crime of conviction, criminal history, and gang affiliation.[74] Later, prison officials could reclassify prisoners after they entered Ohio's prison system.[75]

The process of prisoner classification to OSP was part of a three-tier process, which takes place entirely within the Ohio prison system itself.[76] A prison official such as a correctional officer or warden initiated the process by filling out a form that stated the basis for the reclassification.[77] A three-member committee held a hearing wherein they considered the proposed reclassification.[78] The prisoner was given written notice of the hearing, where he or she was allowed to participate by testifying both orally and in writing.[79] However, the prisoner was not allowed to call any witnesses or present any other form of countervailing evidence.[80] The committee then rendered a decision and prepared an accompanying report.[81] If they approved it, the warden at the prisoner's current facility approved or denied the reclassification.[82] Approval by the warden sent the matter up to the final body,

70. *Id.* at 213–14.

71. *Id.* The Court noted that:

> Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.
>
> Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there. Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP.

Id. at 214–15.

72. *Id.* at 215.

73. *Id.*

74. *Id.* at 214–215. These are three exemplar factors listed in the opinion, but apparently there are others.

75. *Wilkinson*, 545 U.S. at 214–15.

76. *Id.* at 215–17.

77. *Id.* at 216.

78. Id.

79. Id.

80. Id.

81. *Wilkinson*, 545 U.S. at 216.

82. *Id.* at 216–17.

the Bureau of Classification.[83] If the Bureau agreed with the classification, then the prisoner was transferred to OSP.[84] If any one of the adjudicators (the committee, the warden, or the Bureau of Classification) disagreed with the process at any point, then the process stopped and the prisoner was not transferred.[85] Prisoners were entitled to annual reviews, where the entire process was repeated via the same three adjudicating entities.[86]

The Supreme Court held that this procedure was constitutionally adequate under the Due Process Clause.[87] In reaching this decision, the Court did not have to weigh the *Mathews* factors because it found that all of them militated against finding a due process violation. [88] With respect to the first factor—the nature of the protected interest—it noted that the prisoners' liberty interests were significantly diminished because they were already subject to incarceration.[89] Transfer to OSP was simply a type of confinement, for which prisoners had already received adequate process.[90] For the second factor—whether the process adequately protects against erroneous deprivation of the protected interest—the Court found that the prisoners had adequate opportunity to rebut allegations by prison officials[91] and opined that the three-tier process for review added an extra layer of safety to the process.[92] For the third and final factor—the significance of the government's interest at stake—the Court found that the government had compelling interests in maintaining an efficient and manageable prison system.[93]

In its opinion—which was unanimous—the Court did not address a significant obvious concern: that the entire OSP review process was controlled and adjudicated by prison officials.[94] And while it is true that OSP's three-tier review process provided many different points of review, one might question the usefulness of the system when there is no meaningful third-party oversight of it. Not only were the review procedures conducted exclusively by prison officials, but

83. *Id.* at 217.

84. Id.

85. *Id.* The OSP staff also conducts a review 30 days after prisoners arrive. *See id.*

86. Id.

87. *Wilkinson*, 545 U.S. at 228.

88. *Id.*at 228–29.

89. *Id.* at 211.

90. Id. at 225.

91. *Id.* at 225–26. The Court addressed the lack of the ability to call witnesses:

> Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated. This problem, moreover, is not alleviated by providing an exemption for witnesses who pose a hazard, for nothing in the record indicates simple mechanisms exist to determine when witnesses may be called without fear of reprisal. The danger to witnesses, and the difficulty in obtaining their cooperation, make the probable value of an adversary-type hearing doubtful in comparison to its obvious costs.

Id. at 228.

92. *Id.* at 225–27.

93. Wilkinson, 545 U.S. at 227–28. Specifically, the court found the administrative, fiscal, and safety interests of the State were incredibly important. *Id.*

94. *Id.* at 209–30.

the substantive rules for security classification were devised and promulgated by the Ohio prison bureaucracy itself.[95]

In short—barring a major shift in procedural due process jurisprudence—*Wilkinson* demonstrates that due process claims are a dead letter for challenging long-term solitary confinement. If the prison-written, entirely internal procedures are enough to satisfy the Supreme Court, then prison officials can meet the due process threshold almost *pro forma*. Prisoners should look elsewhere for relief.

2. Solitary Confinement and the Cruel and Unusual Punishment Clause

The Eighth Amendment's Cruel and Unusual Punishment Clause provides another constitutional hook for attacking solitary confinement. After all, prolonged solitary confinement produces profound and lasting harm to prisoners.[96] But of course, grievous harm isn't enough—the Supreme Court has repeatedly upheld the death penalty against Eighth Amendment challenges.[97]

So, what does it mean for a punishment to be "cruel and unusual?" The Court's first modern attempt to provide consistent guidance came in *Trop v. Dulles*, when it said that the Cruel and Unusual Punishment Clause "must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society."[98] But "evolving standards of decency" provide no more explanatory force than the text of the Eighth Amendment itself. The phrases "cruel and unusual" and "evolving standards of decency" both index the meaning of the Eighth Amendment to societal standards about the appropriateness of the punishment in question.

Recognizing this ambiguity, in *Furman v. Georgia*, the Court announced four principles for adjudicating cruel and unusual punishment challenges.[99] The punishment must not (1) degrade human dignity, (2) be inflicted arbitrarily, (3) be "clearly and totally rejected throughout society," or (4) be "patently unnecessary."[100] Since *Furman*, the Court has only invalidated a small handful of sentencing-based punishments.[101] Fortunately for prisoners, "evolving standards of decency" and other *Furman*-like principles cover not only court-announced sentences, but also the actual conditions of a prisoner's confinement while serving

95. *Id.* at 215–16.

96. *See supra* Part I.A.

97. *See, e.g.*, Baze v. Rees, 553 U.S. 35 (2008). The death penalty is subject to special restrictions. For example, the death penalty is only available for crimes that result in death. *See* Kennedy v. Louisiana, 554 U.S. 407, 421–22 (2008) (death penalty for rape of a child violated the Cruel and Unusual Punishment Clause). Additionally, certain classes of convicts, such as juveniles and people with severe mental deficits cannot be subjected to the death penalty. *See* Roper v. Simmons, 543 U.S. 551, 578–79 (2005); Atkins v. Virginia, 536 U.S. 304, 319–21 (2002).

98. 356 U.S. 86, 101 (1958) (per curiam) (emphasis added). In *Trop*, the Supreme Court held that punishing a World War II army deserter by taking away his citizenship violated the Cruel and Unusual Punishment Clause. *Id.* at 101–04.

99. Furman v. Georgia, 408 U.S. 238, 281–82 (1972) (Brennan, J., concurring).

100. *Id.*

101. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 79–81 (2010) (sentencing juveniles to life sentences without the possibility of parole when they did not commit homicide is cruel and unusual punishment).

a sentence.[102] Conditions of confinement include discrete acts and omissions by prison staff[103] and pervasive structural problems created by the prison system.[104]

Under the *Furman* line of cases, prison officials are generally given broad leeway to discipline prisoners so long as they act in good faith and without "deliberate indifference."[105] The two main ways that prison officials may run afoul of this rule are by: (a) acting with "deliberate indifference" to an inmate's health or safety,[106] or (b) the "unnecessary and wanton infliction of pain."[107] The thread tying these two concepts together is that prison action taken without a penological purpose is illegitimate.[108] Because "penological purpose" is broadly construed, prison officials are allowed to inflict a significant amount of pain on prisoners so long as they have a plausible reason for doing so.[109]

C. Psychological Harm and the Eighth Amendment

It's clear that the Eighth Amendment imposes some restrictions on physical harm inflicted on prisoners[110]—but does it do the same for psychological harm? It's an open question. The Supreme Court has never found that a purely mental harm rises to the level of an Eighth Amendment violation.[111] However, it has never categorically held that psychological harm is beyond the scope of the Eighth Amendment, either.[112] When challenging systemic conditions of confinement, the Court has said that a prisoner must show that he or she has been deprived of a "single, identifiable human need."[113] The Court declined to define this concept in detail, instead providing an illustrative list of examples: food, warmth, and exercise.[114]

For the most part, lower courts have been hesitant to expand the scope of what constitutes a "single, identifiable human need."[115] Importantly, many courts

---

102. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 361 (1981) (Brennan, J., concurring).

103. *See* Hope v. Pelzer, 536 U.S. 730, 733–38 (2002) (tying prisoner to hitching post in the hot sun for seven hours as punishment was cruel and unusual punishment); Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) ("deliberate indifference" by prison staff to prisoner's serious medical needs violated prisoner's Eighth Amendment rights).

104. *See* Brown v. Plata, 563 U.S. 493, 517–19 (2011) (prison overcrowding violated Cruel and Unusual Punishment Clause).

105. Farmer v. Brennan, 511 U.S. 825, 839–40 (1994).

106. Hudson v. McMillian, 503 U.S. 1, 8 (1992); *see also Farmer*, 511 U.S. at 839–40 ("subjective recklessness as used in the criminal law" is the test for whether a prison official was deliberately indifferent to the health or safety of a prisoner).

107. *Hope*, 536 U.S. at 737 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

108. *See id.*

109. *See, e.g.*, Williams v. Delo, 49 F.3d 442, 444, 447 (8th Cir. 1995) (placement of prisoner in solitary confinement without clothes, running water, a mattress, blanket, pillows, or toiletries did not violate Eighth Amendment).

110. *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) (citing the *Blackstone Commentaries* for the proposition that the Eighth Amendment prevents physically tortuous methods of execution such as disembowelment and burning prisoners alive).

111. *See The Psychology of Cruelty*, *supra* note 334, at 1252 n.20.

112. *See* Federica Coppola, *The Brain in Solitude: An (Other) Eighth Amendment Challenge to Solitary Confinement*, 6 J.L. & BIOSCIENCES 184, 189–91 (2019) (discussing the open-ended application of the "human needs standard").

113. Wilson v. Seiter, 501 U.S. 294, 304 (1991).

114. *Id.*

115. *See The Psychology of Cruelty*, *supra* note 334, at 1260–61.

have rejected social interaction as a valid "identifiable human need."[116] A review of the cases since *Wilson* shows that most lower courts have required a showing of some sort of physical harm to allow Eighth Amendment challenges to solitary confinement to move forward.[117]

Bucking this trend, in *Ruiz v. Johnson*, a district court held that Texas's entire solitary confinement system violated the Eighth Amendment because of the psychological harm it inflicted.[118] The court found that:

> [T]he administrative segregation units of the Texas prison system deprive inmates of the minimal necessities of civilized life. While the court recognizes and appreciates the formidable task of those public servants saddled with the task of dealing with problematic, violent inmates, even those inmates who must be segregated from general population for their own or others' safety retain some constitutional rights. Texas' administrative segregation units violate those rights through extreme deprivations which cause profound and obvious psychological pain and suffering. Texas' administrative segregation units are virtual incubators of psychoses-seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities.[119]

While the court invalidated the scheme for all prisoners, it specifically noted the heightened harm facing prisoners with mental illness that predated their stays in solitary confinement.[120]

Other courts addressing solitary-confinement-caused psychological harm have found that relegating prisoners with preexisting serious mental illness to solitary confinement violates the Eighth Amendment.[121] For these courts, the presence of serious mental illness acts as a force multiplier, which raises the mental pressures of solitary confinement to the level of cruel and unusual punishment.[122] Moreover, in addition to creating present cruel and unusual punishment, prolonged

---

116. *See, e.g.*, McMillan v. Wiley, 813 F. Supp. 2d 1238, 1251 (D. Colo. 2011).

117. *See, e.g.*, Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996), *amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998) (finding that conditions in solitary confinement related to "exercise, noise, lighting, ventilation, personal hygiene, and food and water" could create an Eighth Amendment violation).

118. 37 F. Supp. 2d 855, 940 (S.D. Tex. 1999), *rev'd on other grounds sub nom.*, Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001).

119. *Id.* at 907.

120. *Id.* at 911–13.

121. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001); Madrid v. Gomez, 889 F. Supp. 1146, 1264–66 (N.D. Cal. 1995); *cf.* U.S. Dep't Justice, Effective Prison Mental Health Services: Guidelines to Expand and Improve Treatment 41–42 (2004), https://nicic.gov/effective-prison-mental-health-services-guidelines-expand-and-improve-treatment (finding that solitary confinement is generally inadvisable for prisoners with severe mental illness).

122. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (placing the seriously mentally ill in prolonged solitary confinement is "the mental equivalent of putting an asthmatic in a place with little air to breath").

solitary confinement is likely to further aggravate mental illness, which creates a substantial risk of future harm.[123] A key distinction between *Ruiz* and the preexisting mental illness-based cases is that the latter explicitly tie constitutional violations to *health* or *mental illness*, while *Ruiz* is based more generally on *mental harm*.

III. THE CONSTITUTIONAL DEFECT IN PROLONGED SOLITARY CONFINEMENT

The legal reasoning applied to ban the use of solitary confinement on seriously mentally ill inmates should be expanded to eliminate—or at least significantly curtail—the use of prolonged solitary confinement for all prisoners in the United States. A large body of empirical research demonstrates that prolonged isolation in solitary confinement *causes* serious mental illness in most ordinarily constituted prisoners.[124] And mental illness is mental illness—its multiplicative effect on the mental harm caused by solitary confinement does not differentiate between preexisting mental illness and confinement-induced mental illness. If preexisting serious mental illness precludes the transfer of an inmate to solitary confinement, then an inmate's mental illness caused by solitary confinement precludes her continued presence therein.

Drawing on the empirical research, this Part proposes two arguments in the alternative for reaching the same conclusion. The primary argument is that prisoners have a categorical right to be free from confinement-caused severe mental illness.[125] This argument is a straightforward application of the long-established principle that prisoners have a right to healthcare and to be confined in a minimally healthy environment.[126] In the alternative, the second argument is that even if prisoners do not have an absolute right to be free from severe mental illness, the harm attendant to such illnesses constitute confinement in conditions that violate the Cruel and Unusual Punishment Clause.[127]

A. The Categorical Argument

Prisoners challenging their conditions of confinement generally need to allege that the challenged conditions deprive them of a "single, identifiable human need."[128] Although "single identifiable human need" is a vague term,[129] an inmate's right to basic healthcare and to be free from significant harm to their health falls unquestionably within its ambit.[130] This right is so strong, that courts have even

123. *Id.* (citing Helling v. McKinney, 509 U.S. 25, 30–32 (1993) (Eighth Amendment claim could be based on possible future harm from secondhand smoke)).

124. *See supra* notes 11–45 and accompanying text.

125. See discussion *infra* Section II.A.

126. See discussion *infra* Section II.A.

127. See discussion *infra* Section II.B.

128. Wilson v. Seiter, 501 U.S. 294, 304 (1991); *see supra* notes 113-117 and accompanying text.

129. *See supra* notes 115-117 and accompanying text.

130. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 30–32 (1993); Ball v. LeBlanc, 792 F.3d 584, 596 (5th Cir. 2015) (holding that excessive heat created cognizable Eighth Amendment claim because it created a serious risk of medical complications for prisoners with high blood pressure).

allowed prisoners to bring claims based on *possible future harm* to their health.[131] And far from being a distinct class, "[c]ourts treat an inmate's *mental* health claims just as seriously as any *physical* health claims," which create cognizable claims under the Eighth Amendment.[132] Therefore, under the categorical argument, inmates in solitary confinement don't have to reinvent the wheel—they just have to show that they are an unrecognized spoke in the current one.

Because solitary confinement causes severe mental illness, an inmate's confinement therein deprives her of the "single, identifiable human need" of being reasonably healthy. All the available empirical research demonstrates that even short stays in solitary confinement cause severe mental illness in the majority of otherwise healthy inmates.[133] Many prisoners develop a DSM-V recognized illness.[134] Others suffer from a wide variety of severe symptoms, such as delirium, hallucinations, and self-mutilation.[135] And, while currently the DSM-V does not recognize "SHU Syndrome"[136] or a similar analog, the constellation of solitary confinement caused symptoms rises to the level of a severe mental illness.[137]

Replying that solitary confinement does not cause severe mental illness in *all* inmates is no response. Courts have long held that a significant risk of harm is enough to create a cognizable Eighth Amendment claim.[138] For example, in *Helling v. McKinney,* the Supreme Court held that a prisoner could bring an Eighth Amendment claim because of possible future risk to their health caused by secondhand smoke in a prison.[139] By contrast, solitary confinement predictably causes severe mental illness in *most* inmates within days of confinement.[140] Under *Helling* and its progeny, solitary confinement's risk is significant enough to create a cognizable Eighth Amendment claim.

Given the state of the case law, prisons are most likely to resist the abovementioned argument on empirical rather than legal grounds. The most

131. Helling, 509 U.S. at 30-35 (stating that the Eighth Amendment claim could be based on possible future harm from secondhand smoke).

132. DePaola v. Clarke, 884 F.3d 481, 486 (4th Cir. 2018) (emphasis added); *accord* Rhodes v. Chapman, 452 U.S. 337, 364 (1981) (Brennan, J., concurring) (listing the provision of mental health care as a relevant factor in whether prison conditions violate the Eighth Amendment); *see also* Woodward v. Corr. Med. Servs. of Ill., 368 F.3d 917 (7th Cir. 2004); Doty v. Cty. of Lassen, 37 F.3d 540 (9th Cir. 1994); Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990); Waldrop v. Evans, 871 F.2d 1030 (11th Cir. 1989); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980).

133. *See supra* notes 37–39 and accompanying text; *see generally* Smith, *supra* note 212, at 495.

134. See Brian O. Hagan et al., History of Solitary Confinement is Associated with Post-Traumatic Stress Disorder Symptoms Among Individuals Recently Released from Prison, 95 J. Urb. Health, 141, 146-47 (2017); Stanford University Human Rights in Trauma Mental Health Lab, Mental Health Consequences Following Release from Long-Term Solitary Confinement in California, 2, 7–9. The DSM-V is the most widely used and respected reference for psychiatric taxonomy. See Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

135. *See supra* notes 41–47 and accompanying text.

136. *See supra* note 39 and accompanying text.

137. *See supra* note 39 and accompanying text.

138. Helling v. McKinney, 509 U.S. 25, 35 (1993).

139. Id.

140. *See supra* notes 44–46 and accompanying text.

straightforward line of attack is that solitary confinement does not cause severe mental illness. But it would be a difficult argument to make because there is no evidence that solitary confinement *does not* cause severe mental illness, while there is plenty of evidence that it does.[141] Lacking any evidence of their own, prison officials would have to portray existing studies and data as so flawed that courts should not rely on them. Relatedly, prisons could note solitary confinement caused symptoms are not "severe mental illness" because they do not fit neatly within a recognized DSM-V diagnosis.[142]

To a very limited extent, their concerns are valid. It is undeniable that the existing literature is imperfect.[143] And certainly the DSM-V does not currently recognize "SHU Syndrome."[144] But even acknowledging these limitations, prison officials would be hard-pressed to seriously contend that symptoms such as delirium, hallucinations, and self-mutilation do not constitute severe mental illness.[145] It is highly unlikely that, even with the acknowledged methodological problems,[146] the centuries-old, widespread reporting of these symptoms is inaccurate. And the reality of these symptoms for prisoners is what matters—not the perfection of studies documenting their misery. While it would be nice to have an officially recognized solitary confinement syndrome, the taxonomical classification of mental disorders is an exercise in normative psychiatry;[147] the absence of the psychiatric community's normative gloss on a group of documented symptoms does not make their effects any less real. Under any reasonable rubric, the myriad of symptoms that prisoners in prolonged solitary confinement suffer from would qualify as a severe mental illness.[148]

B. The Harm Argument

If courts do not accept the categorical argument, they could invalidate solitary confinement on a theory of harm. As one lower court noted, placing inmates with severe mental illness in solitary confinement is the "equivalent of putting an asthmatic in a place with little air to breath."[149] In other words, solitary confinement multiplies the inherent metal harm attendant to severe mental illness.[150] On this theory, lower courts have already prohibited prisons from relegating prisoners with preexisting severe mental illness to solitary confinement.[151] But there is no reason that they should stop there. Solitary confinement *causes* severe mental illness in

141. *See supra* Part I.A.

142. *See supra* note 134.

143. *See supra* notes 28–32 and accompanying text.

144. *See supra* note 39 and accompanying text.

145. *See supra* notes 40–55 and accompanying text.

146. *See supra* notes 33–36 and accompanying text.

147. *See* Marco Stier, *Normative Preconditions for the Assessment of Mental Disorder*, 4 Frontiers Psychol. 1 (2013), https://doi.org/10.3389/fpsyg.2013.00611.

148. *See supra* note 40–55 and accompanying text.

149. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

150. *See* Grassian, *supra* note 212, at 329. Explicitly, the literature is silent on the etiology behind this multiplicate effect. But it's not a great leap to infer that the same features of solitary confinement that *cause* mental illness have an exacerbating effect on preexisting mental illness.

151. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1117–21 (W.D. Wis. 2001); *Madrid*, 889 F. Supp. at 1261–66; Ruiz v. Johnson, 37 F. Supp. 2d 855, 913–15 (S.D. Tex. 1999); *see also supra* notes 118–123 and accompanying text.

the majority of inmates.[152] And under this analysis, whether severe mental illness predates or postdates solitary confinement is not important because the quantum of harm—and therefore the constitutional infirmity—is identical.

Litigants advancing this argument should be careful to frame it in empirical, rather than empathic terms. For example, a recent Harvard Law Review Note suggested that prisoners could challenge solitary confinement by using neuroscientific research to show that solitary confinement subjects inmates to "social isolation," which in turn causes *grave mental harm*.[153] *Grave mental harm* sounds more grievous than "social isolation," but in reality, that argument is simply placing a fancy gloss on extreme discomfort. And while it has strong empathic force, the problem is that grave harm, either physical or mental, has not been enough to abolish a great many punishments; being free from harm is the beginning, but not the end of a cognizable Eighth Amendment claim.[154] To create Eighth Amendment protection, an inmate must allege that the challenged condition subjects them to a specific *type* of harm that the Court is prepared to recognize.

The *type* of harm that inmates subjected to solitary confinement endure is either the onset of a new health problem or the multiplication of the harm from a confinement-caused one.[155] Framing the harm of solitary confinement as a health problem rather than as *grave mental harm* places the issue in a different legal (and rhetorical) light. Rather than drawing on the courts' empathy, this argument draws on their rationality. Rhetorically, health-based arguments are stronger than those grounded in mental suffering (or empathy) because the empirical evidence demonstrates that apart from being merely uncomfortable, prolonged solitary causes lasting measurable health harm.[156] In turn, the features of solitary confinement that cause the health problems to begin with conspire to exacerbate their harmful effects on prisoners.[157] Under this analysis, the multiplicative effect of solitary confinement on the already extreme harm of severe mental illness means that prisons must discontinue the use of solitary confinement.

IV. CONCLUSION

Solitary confinement is a dreadful practice, but there are signs of change on the horizon. The lower courts are sympathetic to the plight of, at least some, prisoners in prolonged solitary confinement.[158] And although most higher courts have never directly addressed the issue, past and present members of the Supreme

152. *See supra* notes 37–38 and accompanying text; *see generally* Smith, *supra* note 212, at 495.

153. *See supra* note 334, at 1265-67, 1270.

154. The death penalty has, mostly, withstood Eighth Amendment challenges. *See supra* note 98 and accompanying text.

155. *See supra* Part II.A.

156. *See supra* notes 25–39 and accompanying text.

157. *See* Grassian, *supra* note 21, at 349; Smith, *supra* note 212, at 482–83.

158. *See supra* notes 118–123 and accompanying text.

Court have clearly signaled their aversion to contemporary solitary confinement practices.[159]

To take the next step, litigants need a properly framed legal hook. Solitary confinement-induced mental illness is the perfect vehicle for a constitutional challenge because it relies on incrementally expanding existing rules rather than on crafting an entirely new one. Moreover, reframing the issue in terms of mental health transmutes an opaque moral matter—about which, many apparently still disagree—into a clear medical problem that cannot be easily dismissed. At worst, mental health-based litigation will slowly improve conditions for prisoners; and at best, it will outright banish the "secret punishment" from American prisons. [160]

159. *See* Davis v. Ayala, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) (inviting legal challenge to solitary confinement); Apodaca v. Raemisch, 864 F.3d 1071 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5 (2018) (Sotomayor, J., statement respecting the denial of certiorari).

160. *See* Dickens, *supra* note 4 and accompanying text.