

A WRONG WITHOUT A RIGHT? OVERCOMING THE PRISON LITIGATION REFORM ACT'S PHYSICAL INJURY REQUIREMENT IN SOLITARY CONFINEMENT CASES

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ABSTRACT—This Essay argues against applying the so-called “physical injury” requirement of the Prison Litigation Reform Act (PLRA) to deny monetary compensation to solitary confinement survivors. The Essay identifies three ways in which misapplication of the PLRA’s physical injury requirement limits the ability of solitary confinement survivors to receive monetary compensation for psychological harm suffered. First, some courts applying the PLRA wrongly dismiss damages claims for alleging “*de minimis*” physical injury. Second, some courts have been reluctant to find that physical injury caused by psychological trauma satisfies the PLRA’s physical injury requirement. Third, courts do not distinguish between “garden variety” mental and emotional suffering and psychiatric illness in applying the physical injury bar. This Essay contends that this jurisprudence is inconsistent with the goal of preserving meritorious prisoner claims and should be reconsidered.

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INTRODUCTION

That the Prison Litigation Reform Act¹ (PLRA) is a formidable obstacle to prisoners’ ability to challenge solitary confinement and other barbaric conditions in U.S. prisons has long been obvious to civil rights lawyers and prisoners alike. Passed by Congress in 1996 and signed into law by President Clinton, the PLRA was ostensibly designed to reduce a purported burden on the federal judiciary by limiting frivolous prisoner lawsuits.² Proponents of the PLRA argued that the new law would block petty cases but not choke off meritorious litigation.³ Critics feared that the law would frustrate meritorious and frivolous claims in equal measure.⁴ As many commentators have noted, the opponents were prescient: in the years since the PLRA was enacted, prisoner lawsuits have slowed to a comparative trickle.⁵ The “physical

¹ 42 U.S.C. § 1997e (2012).

² See 141 CONG. REC. 26548 (1995) (statement of Sen. Dole) (“This legislation is . . . to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners.”); *id.* at 26553 (statement of Sen. Hatch) (“This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits.”); see also Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (Apr. 26, 1996).

³ See 141 CONG. REC. at 27042 (1995) (statement of Sen. Hatch) (“Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. This legislation will, however, go far in preventing inmates from abusing the Federal judicial system.”); *id.* at 27044 (statement of Sen. Reid) (“If they have a meritorious lawsuit, of course they should be able to file.”); *id.* (statement of Sen. Thurmond) (“[The PLRA] will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.”).

⁴ See 142 CONG. REC. 5194 (1996) (statement of Sen. Simon) (“In attempting to curtail frivolous prisoner lawsuits, this legislation goes much too far, and instead may make it impossible for the Federal courts to remedy constitutional and statutory violations in prisons, jails, and juvenile detention facilities.”); 141 CONG. REC. 27044 (1995) (statement of Sen. Biden) (“[I]n an effort to curb frivolous prisoner lawsuits, the amendment places too many roadblocks to meritorious prison lawsuits.”).

⁵ See Anh Nguyen, *The Fight for Creamy Peanut Butter: Why Examining Congressional Intent May Rectify the Problems of the Prison Litigation Reform Act*, 36 SW. U. L. REV. 145, 157 (2007) (“After the PLRA went into effect, statistics demonstrated that the number of granted requests [for assistance of counsel] decreased, indicating that the PLRA has in fact deterred both frivolous cases and cases with

injury” requirement, codified at 42 U.S.C. § 1997e(e), is among the PLRA’s most potent barriers to righting constitutional wrongs.

There is perhaps no thornier application of this statute than to the context of litigation challenging solitary confinement, a barbaric condition of confinement that is increasingly perceived to conflict with the Eighth Amendment. Justice Anthony Kennedy described solitary confinement as a “regime that will bring you to the edge of madness, perhaps to madness itself.”⁶ Justice Stephen Breyer emphasized the psychological and physical injury inflicted by prolonged solitary confinement.⁷ And Justice Sonia Sotomayor called attention to the “clear constitutional problems” with imprisonment in “‘near-total isolation’ from the living world . . . in what comes perilously close to a penal tomb.”⁸

Despite this widespread view, solitary confinement remains in use throughout the United States, a state of affairs for which the physical injury requirement is at least partially to blame. To remedy that imbalance, this Essay argues against an interpretation of the physical injury requirement that is inconsistent with Congress’s professed desire not to slam the courthouse door on prisoners with meritorious claims.

In Part I, we examine the physical injury requirement, including its legislative history, and offer a case study illustrating its pernicious effects. In Part II, we offer a framework for effectuating congressional intent in weeding out frivolous cases by recognizing that solitary confinement does, in fact, impose physical injury. We also argue in Part II that courts should distinguish between claims for compensatory damages for “garden variety” emotional injury and serious psychological injury.

I. THE PHYSICAL INJURY REQUIREMENT: A PRIMER AND A CASE STUDY

42 U.S.C. § 1997e(e), which prohibits compensatory damages unless the opaque terms of the statute are met, reads in its entirety:

sufficient merits to warrant the granting of counsel.”); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1694 (2003) (“The [PLRA] has been highly successful in reducing litigation, triggering a forty-three percent decline over five years, notwithstanding the simultaneous twenty-three percent increase in the incarcerated population.”); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 141–42 (2008) (finding that the PLRA “drastically reduced the number of cases” filed by prison and jail inmates, resulting in 60% fewer federal cases in 2006 than in 1995).

⁶ *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

⁷ *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting).

⁸ *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., concurring in denial of cert.) (citation omitted) (quoting *Ayala*, 135 S. Ct. at 2210 (Kennedy, J., concurring)).

No 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 (as defined in section 2246 of title 18).⁹

The D.C. Circuit has observed that § 1997e(e) “may well present the highest concentration of poor drafting in the smallest number of words in the entire United States Code.”¹⁰ And with good reason: the provision leaves more questions unanswered than answered. Examples of such questions include: How severe must the injury be before a prisoner is entitled to compensatory damages? Is there a difference between “mental or emotional injury” and “physical injury” in the context of damage to that large organ atop our heads? Must that cumulative gatekeeper—“a prior showing of physical injury”—have a nexus to the “mental or emotional injury suffered”?

According to Congress, “the purpose of the PLRA was to curb lawsuits for ‘insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.’”¹¹ That is, the PLRA’s drafters hoped to spare federal courts from frivolous damages lawsuits while preserving the rights of prisoners subjected to constitutional abuses.¹²

For prisoners subjected to the scourge of solitary confinement, however, the physical injury requirement is sometimes misinterpreted to prohibit compensatory damages merely because isolation often does not leave a physical scar, or at least one that can be detected without advanced neurologic imaging equipment. Take the case of Aaron Isby-Israel, which starkly illustrates the absurd results seemingly compelled by the physical injury requirement.

Mr. Isby-Israel spent over eleven years confined in a small cell for twenty-three hours a day, allowed outside for just one hour a day of recreation, alone.¹³ On those occasions when he did leave his cell, he was

⁹ 42 U.S.C. § 1997e(e) (2012), amended by 42 U.S.C. § 1997e(e) (Supp. IV 2013).

¹⁰ Aref v. Lynch, 833 F.3d 242, 263 (D.C. Cir. 2016) (quoting John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 434 (2001)); see also Oliver v. Keller, 289 F.3d 623, 626 (9th Cir. 2002) (“In drafting § 1997e(e), Congress failed to specify the type, duration, extent, or cause of ‘physical injury’ that it intended to serve as a threshold qualification for mental and emotional injury claims.”).

¹¹ Shaheed-Muhammad v. DiPaolo, 393 F. Supp. 2d 80, 107 (D. Mass. 2005) (quoting 141 CONG. REC. 26548 (1995) (statement of Sen. Dole)).

¹² See *id.* (“Lawsuits in which constitutional issues predominate were not the focus of the PLRA.”).

¹³ Isby-Israel v. Wynn, No. 2:12-cv-00116-JMS-MJD, slip op. at 1 (S.D. Ind. Dec. 19, 2018).

handcuffed behind the back and his legs were shackled.¹⁴ He was permitted to shower just three times a week.¹⁵ He ate his meals alone in his cell.¹⁶ His cell was constantly illuminated by a security light that stayed on twenty-four hours a day.¹⁷ He could not touch or hug people when they visited him.¹⁸

The Southern District of Indiana found that Mr. Isby-Israel's experience of these conditions without due process caused him to suffer mental and emotional injuries.¹⁹ Indeed, the court deemed his mental and emotional injuries from this lengthy period of isolation to be "obvious."²⁰ Yet the court concluded, and Mr. Isby-Israel conceded, that he could not recover compensatory damages for his mental and emotional injuries because of the PLRA's physical injury requirement.²¹

The exclusion of damages for mental and emotional injuries that all parties agree Mr. Isby-Israel suffered is more than a little troubling. Mr. Isby-Israel was injured psychologically by the prolonged torture he endured, and he deserved to be compensated for that injury. But the troubles wrought by the physical injury requirement go beyond any one case. Faced with the reduced prospect of meaningful compensatory damages in some courts, prison officials may conclude that they risk nothing in refusing to adhere to the constitutional minima. Neither the prospect of an adverse award of nominal damages—generally limited to one dollar²²—nor the remote possibility of a punitive-damages judgment may be sufficient to incentivize change.²³

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 31 ("Mr. Isby claims that he has suffered mental and emotional injuries, something the Court views as obvious in light of his extensive solitary confinement . . .").

²⁰ *Id.*

²¹ *Id.* Although Mr. Isby-Israel was awarded other compensatory damages unrelated to psychological injury, *id.*, that outcome is not guaranteed. We speak from experience—in many cases, prisoners subjected to prolonged solitary confinement obtain no compensatory damages at all. *See, e.g., Williams v. Hobbs*, 662 F.3d 994, 997, 1009, 1011 (8th Cir. 2011) (affirming district court's denial of compensatory damages despite lack of meaningful review process during nearly fourteen-year stay in solitary confinement constituting due process violation), *cert. denied*, 133 S. Ct. 243 (2012); *Underwood v. Luoma*, 107 F. App'x 543, 544–45 (6th Cir. 2004) (affirming dismissal where prisoner was held in solitary confinement for over thirteen years because extended segregation and denial of periodic review did not implicate due process rights).

²² *See, e.g., Pearson v. Welborn*, 471 F.3d 732, 744–45 (7th Cir. 2016) (affirming award of \$1.00 of nominal damages for one year of wrongful maximum-security confinement).

²³ *See Allison Cohn, Comment, Can \$1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act's Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299,

II. THE PHYSICAL INJURY REQUIREMENT AND SOLITARY CONFINEMENT

Solitary confinement is a paradigmatically physical experience. The experience of solitary confinement has been described as being locked in a “penal tomb.”²⁴ Its main characteristic is confinement to a small space, typically less than the size of a parking spot, for twenty-two to twenty-four hours a day.²⁵ In nearly all cases, prisoners in solitary confinement must wear heavy chains whenever outside the cell, are limited to recreation in a small pen similar to a dog kennel, have no contact visitation, and are not permitted to supplement their diet with food purchased from the prison commissary.²⁶

And consistent with solitary confinement’s inherent physicality, there are a host of physical consequences that accompany these conditions. These physical harms include weight loss, vitamin deficiency, muscle tone loss, gastrointestinal blockage and inhibited digestion, and irregular or arrhythmic heartbeats.²⁷ They also include self-injury driven by the crushing isolation of solitary confinement. Prisoners in solitary confinement have mutilated themselves horrifically,²⁸ and suicide rates for prisoners exposed to solitary

323–24 (2006) (“[T]he reality is that few cases are actually awarded [punitive] damages” because “a key feature of punitive damages is that they are never awarded as a matter of right, regardless of how egregious the defendant’s conduct” and “the question whether to award punitive damages is left to the jury, which may or may not make such an award.” (emphasis omitted)).

²⁴ *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., concurring in denial of cert.).

²⁵ *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring) (“Yet if his solitary confinement follows the usual pattern, it is likely respondent has been held for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day”); *see also Palakovic v. Wetzel*, 854 F.3d 209, 217 (3d Cir. 2017) (“He was isolated for approximately 23 to 24 hours each day, in a tiny cement cell of less than 100 square feet with only small slit windows affording him minimal outside visibility.”).

²⁶ *See Daniella Johner, “One Is the Loneliest Number”: A Comparison of Solitary Confinement Practices in the United States and the United Kingdom*, 7 PENN ST. J.L. & INT’L AFF. 229, 247–48 (2019) (discussing conditions of solitary confinement in the United States); *see also Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 554 (3d Cir. 2017) (noting that a prisoner in solitary was not allowed to have physical contact with any of his visitors and “was permitted to leave his cell only five times a week for two-hour intervals of exercise in the open air, in a restricted area known as the ‘dog cage’”); *Ruiz v. Estelle*, 550 F.2d 238, 239 (5th Cir. 1977) (affirming district court order regarding “provision for adequate food to prevent weight loss while these plaintiffs are in solitary confinement”); *Campbell v. Maldonado*, No. 3:19-cv-1430 (SRU), 2020 WL 2558228, at *2 (D. Conn. May 19, 2020) (alleging that prisoner in solitary confinement in Connecticut “faced restrictions with respect to phone calls, showers, commissary purchases, work, educational programs, and social interactions”).

²⁷ Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 489–90 (2006); Brie A. Williams, *Older Prisoners and the Physical Effects of Solitary Confinement*, 106 AM. J. PUB. HEALTH 2126, 2126–27 (2016).

²⁸ Jeff Coen & Stacy St. Clair, *How Solitary Confinement Drove a Young Inmate to the Brink of Insanity*, CHI. TRIB. (Jan. 2, 2019, 6:50 AM), <https://www.chicagotribune.com/news/ct-met-anthony-gay-solitary-confinement-suit-20181206-story.html> [https://perma.cc/HV4T-5RKN] (describing how an Illinois prisoner responded to solitary confinement by “slicing open his neck, forearms, legs and genitals

confinement far exceed suicide rates among prisoners in general population.²⁹ One recent study of prisoners who reentered society after extended stays in solitary confinement conditions found that prisoners exposed to solitary confinement were 24% more likely to die within the first year after release than prisoners who had not been exposed to such conditions, especially from suicide.³⁰

Despite the obvious physicality of solitary confinement and the physical injury traceable to it, the PLRA's physical injury requirement poses a problem for several reasons. First, some courts wrongly interpret the PLRA as excluding so-called "*de minimis*" physical injury. Second, courts have sometimes been reluctant to take account of physical injury imposed by psychological trauma, perhaps because such injuries may seem inseparable from the psychological injuries long associated with solitary confinement—e.g., psychosis and depression. Relatedly, courts do not—but should—distinguish between garden variety mental and emotional suffering and mental illness in applying the physical injury bar. Current jurisprudence is inconsistent with the aim of the PLRA to preserve meritorious claims and should be reconsidered.

A. Reconsidering the De Minimis Standard

Some PLRA decisions inappropriately borrow from Eighth Amendment jurisprudence and require that the physical injury alleged be more than *de minimis*.³¹ For this reason, solitary confinement survivors

hundreds of times . . . pack[ing] a fan motor inside a gaping leg wound . . . [and] cut[ting] open his scrotum and insert[ing] a zipper").

²⁹ #HALTSOLITARY CAMPAIGN, THE WALLS ARE CLOSING IN ON ME: SUICIDE AND SELF-HARM IN NEW YORK STATE'S SOLITARY CONFINEMENT UNITS, 2015-2019, at 4–5 (2020), http://nycaic.org/wp-content/uploads/2020/05/The-Walls-Are-Closing-In-On-Me_For-Distribution.pdf [<https://perma.cc/GK9K-57R8>] (finding that at least one-third of all suicides in the New York prison system from 2015 to 2019 occurred in solitary confinement and estimating that over half of all suicide attempts in the New York prison system during this period occurred in some form of isolation).

³⁰ Lauren Brinkley-Rubinstein, Josie Sivaraman, David L. Rosen, David H. Cloud, Gary Junker, Scott Proescholdbell, Meghan E. Shanahan & Shabbar I. Ranapurwala, *Association of Restrictive Housing During Incarceration with Mortality After Release*, JAMA NETWORK OPEN, Oct. 2019, at 1, available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350> [<https://perma.cc/LLA9-LJDF>].

³¹ See *Pierce v. County of Orange*, 526 F.3d 1190, 1224 (9th Cir. 2008) (reversing district court's dismissal of damages claim of paraplegic prisoner because the physical injuries alleged—bladder infections and bed sores—were not *de minimis*, as both "pose significant pain and health risks"); *Harris v. Garner*, 190 F.3d 1279, 1286–87 (11th Cir. 1999) (following the Fifth Circuit's *de minimis* approach by requiring that physical injury be "more than de minimis, but need not be significant," and holding that prisoner's claim that he was forced to "dry shave" was *de minimis* in light of the PLRA's purpose of curtailing "frivolous and abusive prisoner litigation" (quoting *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998))); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (interpreting physical injury

seeking compensation for psychological harm risk dismissal for alleging *de minimis* physical injury.³² However, the term *de minimis* appears nowhere in the PLRA's statutory text. Importing into the PLRA a nebulous Eighth Amendment standard not only departs from the text of the PLRA but is contrary to its design—the PLRA was enacted to weed out frivolous claims, not to require that all claims, irrespective of the constitutional provision under which they arise, satisfy the Eighth Amendment.³³

The requirement that a physical injury be more than *de minimis* to get past the PLRA is often accepted unquestioningly.³⁴ But identifying the origins of the term is helpful in identifying and delineating its proper usage.

requirement by reference to Eighth Amendment standards under *Hudson v. McMillian*, 503 U.S. 1, 7 (1992), and holding that prisoner's sore, bruised ear that lasted for three days was a *de minimis* physical injury barring damages for mental or emotional suffering). The Seventh Circuit has not expressly adopted the *de minimis* standard, but district courts in the Seventh Circuit do apply it. *See Norfleet v. IDOC*, No. 15-CV-1279, 2018 WL 1640458, at *6 (S.D. Ill. Apr. 5, 2018) (citing *Rahim v. Sheahan*, No. 99-CV-0395, 2001 WL 1263493, at *9 (N.D. Ill. Oct. 19, 2001)); *Lynch v. Flowers Foods Specialty Grp.*, No. 08-CV-554, 2011 WL 3876951, at *5 (E.D. Wis. Aug. 31, 2011) (citing *Hudson*, 503 U.S. at 6–8, for the proposition that no “serious injury is required” and finding the allegation that a prisoner bit into a shard of metal inside a honey bun was not *de minimis* due to alleged bleeding from mouth in the wake of the accident and ongoing numbness and loss of taste, as well as headaches); *Arnold v. Williams*, No. 07-CV-1178, 2010 WL 2697156, at *2 (C.D. Ill. July 7, 2010) (citing *Siglar*, 112 F.3d at 193); *see also* *Disessa v. Massachusetts*, No. 18-CV-11024, 2020 WL 1158254, at *5 (D. Mass. Mar. 10, 2020) (observing that “[t]he First Circuit has not determined whether the PLRA requires a showing of more than a *de minimis* injury”).

³² *See, e.g., McCoy v. Chatman*, No. 15-CV-175, 2016 WL 7741737, at *11 (M.D. Ga. July 6, 2016) (suggesting that injuries alleged from isolated confinement—“insomnia, cardiovascular and genitourinary problems, tremulousness, gastro-intestinal problems, deterioration of eyesight, heart palpitations, migraines, appetite loss, weight loss, back and joint pain, dizziness, hypersensitivity to external stimuli, chronic depression, hallucinations, anxiety, nervousness, night terrors, panic attacks, paranoia, and claustrophobia”—were *de minimis* and therefore dismissing prisoner's damages claims for failing to satisfy physical injury requirement).

³³ Courts that apply the *de minimis* standard do not interpret it uniformly. District courts in the Fifth Circuit require “an observable or diagnosable medical condition requiring treatment by a medical care professional,” which would cause a “free world person” to seek such treatment. *Luong v. Hatt*, 979 F. Supp. 481, 486 (N.D. Tex. 1997). The Ninth Circuit Court of Appeals rightly has rejected that standard as “overly restrictive.” *Pierce*, 526 F.3d at 1224 (citing *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002)).

³⁴ *See, e.g., Folts v. Grady Cty. Bd. of Cty. Comm'rs*, No. CIV-15-996-M, 2016 WL 7116184, at *8 (W.D. Okla. Nov. 2, 2016) (finding that “[p]hysical pain, standing alone, is a *de minimis* injury that may be characterized as a mental or emotional injury and . . . fails to overcome the PLRA's bar; but, when paired with allegations of physical effects . . . may support a claim under the PLRA”), *report and recommendation adopted*, No. CIV-15-996-M, 2016 WL 7116192 (W.D. Okla. Dec. 6, 2016); *Harkless v. Toney*, No. 11-0530-CG-N, 2012 WL 2049948, at *2 (S.D. Ala. May 7, 2012) (“[T]he physical injury that must be shown must be greater than *de minimis*.” (citing *Harris*, 190 F.3d at 1286)), *report and recommendation adopted*, No. 11-0530-CG-N, 2012 WL 2049941 (S.D. Ala. June 5, 2012); *Crayton v. Terhune*, No. C 98-4386 CRB(PR), 2002 WL 31093590, at *5 (N.D. Cal. Sept. 17, 2002) (“However, [the plaintiff] has not established that he suffered ‘physical injury’ within the meaning of § 1997e(e). While the qualifying physical injury under § 1997e(e) need not be significant, it must be more than *de minimis*.” (citing *Oliver*, 289 F.3d at 627–29)).

In *Hudson v. McMillian*, the Supreme Court held that the physical force used against a prisoner must be more than *de minimis* to be actionable and described the prisoner's injuries only as one way to measure the force applied.³⁵ Thus, a decision as to whether a particular injury is more than *de minimis* is not even determinative in answering the key question on the merits—i.e., whether the force applied exceeded constitutional bounds. For example, a correctional officer who beats a prisoner without justification but who does so in such a way that the physical injuries are *de minimis* would still violate the prisoner's Eighth Amendment rights.³⁶ Likewise, a correctional officer who subjects a prisoner to needless, malicious, and degrading strip searches would violate the Eighth Amendment even if the prisoner does not suffer a physical injury. Similarly, consigning a prisoner to conditions of confinement that are harsh and restrictive could violate the Eighth Amendment absent any physical injury. When those conditions cause physical injury, the degree of injury is but one possible measure of the severity of the conditions imposed.

Thus, the extratextual *de minimis* standard, which *may* be a barrier to prevailing on the merits of some Eighth Amendment claims, has no logical relevance to the PLRA. The latter is a gatekeeping statute relevant to almost all constitutional claims, not only those brought to vindicate rights conferred by the Eighth Amendment.³⁷

³⁵ 503 U.S. at 9–10; *accord* *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012) (“When a physical injury occurs as the result of force applied in the course of prison operations . . . the courts should approach the matter as . . . *Hudson* . . . direct[s], rather than trying to classify injuries as *de minimis*.” (quoting *Guitron v. Paul*, 675 F.3d 1044, 1046 (7th Cir. 2012))); *id.* (“[P]ersecution . . . involves the use of *significant* physical force against a person’s body, or the infliction of comparable physical harm without direct application of force (locking a person in a cell and starving him would be an example), or nonphysical harm of equal gravity.” (quoting *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011))).

³⁶ *See Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (“Injury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.”).

³⁷ A majority of the circuits that have addressed the issue hold that the PLRA’s physical injury requirement is inapplicable to claims that arise under the First Amendment. *Compare Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017) (holding that deprivations of First Amendment rights are compensable injuries distinct from mental or emotional injury), *Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016) (same), *King v. Zamirara*, 788 F.3d 207, 212 (6th Cir. 2015) (same), *Rowe v. Shake*, 196 F.3d 778, 781–82 (7th Cir. 1999) (same), *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (same), *and Toliver v. City of New York*, 530 F. App’x 90, 93 n.2 (2d Cir. 2013) (noting the plaintiff “may still recover damages for injuries to his First Amendment rights” despite no physical injury), *with Al-Amin v. Smith*, 637 F.3d 1192, 1199 (11th Cir. 2011) (holding that the physical injury requirement of § 1997e(e) bars recovery of compensatory damages for First Amendment violations), *Geiger v. Jowers*, 404 F.3d 371, 374–75 (5th Cir. 2005) (same), *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (same), *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (same), *and Allah v. Al-Hafeez*, 226 F.3d 247, 250–51 (3d Cir. 2000) (same).

B. Physical Injury Attributable to Psychiatric Suffering

Several courts have refused to recognize physical injury that arises from mental pain and suffering as satisfying the PLRA's physical injury requirement.³⁸ These courts reason that the mental and emotional injury is compensable when it is a consequence of the physical injury, but not the other way around.³⁹ However, this restriction directly contravenes the goal of weeding out frivolous claims because the serious nature of physical injury does not turn on its genesis; no one can argue that a laceration caused by a guard's baton is more dangerous than self-mutilation provoked by severe depression or anxiety.

Courts examining solitary confinement claims should find that physical injury resulting from solitary confinement satisfies the PLRA's physical injury requirement regardless of whether that physical injury is a consequence of some psychiatric injury. Self-mutilation, for example, is a well-known risk of solitary confinement. Experts agree that the mental pain and anguish occasioned by solitary confinement causes some people to lacerate their flesh or cause themselves other injuries as a way of releasing anxiety and frustration from their psychological torture.⁴⁰ For some prisoners, the physical pain associated with self-injury is a way of assuring themselves that they are still alive amidst the overwhelming monotony and isolation of their lived experience.⁴¹ The fact that the physical injury these prisoners endure is triggered by psychiatric anguish does not call into

³⁸ See, e.g., *Herman v. Holiday*, 238 F.3d 660, 665–66 (5th Cir. 2001) (holding recovery barred under § 1997e(e), as the prisoner's increased risk of developing an injury from exposure to asbestos was not sufficiently separate from his alleged "grave and emotional and mental depression"); *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (finding prisoner's weight loss, appetite loss, and insomnia after alleged constitutional violation not "physical injury" as required by § 1997e(e)); *Minifield v. Butikofer*, 298 F. Supp. 2d 900, 905 (N.D. Cal. 2004) ("Physical symptoms that are not sufficiently distinct from a plaintiff's allegations of emotional distress do not qualify as a prior showing of physical injury."); *Todd v. Graves*, 217 F. Supp. 2d 958, 960 (S.D. Iowa 2002) (holding that allegations of stress-related aggravation of hypertension, dizziness, insomnia, and loss of appetite were not actionable and noting that "[p]rison itself is a stressful environment").

³⁹ *Davis*, 158 F.3d at 1349 ("Both the explicit requirement of § 1997e(e) that the physical injury be 'prior,' and the statutory purpose of discouraging frivolous suits, preclude reliance on the somatic manifestations of emotional distress Davis alleges.").

⁴⁰ See *Position Statement on Solitary Confinement (Isolation)*, NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE (Apr. 10, 2016), <https://www.ncchc.org/solitary-confinement> [<https://perma.cc/9TPX-HXUV>] (finding that even prisoners without preexisting mental illness are at risk of "deterioration in mental health, experiencing anxiety, depression, anger, diminished impulse control, paranoia, visual and auditory hallucinations, cognitive disturbances, obsessive thoughts, paranoia, hypersensitivity to stimuli, post-traumatic stress disorder, self-harm, suicide, and/or psychosis").

⁴¹ SHARON SHALEV, MANNHEIM CTR. FOR CRIMINOLOGY, *A SOURCEBOOK ON SOLITARY CONFINEMENT* 17 (2008), www.solitaryconfinement.org/sourcebook [<https://perma.cc/N2N6-E383>] (examining prevalence of self-mutilation or cutting in solitary confinement).

question the legitimacy of the harm that they have suffered. To the contrary, self-mutilation is an objective indicium that a serious harm has occurred and validates the psychiatric pain and suffering as real and deserving of compensation.⁴²

The preceding discussion presumes that the psychological trauma induced by solitary confinement, such as severe depression, anxiety disorder, suicidal ideation, and post-traumatic stress disorder, is distinct from physical injury. What if, however, such assumptions have no scientific basis? That is, might solitary confinement induce quantifiable and observable physical injury to the brain and other vital organs such as the heart? Recently, Dr. Federica Coppola of Columbia University aggregated scientific research suggesting as much.⁴³ “All in all,” Dr. Coppola explains, “neuroscience research indicates that the essential features of solitary confinement, [i.e.,] social and environmental deprivation, can alone induce significant damages in the brain.”⁴⁴ For example, “social engagement and participation in meaningful social activities”—the denial of which is a hallmark of solitary

⁴² Similarities between the PLRA’s physical injury requirement and the common law tort of negligent infliction of emotional distress further supports interpreting § 1997e(e) as satisfied in cases where there is a physical injury derivative of or otherwise inseparable from psychiatric harm. Courts adjudicating negligent infliction of emotional distress claims have required a showing of physical injury or other compensable damage to award a litigant damages for mental or emotional harm. *See generally* RESTATEMENT (SECOND) OF TORTS § 436A (AM. LAW INST. 1965) (citing cases where courts imposed physical injury requirement). The logic behind this requirement is markedly similar to that animating § 1997e(e): claims of negligent infliction of emotional distress are so uniquely vulnerable to abuse that they should require a concrete and readily disprovable element, i.e., physical injury. *See Zehner v. Trigg*, 952 F. Supp. 1318, 1325 (S.D. Ind. 1997) (“[B]y enacting § 1997e(e), Congress took a page from the common law by limiting claims for mental and emotional injuries, which can easily be feigned or exaggerated, in the absence of physical injury.”), *aff’d*, 133 F.3d 459 (7th Cir. 1997); *see also* *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996) (“Traditionally, common law courts have been reticent regarding compensatory damages for emotional distress in the absence of physical injury Not only is emotional distress fraught with vagueness and speculation, it is easily susceptible to fictitious and trivial claims.”); RESTATEMENT (SECOND) OF TORTS, *supra*, at § 436A (explaining that the reasons for the rule include “that in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and that to allow recovery for it might open too wide a door for false claimants who have suffered no real harm at all”). Physical injuries that could be categorized as derivative of or inseparable from a primarily psychiatric injury generally suffice to make out a negligent infliction of emotional distress claim. *See* RESTATEMENT (SECOND) OF TORTS, *supra*, at § 436A (citing decisions accepting long-term insomnia and severe headaches resulting from traumatic events as fulfilling the physical injury requirement). The PLRA’s physical injury requirement should be similarly unconcerned with the question of whether a physical injury derives from or is inseparable from a mental or emotional harm, as the existence of a physical injury tends to support the merits of the claim regardless.

⁴³ *See* Federica Coppola, *The Brain in Solitude: An (Other) Eighth Amendment Challenge to Solitary Confinement*, 6 J.L. & BIOSCIENCES 184, 203–14 (2019).

⁴⁴ *Id.* at 211.

confinement—may “delay cognitive decline.”⁴⁵ This may be so because “research on brain plasticity has indicated that positive social engagement induces positive changes to the neural circuits that underlie cognitive functions.”⁴⁶ To be clear, the isolation and lack of positive stimuli inherent to solitary confinement exceed the deficits of each in general population in psychologically and physically meaningful ways.⁴⁷

Likewise, the social and environmental isolation emblematic of solitary confinement negatively impacts “brain structure and function, including reduced cortical volume, diminished neuronal connections in cortical areas and the hippocampus, decreased myelin production, and altered activity in the reward system and the amygdala.”⁴⁸ Such modifications to brain structure are catastrophic. For example, reduced cortical volume and diminished neuronal connections have been associated with memory loss and cognitive

⁴⁵ *Id.* at 205 & n.147 (citing Daniela Weber, *Social Engagement to Prevent Cognitive Ageing?*, 45 AGE & AGEING 441 (2016); and citing Michelle E. Kelly, Hollie Duff, Sara Kelly, Joanna E. McHugh Power, Sabina Brennan, Brian A. Lawlor & David G. Loughrey, *The Impact of Social Activities, Social Networks, Social Support and Social Relationships on the Cognitive Functioning of Healthy Older Adults: A Systematic Review*, 6 SYSTEMATIC REVIEWS 259 (2017)).

⁴⁶ Coppola, *supra* note 43, at 206 & n.157 (citing Riitta Hari, Linda Henriksson, Sanna Malinen & Lauri Parkkonen, *Centrality of Social Interaction in Human Brain Function*, 88 NEURON 181 (2015); then citing Sofie L. Valk, Boris C. Bernhardt, Fynn-Mathis Trautwein, Anne Böckler, Philipp Kanske, Nicolas Guizard, D. Louis Collins & Tania Singer, *Structural Plasticity of the Social Brain: Differential Change After Socio-Affective and Cognitive Mental Training*, 3 SCI. ADVANCES e1700489 (2017); and citing Richard J. Davidson & Bruce E. McEwen, *Social Influences on Neuroplasticity: Stress and Interventions to Promote Well-Being*, 15 NATURE NEUROSCIENCE 689 (2012)).

⁴⁷ See Craig Haney, *Restricting the Use of Solitary Confinement*, 2018 ANN. REV. CRIMINOLOGY 285, 291–93 (discussing a study finding that long-term isolated prisoners suffered nearly twice the number of symptoms of both stress-related trauma and isolation-related pathology as prisoners held in general population for similar amounts of time).

⁴⁸ Coppola, *supra* note 43, at 208–09 & nn.177–80 (footnotes omitted) (citing Jelena Djordjevic, Ana Djordjevic, Miroslav Adzic & Marija B. Radojicic, *Effects of Chronic Social Isolation on Wistar Rat Behavior and Brain Plasticity Markers*, 66 NEUROPSYCHOBIOLOGY 112 (2012); then citing Kevin C.F. Fone & M. Veronica Porkess, *Behavioural and Neurochemical Effects of Post-Weaning Social Isolation in Rodents—Relevance to Developmental Neuropsychiatric Disorders*, 32 NEUROSCIENCE & BIOBEHAVIORAL REV. 1087 (2008); then citing Jia Liu, Karen Dietz, Jacqueline M. DeLoyht, Xiomara Pedre, Dipti Kelkar, Jasbir Kaur, Vincent Vialou, Mary Kay Lobo, David M. Dietz, Eric J. Nestler, Jeffrey Dupree & Patrizia Casaccia, *Impaired Adult Myelination in the Prefrontal Cortex of Socially Isolated Mice*, 15 NATURE NEUROSCIENCE 1621 (2012); then citing Esther Castillo-Gómez, Marta Pérez-Rando, María Bellés, Javier Gilabert-Juan, José Vicente Llorens, Héctor Carceller, Clara Bueno-Fernández, Clara García-Mompó, Beatriz Ripoll-Martínez, Yasmina Curto, Noelia Sebastián-Ortega, María Dolores Moltó, Julio Sanjuan & Juan Nacher, *Early Social Isolation Stress and Perinatal NMDA Receptor Antagonist Treatment Induce Changes in the Structure and Neurochemistry of Inhibitory Neurons of the Adult Amygdala and Prefrontal Cortex*, 4 ENEURO 0034 (2017); and citing Javier Gilabert-Juan, Maria Dolores Moltó & Juan Nacher, *Post-Weaning Social Isolation Rearing Influences the Expression of Molecules Related to Inhibitory Neurotransmission and Structural Plasticity in the Amygdala of Adult Rats*, 1148 BRAIN RES. 129 (2012)).

decline.⁴⁹ Decreased myelin production is thought to correlate with schizophrenia and depression.⁵⁰ Alteration of neurons in the amygdala of rodents induces “anxiety, deficits in social interaction, and poor regulation of social behavior.”⁵¹ To pile misfortune upon misfortune, the profound negative modifications to the brain induced by solitary confinement are unlikely to be transient.⁵² Rather, the “evidence suggests that many of these effects can hardly be reversed, even upon reintroduction of the individual into a social environment.”⁵³

These quantifiable brain alterations are no less a physical injury than a broken bone. In fact, unlike brain alterations, bone heals and does not regulate a wide variety of behavior. Therefore, it stands to reason that the physical injuries caused by the psychological trauma of solitary confinement are just as, if not more, worthy of judicial review under the standards set forth by Congress.

C. Separating Garden Variety Mental and Emotional Damages from Major Mental Illnesses

Separate and apart from the metaphysical divide between physical and psychological injury, the extreme psychiatric distress that some prisoners experience in solitary confinement should also be compensable as a category of injury separate from mere “mental or emotional injury.”⁵⁴ The PLRA does not define mental or emotional injury, but the law of torts draws relevant distinctions.

The garden variety of emotional damages are those “negative emotions that [plaintiff] experienced essentially as the intrinsic result of defendant’s

⁴⁹ *Id.* at 209 & nn.184–87 (citing Andrew M. Slater & Lei Cao, *A Protocol for Housing Mice in an Enriched Environment*, 100 J. VISUALIZED EXPERIMENTS e52874 (2015); then citing Djordjevic et al., *supra* note 48; then citing Fone & Porkess, *supra* note 48; then citing Faiza Mumtaz, Muhammad Imran Khan, Muhammad Zubair & Ahmad Reza Dehpour, *Neurobiology and Consequences of Social Isolation Stress in Animal Model—A Comprehensive Review*, 105 BIOMEDICINE & PHARMACOTHERAPY 1205 (2018); then citing Alessandro Ieraci, Alessandra Mallei & Maurizio Popoli, *Social Isolation Stress Induces Anxious-Depressive-Like Behavior and Alterations of Neuroplasticity-Related Genes in Adult Male Mice*, 2016 NEURAL PLASTICITY, available at <http://downloads.hindawi.com/journals/np/2016/6212983.pdf> [<https://perma.cc/T3DQ-ML57>]; then citing J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 DIALOGUES CLINICAL NEUROSCIENCE 445 (2006); and citing Bruce S. McEwen, Carla Nasca & Jason D. Gray, *Stress Effects on Neuronal Structure: Hippocampus, Amygdala, and Prefrontal Cortex*, 41 NEUROPSYCHOPHARMACOLOGY 3 (2016)).

⁵⁰ *Id.*, at 209–10.

⁵¹ *Id.* at 209 & n.188 (citing Fone & Porkess, *supra* note 48).

⁵² *See id.* at 210, 219.

⁵³ *Id.* at 210.

⁵⁴ 42 U.S.C. § 1997e(e) (2012).

alleged conduct,” such as “humiliation, embarrassment, and other similar emotions.”⁵⁵ Solitary confinement, as noted above, causes or exacerbates recognized mental illness, such as depression and psychosis.⁵⁶ Distinguishing between garden variety claims of emotional distress and claims of psychiatric harm amounting to a psychiatric syndrome or illness is a familiar concept in tort litigation. In many jurisdictions, courts will find that a complaint alleging garden variety emotional distress does not put a plaintiff’s mental health sufficiently at issue so as to warrant overcoming the psychotherapist privilege and allowing discovery into the plaintiff’s mental health history.⁵⁷ Similarly, a complaint of garden variety emotional distress will not provide a justification for opposing counsel to subject plaintiff to a mental examination pursuant to Federal Rule of Civil Procedure 35.⁵⁸

Courts interpreting the PLRA’s physical injury requirement should incorporate this distinction between garden variety emotional injuries and more serious allegations of psychological and psychiatric symptoms stemming from solitary confinement. Such a distinction would have the commendable consequence of preserving the most serious claims of psychiatric torture regardless of proof of physical injury while remaining consistent with the PLRA’s goal of reducing frivolous litigation.

⁵⁵ Santelli v. Electro-Motive, 188 F.R.D. 306, 309 (N.D. Ill. 1999); see also Flowers v. Owens, 274 F.R.D. 218, 225–26 (N.D. Ill. 2011) (collecting cases showing that though the various definitions of garden variety mental or emotional damages differ, the thrust of the formulations is the same).

⁵⁶ See Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (finding that for prisoners with “history of prior psychiatric problems or chronic depression . . . placing them in the SHU is the mental equivalent of putting in an asthmatic in a place with little air to breathe”).

⁵⁷ See *In re Sims*, 534 F.3d 117, 141 (2d Cir. 2008); Diehl v. Bank of Am. Corp., No. 3:09-cv-1220-J-25MCR, 2010 WL 4829970, at *1–2 (M.D. Fla. Nov. 19, 2010); Ruhlmann v. Ulster Cty. Dep’t of Soc. Servs., 194 F.R.D. 445, 450 (N.D.N.Y. 2000) (explaining that “a ‘garden variety’ claim of emotional distress, without more, does not place a plaintiff’s mental condition at issue or ‘in controversy’” (citing Jackson v. Chubb Corp., 193 F.R.D. 216, 225–26 n.8 (D.N.J. 2000))); Wynne v. Loyola Univ. of Chi., No. 97 C 06417, 1999 WL 759401, at *1–2 (N.D. Ill. Sept. 3, 1999) (finding plaintiff waived the privilege where “the exact parameters of [her] condition are at the very heart” of her ADA case alleging disability due to major depression); Kirchner v. Mitsui & Co., 184 F.R.D. 124, 128 & n.9 (M.D. Tenn. 1998) (finding exception to privilege where plaintiff raised the issue of her mental condition by seeking damages for emotional distress and noting that plaintiff brought a claim against an individual defendant for intentional infliction of emotional distress); Sidor v. Reno, No. 95 Civ. 9588(KMW), 1998 WL 164823, at *1–2 (S.D.N.Y. Apr. 7, 1998) (indicating that where a claim for emotional distress is not a garden variety claim, psychotherapist privilege is waived); Holtz v. Wildenstein & Co., 693 N.Y.S.2d 516, 516 (Sup. Ct. 1999) (finding waiver of the privilege where plaintiff claimed an assault and battery by her supervisor resulting in “psychological fears, stress and depression”).

⁵⁸ See *Kuminka v. Atlantic County*, 551 F. App’x 27, 29–30 (3d Cir. 2014) (noting the general consensus that allegations of garden variety emotional distress are “insufficient to place the plaintiff’s mental condition ‘in controversy’ for purposes of Rule 35(a)”; *Turner v. Imperial Stores*, 161 F.R.D. 89, 95 (S.D. Cal. 1995) (finding that a mere claim of emotional distress, without more, cannot compel psychiatric examination under Rule 35(a)).

CONCLUSION

The physical injury requirement ostensibly sought to weed out frivolous lawsuits so that meritorious claims could monopolize federal judicial resources. This provision should not be used to deny monetary redress to prisoners injured by barbaric conditions of confinement. An interpretation of § 1997e(e) that bars compensatory damages for psychological suffering in cases challenging solitary confinement is incompatible with congressional intent and threatens to impede the judiciary's ability to uphold the Constitution behind prison walls.

