COMPENSATORY DAMAGES ARE NOT FOR EVERYONE: SECTION 1997E(E) OF THE PRISON LITIGATION REFORM ACT AND THE OVERLOOKED AMENDMENT

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INTRODUCTION

Before the Senate in 1995, Senator Bob Dole described the impetus for creating the Prison Litigation Reform Act (PLRA)[1] as a reaction to: "the litigation explosion now plaguing our country, [which] does not stop at the prison gate . . . . [The PLRA] will help put an end to the inmate litigation fun-and-games."[2] Congress enacted the PLRA in response to a perceived explosion in litigation brought by prisoners against prison officials.[3] The Act was ostensibly designed to reduce frivolous lawsuits while preserving meritorious suits.[4] What Congress failed to recognize, however, was that the increasing amount of litigation reflected a parallel rise in the prison population.[5] Ultimately, the PLRA has not substantively re-

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1 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66 (codified at 42 U.S.C. § 1997e (2012)).

2 141 CONG. REC. S14,573, S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole).

3 *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, 303–04 (2006).

4 *See* Marissa C.M. Doran, Note, *Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms*, 122 YALE L.J. 1024, 1040 (2013).

5 *Id.* at 1041; *see also* Jennifer Winslow, Note, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant to?*, 49 UCLA L. REV. 1655, 1663 (2002) ("[T]he number of lawsuits filed by federal and state prisoners *has* dramatically increased. But this argument is incomplete, because the sheer growth of lawsuits filed fails to take into account the corresponding increase in the size of the U.S. prison population.").

duced the rate of frivolous lawsuits filed by prisoners against prison officials.[6]

The PLRA, enacted in 1996, introduced a number of provisions that seek to limit prisoners' ability to bring frivolous lawsuits under 42 U.S.C. § 1983, which provides a civil action for deprivation of rights.[7] These provisions consist of, among other things, a requirement that prisoners exhaust administrative remedies within the prison system before filing suit in court,[8] a requirement that indigent prisoners pay all of their filing fees,[9] a restriction on attorneys' fees,[10] and a provision that prohibits prisoners from using *in forma pauperis* provisions if the courts have already dismissed at least three of their complaints for failure to state a claim.[11]

While the members of the Senate spent some time debating the other provisions of the PLRA, they hardly discussed another provision: 42 U.S.C. § 1997e(e).[12] In 1996, this provision stated: "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."[13] Since the PLRA was enacted, federal courts have split over the question whether § 1997e(e) allows prisoners to recover compensatory damages for claims in which their constitutional rights have been violated but they have not suffered a physical injury.[14]

In 2013, the PLRA was amended (hereinafter "2013 Amendment") as part of the Reauthorization of the Violence Against Women Act[15] to read:

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6 *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 162 (2015).

7 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

8 42 U.S.C. § 1997e(b).

9 28 U.S.C. § 1915(a)–(b) (2012).

10 42 U.S.C. § 1997e(d).

11 28 U.S.C. § 1915(g). This provision does contain an exception for a situation in which the prisoner is in "imminent danger of serious physical injury." *Id.*

12 *See* Hilary Detmold, Note, *'Tis Enough, 'Twill Serve: Defining Physical Injury Under the Prison Litigation Reform Act*, 46 SUFFOLK U. L. REV. 1111, 1116–17 (2013) ("The PLRA eventually passed with very little legislative debate, and with no mention whatsoever of the limitation-on-recovery provision requiring prisoner-plaintiffs to show physical injury."); *see also* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 437 n.23 (2001) (describing the legislative history of the PLRA).

13 42 U.S.C. § 1997e(e) (2000).

14 *See* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016).

15 Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 1101(a), 127 Stat. 54, 134.

> 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.*[16]

This amendment followed a growing congressional awareness of and focus on reducing rape in prisons,[17] as well as vocal criticism of the PLRA after some courts had interpreted § 1997e(e) to bar rape claims when the prisoner could not prove a physical injury.[18]

Since the 2013 Amendment was passed, courts have continued to split regarding how to interpret § 1997e(e), but they have failed to consider whether the 2013 Amendment alters the meaning or clarifies Congress's intentions with respect to § 1997e(e).[19] Part I of this Note gives the historical and legislative background of prison litigation and the enactment of the PLRA. Part II describes the circuit split surrounding the meaning of § 1997e(e). Part III provides the background on sexual abuse in prisons, the increased legislative concern about the issue, and the 2013 Amendment to § 1997e(e). In Part IV, this Note argues that the 2013 Amendment changes the plain meaning of § 1997e(e) such that it could lead to different outcomes in cases on both sides of the circuit split, ultimately concluding that it shows Congress intended the more restrictive interpretive approach to prevail. This Note further illustrates how the 2013 Amendment fails to adhere to the goals of either the Prison Litigation Reform Act or the Prison Rape Elimination Act (PREA), for which it was designed. Part V argues that the Supreme Court should clarify whether § 1997e(e) precludes prisoners from seeking compensatory damages for constitutional violations absent physical injury. Ultimately, this Note recommends that a less restrictive interpretation of § 1997e(e) would best achieve the goals of the PLRA and the PREA.

I. Background

A. *History of Prison Litigation*

Before the 1960s, the federal courts used a "hands-off" approach with respect to state prisoner litigation.[20] In fact, "[u]ntil the 1960s, it was unclear whether prisoners retained any constitutional rights upon incarceration."[21] However, in the decades following the 1960s, the Supreme Court began pro-

16 42 U.S.C. § 1997e(e) (2013) (emphasis added).

17 *See* Nat'l Prison Rape Elimination Comm'n, National Prison Rape Elimination Commission Report (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf.

18 *See* James E. Robertson, *The Prison Litigation Reform Act as Sex Litigation: (Imagining) a Punk's Perspective of the Act*, 24 Fed. Sent'g Rep. 276, 280 (2012).

19 *See infra* Parts II and IV.

20 *See* Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 Cardozo L. Rev. 645, 652 (2008); Doran, *supra* note 4, at 1036–39.

21 Cohn, *supra* note 3, at 302 ("Federal courts adopted a 'hands off' policy with regard to prisoner civil rights lawsuits and consistently deferred to the authority of prison administrators.").

viding expanded constitutional protections for prisoners, allowing them to bring claims for infringement of their constitutional rights under 42 U.S.C. § 1983.[22] Additionally, the Supreme Court recognized a prohibition on excessive force, access to sufficient healthcare, religious freedom, access to prison libraries, and due process rights for prisoners.[23] Furthermore, the Court clarified that state facilities had a duty to protect people in their care, premised on the notion that if a prison restrains a person's freedom so much that "it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by [the Constitution]."[24] However, the Court has also retained significant protections for prisons by deferring to administration decisionmaking, using a standard that permits prison regulation of prisoners' constitutional rights when the regulation is "'reasonably related' to legitimate penological interests"[25] and allows challenges to prison regulation only when the policy is so unrelated to a government initiative that it is "so remote as to render the policy arbitrary or irrational."[26] Additionally, any public official is entitled to qualified immunity from monetary damages "unless a reasonable official in his position would know that his specific conduct violated clearly established rights."[27]

Since the Supreme Court began recognizing constitutional claims from prisoners using § 1983 in the 1960s, prisoners and advocacy groups have used litigation to expose problems within prisons and spur reform.[28] Throughout

22 See *Cooper v. Pate*, in which the Supreme Court permitted a prisoner to bring a claim for infringement of his constitutional rights under 42 U.S.C. § 1983 because he was prohibited from buying religious publications and privileges allowed for other prisoners. 378 U.S. 546, 546 (1964). However, § 1983 does not provide substantive rights in and of itself; rather, it is a mechanism through which prisoners can assert rights under federal law. *See* Cohn, *supra* note 3, at 301–02; *see also* Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 933 (2009) ("The general purposes underlying § 1983 litigation are deterring officials from using their positions to deprive individuals of their rights protected by the Constitution or federal statutes, and providing victims of such deprivations with a remedy in federal court."). To assert a § 1983 claim, a plaintiff must show deprivation of some right under federal law and that it occurred "under color of law." "Under color of law" means that the defendant either had the power or the apparent power of the state behind him. *Id.* at 934.

23 *See* Detmold, *supra* note 12, at 1123–24; Doran, *supra* note 4, at 1036–39.

24 DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

25 Turner v. Safley, 482 U.S. 78, 89 (1986) ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.").

26 *Id.* at 89–90.

27 Allah v. Al-Hafeez, 208 F. Supp. 2d 520, 537 (E.D. Pa. 2002) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)); *see also* Miller, *supra* note 22, at 937–39 (describing qualified immunity for government officials).

28 *See* Doran, *supra* note 4, at 1036–39; *see also* Brill, *supra* note 20, at 652 n.37 ("Prisoners may also access federal courts through other statutory means, including: (i) Section 1985 suits, a conspiracy corollary to § 1983 suits; and (ii) Section 504 of the Rehabilitation

this time, the courts, rather than Congress, largely drove prison reform.[29] In fact, litigation proved to be a valuable tool for prisoners to provide information to the outside world regarding wrongdoing within their prisons.[30] Going to court has proven to be a particularly effective method of communication because prisoners do not have access to other channels of reform, such as the political process.[31] As Margo Schlanger and Giovanna Shay have written:

> [F]or prisons—closed institutions holding an ever-growing disempowered population—most of the methods by which we, as a polity, foster government accountability and equality among citizens are unavailable or at least not currently practiced. In the absence of other levers by which these ordinary norms can be encouraged, lawsuits, which bring judicial scrutiny behind bars, and which promote or even compel constitutional compliance, accordingly take on an outsize importance.[32]

Likewise, litigation can result in more than just a win for an individual plaintiff; it can lead to broader positive change within prisons if a prisoner's lawsuit triggers a judge to mandate reforms within the penal system.[33] Not only can court orders lead to changes in prison policies and practices, litigation can also lead to increased public awareness and scrutiny of issues in prisons, putting pressure on officials to more effectively implement change.[34] Furthermore, litigation can lead to increases in funding that might be needed by a prison.[35] Ultimately, litigation may prove more effective for protecting

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Act of 1973, 29 U.S.C. § 794, which prohibits discrimination of otherwise qualified handicapped individuals. The Americans with Disabilities Act (ADA) also provides a means for prisoners to sue." (citation omitted)); Elizabeth A. Etchells, Note, *Please Pass the Dictionary: Defining* De Minimis *Physical Injury Under the Prison Litigation Reform Act § 1997e(e)*, 100 IOWA L. REV. 803, 811 (2015) ("[O]rganizations like the American Civil Liberties Union . . . started litigating on behalf of prisoners. This allowed the sometimes brutal conditions inside American prisons to be exposed, and even conservative-leaning jurists . . . acknowledged the necessary role of the federal judiciary in correcting these wrongs." (footnote omitted)).

29 *See* Brill, *supra* note 20, at 646.

30 *See generally* Doran, *supra* note 4.

31 Etchells, *supra* note 28, at 808–09 ("[A]s individual wardens and correctional officers control the enforcement of prisoner rights, lawsuits are uniquely well positioned to challenge improper actions . . . .").

32 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, 139–40 (2008) (footnote omitted).

33 NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 17, at 10, 91 ("Courts cannot replace internal monitoring, audits, and ombudsmen or inspectors general, yet society depends on them when other modes of oversight fail or are lacking altogether.").

34 *Id.* at 91.

35 *Id.* (quoting the former Warden of San Quentin State Prison and former head of the California Department of Corrections and Rehabilitation as saying: "All of this court intervention has been necessary because of my state's unwillingness to provide the Department with the resources it requires. These lawsuits have helped the state make dramatic improvements to its deeply flawed prison system").

prisoners' rights than political change, as the debates surrounding the implementation of the PLRA have shown, because politicians may focus more on appearing tough on crime and reducing the cost of prisons than on prisoner rights.[36]

Nevertheless, while prisoner litigation can lead to positive reform in prisons, it can also lead to problems within the legal system. On the one hand, some argue that increasing funding for prisoners as a result of litigation contributes to the growth of mass incarceration and the prison bureaucracy in the United States.[37] On the other hand, some view court orders mandating prison reform as forms of activism by liberal judges intervening erroneously in state domains.[38] Inarguably, starting in the 1960s, the number of prisoner lawsuits increased significantly.[39] While this increase corresponded with growth in the prison population, it nevertheless created a burden on the courts.[40] In 1994, prisoners filed 39,065 lawsuits, up from 6606 in 1975.[41] In 1993, prisoner suits made up over one third of all civil appeals that were filed.[42] Furthermore, only a small proportion of those lawsuits were deemed meritorious enough to go to trial.[43] As Senator Orrin Hatch told the Senate in September 1995, "[t]he crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims."[44] Of course, the poor rates of success by prisoner litigants could be explained by a shortage of lawyers willing to represent them, low income, high rates of disability both physically and psychologically, and bias on behalf of the courts against prisoners filing lawsuits against their prisons.[45]

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36 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) ("Many people think of prison inmates as spending their free time in the weight room or the television lounge. But the most crowded place in today's prisons may be the law library. . . . Today's system seems to encourage prisoners to file with impunity. After all, it's free."); *see also* Detmold, *supra* note 12, at 1116–17 (describing the legislative process for enacting the PLRA).

37 Schlanger, *supra* note 6, at 171.

38 *See* Boston, *supra* note 12, at 437 n.23.

39 Schlanger, *supra* note 6, at 156 ("A steep increase in prisoner civil rights litigation combined in the 1970s with a steep increase in incarcerated population. The filing rate slowly declined in the 1980s but the increase in jail and prison population nonetheless pushed up raw filings. Then, as in the 1970s, the 1990s saw an increase in both jail and prison population *and* filings rates, until 1995.").

40 *See* Etchells, *supra* note 28, at 806.

41 Walter Berns, *Sue the Warden, Sue the Chef, Sue the Gardener*, WALL ST. J. (Apr. 24, 1995), https://www.aei.org/publication/sue-the-warden-sue-the-chef-sue-the-gardener/.

42 Cohn, *supra* note 3, at 303–04.

43 *See* 141 CONG. REC. S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("[R]oughly 94.7 percent [of lawsuits brought by prisoners in federal court] are dismissed before the pretrial phase, and only a scant 3.1 percent have enough validity to even reach trial.").

44 *Id.* at S14,627.

45 *See* Doran, *supra* note 4, at 1043.

B. Understanding the PLRA

The PLRA was enacted in response to Congress's concerns regarding the increasing rate of prisoner litigation in the 1990s.[46] Members of Congress had become particularly nervous about the rate of frivolous claims tying up the courts as well as the overall cost of litigation on the government and taxpayers.[47] As a result, Congress's debates about the PLRA centered around the importance of reducing frivolous lawsuits while not preventing meritorious ones.[48] However, given that the PLRA led to dramatic consequences for many individuals, Congress spent little time debating its potential weaknesses.[49] Section 1997e(e) in particular was not discussed in any legislative reports or in the floor debates.[50] While there was some pushback against the Act,[51] the PLRA ultimately passed easily as part of an appropriations bill.[52]

The PLRA contains a number of provisions designed to address what Congress perceived as high numbers of frivolous lawsuits. Some of the most well-known and contested provisions include a requirement that prisoners exhaust administrative remedies within their prisons before filing suit in federal court, capping attorneys' fees at 150% of damages when suits are successful, requiring indigent prisoners to pay initial filing fees, and limiting filing *in forma pauperis* after a prisoner's claims have been dismissed three times so that prisoners must pay over one hundred dollars when they file their claim

46 *See* Schlanger, *supra* note 6, at 156.

47 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) ("The vast majority of frivolous suits are brought in Federal courts . . . . Federal prisoners are churning out lawsuits with no regard to this cost to the taxpayers or their legal merit. We can no longer ignore this abuse of our court system and taxpayers' funds."). Examples of frivolous lawsuits presented to Congress included a complaint by a prisoner who was served creamy instead of chunky peanut butter, another who complained about being given jeans that fit badly, and a third who bragged on television about filing hundreds of lawsuits. *Id.* at S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Reid).

48 *See id.* at S14,626–27; *see also* Aref v. Lynch, 833 F.3d 242, 265 (D.C. Cir. 2016) ("[M]embers of Congress also made it clear that the PLRA was not meant to bar serious, potentially meritorious claims.").

49 Boston, *supra* note 12, at 437 n.23.

50 *Id.*

51 Then-Senator Joseph Biden brought up stories about meritorious prisoner litigation where the courts had created positive remedies. 141 CONG. REC. S14,628 (daily ed. Sept. 29, 1995) (statement of Sen. Biden) ("Stemming the tide of frivolous lawsuits is certainly an important goal. . . . But in solving these problems, we must not lose sight of the fact that some of these lawsuits have merit—some prisoners' rights are violated—some prisons are terribly overcrowded."); *see also* Etchells, *supra* note 28, at 813 (describing the one-sidedness of the debates in Congress).

52 *See* Winslow, *supra* note 5, at 1660, 1662 ("In a process that some lawmakers considered 'inappropriate' for a bill making substantive changes to the federal rights of prisoners, the PLRA breezed through the Senate and easily passed without ever being subjected to a committee mark-up and with few voices raised in opposition." (footnotes omitted) (citing 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) ("In reality, the PLRA is a far-reaching effort to strip Federal courts of the authority to remedy unconstitutional prison conditions.")))).

regardless of their financial capabilities.[53] The PLRA applies to all civil suits regarding a prisoner's incarceration.[54] However, after a prisoner has filed a lawsuit in federal court, prison officials can move to dismiss the claim for failure to comply with any of the other provisions in the PLRA. For example, if the prisoner has filed pro se but unknowingly did not fully comply with prison administration remedies first, the court must dismiss his claim.[55] Furthermore, if a prisoner has mistakenly failed to exhaust the remedies within his prison, perhaps because he is filing pro se and does not fully understand the procedures, and the court then dismisses his claim, that dismissal counts as one strike under the *in forma pauperis* provision.[56]

Section 1997e(e) of the PLRA[57] has caused considerable problems in the courts due to lack of clarity. As John Boston wrote: "The PLRA's mental or emotional injury provision may well present the highest concentration of poor drafting in the smallest number of words in the entire United States Code."[58] Section 1997e(e) has proven problematic because it does not define "physical injury" or "mental or emotional injury," nor does it specify whether harms other than mental and emotional injuries, unaccompanied by physical injury, qualify for compensatory damages.[59] Congress's reasoning for prohibiting mental and emotional injuries presumably stems from tort law, which disallows recovery for these types of injuries because of the notion that they can be easily faked or overblown in the absence of a physical

53 *See Aref*, 833 F.3d at 265–66. For an analysis of how each of these provisions negatively affects prisoners and bars indigent prisoners from bringing lawsuits regardless of merit, see Boston, *supra* note 12, at 430–33 ("[The limit on filing *in forma pauperis*] is more than a nuisance or even a hardship. It is an absolute barrier to a litigant who does not have the money for filing fees—and many do not. This class of absolutely indigent prisoners is composed disproportionately of the most oppressed people in the prison system, those held in administrative and disciplinary segregation units, frequently the locus of the worst abuses and harshest conditions in the prison system. These prisoners are generally barred from prison jobs and have no means of earning money. Under the PLRA, their indigency will bar many of them from any ability to seek judicial redress." (footnotes omitted)). This Note focuses primarily on § 1997e(e).

54 NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 17, at 93.

55 *Id.* ("Any mistakes, such as using an incorrect form, may forever bar an incarcerated individual from real access to the courts.").

56 28 U.S.C. § 1915(g) (2012); *see also* Coleman v. Tollefson, 135 S. Ct. 1759 (2015) (upholding a literal reading of the three-strikes provision by not allowing a prisoner who was appealing his third dismissed claim from bringing a new claim *in forma pauperis* in the meantime); Maureen Brocco, *Facing the Facts: The Guarantee Against Cruel and Unusual Punishment in Light of PLRA,* Iqbal*, and PREA*, 16 J. GENDER RACE & JUST. 917, 942–43 (2013) ("After three strikes—even if the strikes resulted from errors related to the inmate's pro se status—the impoverished prisoner must pay off all of the previous filing fees before the court can hear his or her complaint.").

57 42 U.S.C. § 1997e(e) (2013) ("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).").

58 Boston, *supra* note 12, at 434.

59 *See* Detmold, *supra* note 12, at 1111.

injury.[60] However, tort law does differentiate between emotional injuries and intangible injuries.[61] As a result, circuits have split over whether constitutional violations absent physical injury fall within § 1997e(e)'s purview as intangible injuries.[62] Ultimately, though, most courts agree that § 1997e(e) applies to a prisoner's ability to recover compensatory damages, not punitive damages, nominal damages, or injunctive relief.[63]

II. The Circuit Split

The federal circuits have divided over the meaning of § 1997e(e) with respect to whether prisoners can sue for damages for constitutional violations absent a physical injury. In particular, the courts have divided in cases involving the First, Fourth, Eighth, and Fourteenth Amendments.[64] Approximately half of the circuits, including the Second, Third, Eighth, Tenth, and Eleventh Circuits, interpret § 1997e(e) more restrictively (hereinafter the "more restrictive approach"), to preclude compensatory damages if the claim simply does not involve a physical injury.[65] This interpretation applies to "all federal civil actions including claims alleging constitutional violations."[66] These circuits focus on the type of injury alleged by the prisoner,[67] essentially dividing all injuries into either physical or nonphysical harms.[68] These circuits read the plain language of the provision and "refus[e] to permit altera-

60 *See* Robertson, *supra* note 18, at 280.

61 *See* Doran, *supra* note 4, at 1047–48.

62 *See infra* Part II.

63 *See* Cohn, *supra* note 3, at 308–09. In fact, courts have upheld the constitutionality of the PLRA by pointing to the alternative forms of relief still available to prisoners through nominal and punitive damages awards. *See* Aref v. Lynch, 833 F.3d 242, 262 n.15 (D.C. Cir. 2016). Courts have not uniformly agreed on this issue, though. For example, in *Davis v. District of Columbia*, the court held that "much if not all of Congress's evident intent would be thwarted if prisoners could surmount § 1997e(e) simply by adding a claim for punitive damages and an assertion that the defendant acted maliciously." 158 F.3d 1342, 1348 (D.C. Cir. 1998); *cf.* Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) ("Congress did not intend section 1997e(e) to bar recovery for all forms of relief.").

64 Cohn, *supra* note 3, at 306.

65 *Aref*, 833 F.3d at 262–63; *see also* Doran, *supra* note 4, at 1045 n.96. This side of the split has been called the majority in other scholarship. Cohn, *supra* note 3, at 307. However, although it was previously believed that the D.C. Circuit was on this side, that Circuit clarified its interpretation as on the less restrictive side of the split in *Aref v. Lynch*, decided in August 2016. 833 F.3d 242. As a result, an equal number of circuits appear to fall on each side of the split now.

66 Thompson v. Carter, 284 F.3d 411, 416 (2d Cir. 2002) ("Because Section 1997e(e) is a limitation on recovery of damages for mental and emotional injury in the absence of a showing of physical injury, it does not restrict a plaintiff's ability to recover compensatory damages for actual injury, nominal or punitive damages, or injunctive and declaratory relief.").

67 *Aref*, 833 F.3d at 262–63.

68 *See* Doran, *supra* note 4, at 1046.

tion from the strict wording of the statute."[69] While this approach mimics tort law's prohibition on mental and emotional injuries absent physical injuries,[70] the circuits that oppose this approach argue that it implicitly ranks emotional injuries as subordinate to physical injuries, while also mistakenly merging intangible harms like constitutional violations with mental and emotional injuries.[71] As a result, prisoners alleging constitutional violations such as retaliation,[72] racial discrimination,[73] violations of due process rights,[74] violations of religious freedom,[75] and violations of their equal protection rights[76] have been barred from seeking compensatory damages when they have been unable to prove physical injury in these circuits.[77] These circuits justify allowing the prisoner to continue to seek punitive or nominal damages because those damages are meant "to vindicate a constitutional right or to punish for violation of that right" rather than compensating for the actual injury.[78] In this way, the courts adhere to what they consider to be the plain

69 Cohn, *supra* note 3, at 307 n.50 (citing United States v. McAllister, 225 F.3d 982, 986 (8th Cir. 2000) ("If the plain language of the statute is unambiguous, that language is conclusive absent clear legislative intent to the contrary.")).

70 *See* Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) ("It is well settled that compensatory damages under § 1983 are governed by general tort-law compensation theory.").

71 *See* Cohn, *supra* note 3, at 307 n.50.

72 Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) ("We join the majority, concluding Congress did not intend section 1997e(e) to limit recovery only to a select group of federal actions brought by prisoners. . . . If Congress desires [a different interpretation] of section 1997e(e), Congress can certainly say so."). *See generally* Doran, *supra* note 4, at 1027 (arguing that the physical injury requirement of § 1997e(e) is unconstitutional with respect to a petition violation since it "arbitrarily impairs prisoners' right to access the courts and, in doing so, enables retaliation against prisoner litigants to go unchecked").

73 Todd v. Graves, 217 F. Supp. 2d 958 (S.D. Iowa 2002).

74 Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002).

75 Searles v. Van Bebber, 251 F.3d 869 (10th Cir. 2001); Amaker v. Goord, No. 06–CV–490A, 2015 WL 3603970, at *1 (W.D.N.Y. June 5, 2015) ("[A]lthough the Court has no doubt that plaintiff suffered injury as a result of defendants' violation of his free exercise rights pursuant to the First Amendment of the United States Constitution, *to wit*, disciplinary confinement to special housing for approximately 200 days and repeated denial of access to religious services and celebrations, in accordance with the precedent of the Court of Appeals for the Second Circuit, compensation for such injury is barred . . . .").

76 Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998).

77 Doran, *supra* note 4, at 1045–46.

78 Allah v. Al-Hafeez, 226 F.3d 247, 252 (3d Cir. 2000); *id.* at 250 ("[Plaintiff] seeks substantial damages for the harm he suffered as a result of defendants' alleged violation of his First Amendment right to free exercise of religion. . . . [T]he only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury."); *see also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986) ("[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury . . . ." (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978))).

meaning of § 1997e(e) while still maintaining some accountability for prison officials through a threat of punitive damages.[79]

The Sixth, Seventh, Ninth, and District of Columbia Circuits interpret § 1997e(e) more broadly (hereinafter the "less restrictive approach") to mean that constitutional harms are a form of intangible injury separate from mental or emotional injuries and thus not excluded by the PLRA.[80] As the court in *King v. Zamiara* wrote: "[Section 1997e(e)] says nothing about claims brought to redress constitutional injuries, which are distinct from mental and emotional injuries."[81] These courts' decisions align with the idea, expressed in an amici curiae brief, that "[the Bill of Rights] was enacted to safeguard the people's liberty interests [rather than mental or emotional distress]. To characterize a deprivation of liberty as nothing more than a 'mental or emotional injury,' as some courts have done, is to trivialize our most basic constitutional protections."[82] These courts thus hold § 1997e(e) does not preclude prisoners from seeking compensatory damages for constitutional violations absent physical injury.[83] Rather than highlighting the language "[*n*]*o* Federal civil action,"[84] they argue that the more restrictive interpretation of § 1997e(e) leads to the conclusion that the words "for mental or emotional injury" are superfluous because if the PLRA was intended to only allow compensatory damages for physical injuries, it would not need to include the words "for mental or emotional injury."[85] These courts using the less restrictive approach tend to take the perspective that the court in *Aref v. Lynch* articulated: "[W]e find it hard to believe that Congress intended to afford virtual immunity to prison officials even when they commit blatant constitu-

79 *See* Cohn, *supra* note 3, at 315 ("[C]ourts are able to . . . us[e] the threat of a punitive damages award to avoid giving prison authorities carte blanche to violate the constitutional rights of prisoners.").

80 Aref v. Lynch, 833 F.3d 242, 262–64 (D.C. Cir. 2016) ("Analogous Supreme Court and circuit precedent supports the view that there can be real harms separate and apart from mental or emotional injury." (citing *Carey*, 435 U.S. at 264)); *see also* Doran, *supra* note 4, at 1045 n.99. In *Aref*, the D.C. Circuit distinguished *Davis v. District of Columbia*, a case it had previously decided in which it held that a plaintiff seeking compensatory damages for an alleged privacy violation in prison could not recover because he alleged no actual nonphysical injury, just emotional and mental distress. *Aref*, 833 F.3d at 266; *Davis*, 158 F.3d 1342.

81 788 F.3d 207, 213 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 794 (2016) (mem.).

82 Brief of Amici Curiae the Legal Aid Society of the City of New York et al. in Support of Plaintiffs-Appellants and Reversal at 4, *Aref*, 833 F.3d 242 (No. 15-5154).

83 *Aref*, 833 F.3d at 262–63. The First and Fourth Circuits have not defined their interpretations of the physical injury requirement. *See* Detmold, *supra* note 12, at 1124; *see also* Smith v. James, No. 8:13-cv-1270, 2014 WL 2809609, at *7 (D.S.C. June 20, 2014) ("The Fourth Circuit has not fully addressed the scope of § 1997e(e).").

84 42 U.S.C. § 1997e(e) (2012) (emphasis added).

85 *King*, 788 F.3d at 213; *see also* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) ("The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred.").

tional violations, as long as no physical blow is dealt."[86] Thus, both sides of the circuit split have concluded that a prisoner's claim must be divided up, either by the injury or by the relief.[87] Under the more restrictive approach, if a plaintiff alleges a constitutional violation without showing a physical injury, the court will separate the claim by relief and only allow punitive or injunctive damages.[88] By contrast, if a plaintiff alleges a constitutional violation and a mental or emotional injury, the courts taking the less restrictive approach will divide up the claim by injuries rather than damages, cutting out the mental or emotional injury but keeping the constitutional violation.[89]

Ultimately, compensatory damages are meant to compensate for actual injury.[90] Meanwhile, nominal damages are "designed to vindicate legal rights 'without proof of actual injury.'"[91] Before the PLRA was passed, plaintiffs filing § 1983 claims had to show "actual" injuries to recover compensatory damages.[92] With the passage of the PLRA, this requirement shifted to a physical injury requirement instead of an actual injury requirement.[93] Thus, under the more restrictive interpretation,

> litigants [outside of prison] can recover for "actual damages" resulting from [constitutional violations], not merely "nominal damages." Litigants must prove those damages, but they are entitled to prove them. Barring *prisoners* from compensatory damages means that prisoners . . . are not permitted to prove the "actual harm" that others are permitted to prove.[94]

III. Sexual Abuse in Prisons and the 2013 Amendment to the PLRA

Sexual abuse has been and still is a significant problem in prisons.[95] The National Prison Rape Elimination Commission estimates, based on survey data, that approximately 60,500 state and federal prisoners were sexually

86 *Aref*, 833 F.3d at 265 (footnote omitted); *see also* Calhoun v. Detella, 319 F.3d 936, 940 (7th Cir. 2003) ("[Requiring a showing of physical injury in every lawsuit], if taken to its logical extreme would give prison officials free reign to maliciously and sadistically inflict psychological torture on prisoners, so long as they take care not to inflict any physical injury in the process."). These issues are particularly true in cases involving violations of prisoners' First Amendment rights. *See Aref*, 833 F.3d at 265 ("It is especially difficult to see how violations of inmates' First Amendment rights could ever be vindicated, given the unlikelihood of physical harm in that context. Against that backdrop . . . we believe our reading of Section 1997e(e) best aligns with the purposes of the PLRA.").

87 *See Aref*, 833 F.3d at 263.

88 *See id.*

89 *Id.*

90 Carey v. Piphus, 435 U.S. 247, 264 (1978).

91 Doe v. Chao, 306 F.3d 170, 181 (4th Cir. 2002) (quoting *Carey*, 435 U.S. at 266).

92 Doran, *supra* note 4, at 1051 n.126.

93 *Id.*

94 *Id.* at 1052 (emphasis added) (noting that, outside of prison, litigants can seek to prove compensatory damages resulting from First Amendment violations—which might be a difficult task but certainly possible—while prisoner litigants are barred from even trying).

95 *See* Brocco, *supra* note 56, at 939.

assaulted in 2007 alone—about 4.5% of the prison population.[96] Meanwhile, adult correctional facilities reported 8763 allegations of sexual abuse from 2011, an increase from those reported in the previous year.[97] Prisoners identifiable by certain characteristics tend to be at greater risk of victimization. Some of these indicators are young age, small size, and lack of experience in prison, as well as mental disability and mental illness.[98] Likewise, individuals who identify as nonheterosexual or transgender are also at higher risk of assault.[99] The type of abuse in prisons tends to vary depending on the type of facility: guard-on-prisoner abuse is more common in female prisons with male guards abusing female inmates.[100] In contrast, prisoner-on-prisoner rape is more common in male prisons.[101]

The aftermath of sexual abuse for a victim in prison can prove to be catastrophic. Individuals who are sexually abused in prison are at high risk for trauma-related illnesses such as post-traumatic stress disorder and anxiety.[102] In fact, the experience of living as a prisoner can, on its own, exacerbate a victim's trauma symptoms because he will likely not be able to leave the vicinity of the perpetrator, meaning he will not be able to seek a safe space to recover and he will remain at high risk of revictimization.[103] Furthermore, prisoner victims may experience repercussions from other inmates or prison staff.[104] To top it off, most prisons offer few mental health resources and some put prisoner victims who report assault into administra-

96 NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 17, at 40. In 2007, there were approximately 1.6 million state and federal prisoners. Heather C. West & William J. Sabol, *Prisoners in 2007*, BUREAU OF JUST. STAT. BULL. 1 (2008).

97 U.S. DEP'T OF JUSTICE, NCJ 248824, PREA DATA COLLECTION ACTIVITIES, 2015 (2015), http://www.bjs.gov/content/pub/pdf/pdca15.pdf.

98 NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 17, at 7.

99 *Id.*

100 Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705, 707 (2010). Female prisoners also tend to have high rates of prior victimization. *See* Martin A. Geer, *Protection of Female Prisoners: Dissolving Standards of Decency*, 2 MARGINS 175, 177 (2002) ("Female prisoners generally differ from their male counterparts in their history of victimization by men in positions of authority outside the prisons and in the incidences of cross-gender sexual assaults by correctional officers.").

101 Robb, *supra* note 100, at 707.

102 Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL'Y & L. 281, 287–88 (2010).

103 *Id.*

104 *Id.* In male prisons, victims may be labeled "punks" to indicate that they are less masculine. *See also* Robertson, *supra* note 18, at 276–77 ("Punks are commonplace in the prison population. . . . Because many drug offenders bear [characteristics of 'youthful Caucasians of small stature' without knowledge of the prison system], their mass incarceration has probably swelled the punk population over the last several decades" (footnote omitted) (citing Schwenk v. Hartford, 204 F.3d 1187, 1203 n.14 (9th Cir. 2000))). In female prisons, victims are more likely to experience blame from others given that perpetrators are often guards. Ribet, *supra* note 102, at 288–89. These individuals might also be labeled promiscuous and their vulnerability could attract abuse by other prison staff as well. *Id.*

tive segregation for their own protection, an experience that could further victimize or exacerbate the prisoner's trauma.[105]

A prisoner who has been subjected to sexual abuse may bring either a *Bivens* claim[106] or a § 1983[107] claim against prison officials.[108] A prisoner may bring a *Bivens* claim if a federal officer violates his constitutional rights.[109] Meanwhile, a prisoner utilizing a § 1983 claim has a cause of action against a state official acting under "color of law" for violating his rights under federal law.[110] Prisoner victims of sexual assault who wish to pursue civil actions in court to recover damages typically bring claims alleging violations of their Eighth Amendment rights.[111] The Eighth Amendment guarantees that individuals will be free from "cruel and unusual punishment[ ]" from the government.[112] The Supreme Court held in *Farmer v. Brennan* that a "prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."[113] *Farmer* also established the standard for determining "deliberate indifference" as a "showing that the official was subjectively aware of the risk."[114] Additionally, in *Hudson v. McMillian*, the Supreme Court held that excessive use of physical force against a prisoner without a resulting serious injury could violate his Eighth Amendment right against cruel and unusual punishment.[115] The Court reasoned that the Eighth Amendment excludes *de minimis* uses of physical force as long as they are not of the kind that are "repugnant to the conscience of mankind."[116] Subsequently, in *Wilkins v. Gaddy*, the Court clarified that an

105 Ribet, *supra* note 102, at 289 ("So, in essence, prison rape victims are immersed in a state of extreme psychological crisis, without any likelihood of a meaningful therapeutic outlet with which to manage or alleviate the experience.").

106 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

107 42 U.S.C. § 1983 (2012).

108 Megan Coker, Note, *Common Sense About Common Decency: Promoting a New Standard for Guard-on-Inmate Sexual Abuse Under the Eighth Amendment*, 100 VA. L. REV. 437, 440–41 (2014).

109 *See* Brocco, *supra* note 56, at 930; Coker, *supra* note 108, at 440–41.

110 42 U.S.C. § 1983; *see* Brocco, *supra* note 56, at 930; Coker, *supra* note 108, at 440–41. Prisoners make up a significant proportion of individuals bringing § 1983 claims, likely because they spend their lives in constant contact with state officials while incarcerated. *See* Miller, *supra* note 22, at 929–30.

111 *See* Brocco, *supra* note 56, at 920.

112 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

113 511 U.S. 825, 828 (1994).

114 *Id.* at 829 (stating that"[s]ubjective[ ] aware[ness]" requires actual knowledge of the risk).

115 503 U.S. 1, 4 (1992).

116 *Id.* at 9–10 ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been unacceptable to the drafters of the Eighth Amendment as it is today." (internal citations omitted)).

excessive force claim should be decided based on "the nature of the force rather than the extent of the injury."[117] Thus, prisoners who are victims of sexual assault in prison can bring claims for violations of their Eighth Amendment rights under certain circumstances using either a *Bivens* or a § 1983 claim depending on whom they are suing.

Before the 2013 Amendment to the PLRA, federal courts ruling on prisoners' § 1983 claims against state prison officials alleging sexual abuse without a showing of physical injury interpreted § 1997e(e) inconsistently. The majority of courts found that sexual assault constituted a physical injury under § 1997e(e).[118] For example, the court in *Liner v. Goord* held that "alleged sexual assaults qualify as physical injuries as a matter of common sense."[119] However, other courts held that a prisoner alleging sexual assault without a showing of physical injury could not bring a claim under the PLRA.[120] Thus, the question that courts faced before the 2013 Amendment was passed was whether sexual assault itself was an emotional injury, an intangible injury, or a physical injury.[121] The National Prison Rape Elimination Commission expressed the frustration many felt about different interpretations of sexual assault when it wrote that when courts held that sexual assault without a showing of physical injury did not constitute a physical injury, those courts "fail[ed] to take into account the very real emotional and psychological injuries that often follow sexual assault, ranging from temporary fear and emotional numbness to nightmares and major depressive episodes that can occur months or years after an assault."[122] The Commission further noted that it was "convinced that victims of sexual abuse are losing vital avenues for relief because they cannot prove physical injury as defined in the PLRA. Victims deserve their day in court."[123]

This response to sexual assault's treatment by the PLRA parallels the reactions of the courts using the less restrictive approach to interpreting § 1997e(e). In fact, the courts' differing interpretations of how § 1997e(e) treated sexual assault before the 2013 Amendment generally aligned with the interpretations on each side of the circuit split regarding constitutional violations absent a physical injury. The courts that interpreted sexual assault as essentially a physical injury before the 2013 Amendment were also those that

117 559 U.S. 34, 34 (2010).

118 *See generally* John Boston, *Congress Amends PLRA Physical Injury Requirement for Sexual Abuse Cases*, Prison Legal News (July 15, 2013), https://www.prisonlegalnews.org/news/2013/jul/15/congress-amends-plra-physical-injury-requirement-for-sexual-abuse-cases/.

119 196 F.3d 132, 135 (2d Cir. 1999).

120 Hancock v. Payne, No. Civ.A.103CV671, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006) ("[T]he plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault. . . . They make no claim of physical injury . . . . Therefore, the Court finds no claim or evidence of a physical injury and that [plaintiffs] have failed to meet the physical injury requirement of the Prison Litigation Reform Act, § 1997e(e).").

121 *See* Deborah M. Golden, *The Prison Litigation Reform Act—A Proposal for Closing the Loophole for Rapists*, J. ACS Issue Grps. 95, 95 (2006).

122 Nat'l Prison Rape Elimination Comm'n, *supra* note 17, at 95.

123 *Id.*

used the less restrictive interpretation (the Sixth, Seventh, Ninth, and D.C. Circuits).[124] In the broader split on constitutional violations, these courts view sexual assault as something other than a mental or emotional injury—an intangible injury—even if it does not rise to the level of an Eighth Amendment violation. In *Carrington v. Easley*, the court agreed with the magistrate judge's previous ruling that, "even absent a physical injury, sexual assault is an injury of 'constitutional dimensions' as to which the PLRA does not bar recovery."[125] This reasoning suggests that these courts see sexual assault, even when it does not reach the level of an Eighth Amendment violation, as a form of harm comparable to constitutional violations. In contrast, the courts that held that sexual assault without a physical injury did not fit within § 1997e(e) looked only at the strict meaning of the words in the provision, rather than the implication of that interpretation on different types of harms.[126]

In 2013, Congress amended § 1997e(e) through the Violence Against Women Reauthorization Act (hereinafter "2013 VAWA Reauthorization"), adding "or the commission of a sexual act (as defined in section 2246 of title 18, United States Code)."[127] While one scholar marked the change as a "significant amendment" to the PLRA, it was not a source of much debate in Congress.[128] Rather, it appears to have stemmed from the enactment of the Prison Rape Elimination Act[129] and a subsequent report by the Prison Rape

124 *See supra* text accompanying notes 80–89.

125 Carrington v. Easley, No. 5:08-CT-3175, 2011 WL 2132850, at *3 (E.D.N.C. May 25, 2011) (quoting the magistrate judge's opinion in the case). The court in this case did not award the plaintiff, who had been sexually assaulted by his prison guard, compensatory damages because it found that he had not provided sufficient evidence of actual damages. While the plaintiff testified about his mental and emotional distress, including nightmares, anxiety, panic attacks, and bed-wetting, the court required evidence of professional treatment in order to provide compensatory damages. *Id.* at *4. However, the court's holding was that the plaintiff was not barred from recovery by the PLRA. *Id.* at *3–4; *see also* Cleveland v. Curry, 07-cv-02809, 2014 WL 690846, at *6 (N.D. Cal. Feb. 21, 2014) ("[A]ny type of sexual assault is 'always' deeply offensive to human dignity.").

126 *See supra* text accompanying notes 64–79; *see also* Hancock v. Payne, No. Civ.A.103CV671, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006).

127 Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 1101(a), 127 Stat. 134.

128 Boston, *supra* note 118.

129 Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended in scattered sections of 42 and 45 U.S.C.); *see Prison Rape Elimination Act*, NAT'L PREA RES. CTR., https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea (last visited Feb. 8, 2017) ("In addition to creating a mandate for significant research from the Bureau of Justice Statistics and through the National Institute of Justice, funding through the Bureau of Justice Assistance and the National Institute of Corrections supported major efforts in many state correctional, juvenile detention, community corrections, and jail systems. The act also created the National Prison Rape Elimination Commission and charged it with developing draft standards for the elimination of prison rape. Those standards were published in June 2009, and were turned over to the Department of Justice for review and passage as a final rule. That final rule became effective August 20, 2012.").

Elimination Act Commission.[130] The Commission's 2009 Report criticized the "serious hurdles that . . . block access to the courts for many victims of sexual abuse,"[131] particularly singling out the PLRA's exhaustion of the administrative remedies requirement and the physical injury requirement of § 1997e(e).[132] Other advocacy groups also contributed to the condemnation of § 1997e(e) although the criticism seemed to advocate more for removing the provision than amending it.[133] In fact, in 2007 and again in 2009, Representative Robert Scott introduced a bill called the "Prison Abuse Remedies Act of 2009" in the House of Representatives that, *inter alia*, proposed to eliminate § 1997e(e) altogether.[134] However, the bill never advanced in Congress.[135] Similarly, the eventual 2013 Amendment was previously included in the Violence Against Women Reauthorization Act of 2012, which Congress ultimately did not pass that year.[136]

The amendment to the PLRA that eventually passed through the 2013 VAWA Reauthorization is an addition to the back end of § 1997e(e).[137] It consists of two parts: "or the commission of a sexual act," followed by the parenthetical defining "sexual act" according to 18 U.S.C. § 2246.[138] This section of the United States Code defines "sexual act" as:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

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130 Ribet, *supra* note 102, at 297 ("[A]t the urging of the National Prison Rape Elimination Commission, a body established under PREA, as well as that of human rights advocates, it appears that efforts to amend the PLRA in order to remove some barriers to sexual assault related litigation may be successful in the near future." (footnote omitted)); *see also* Giovanna Shay, *PREA's Peril*, 7 NE. U. L.J. 21, 35–36 (2015) (noting that although the PLRA amendment was not expressly part of PREA regulations, it was likely a result of broader advocacy efforts by groups such as Just Detention International).

131 NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 17, at 93.

132 *Id.* Notably, in the 2013 VAWA Reauthorization Act, the changes to the PLRA are placed right before an amendment to the Prison Rape Elimination Act. *See* Violence Against Women Reauthorization Act of 2013 § 1101(a)–(c).

133 *See* Robertson, *supra* note 18, at 280; *see also* Wendy N. Davis, *Unlocking the Lawsuit*, NAT'L PULSE (June 1, 2010), http://www.abajournal.com/magazine/article/unlocking_the_lawsuit (describing some of the efforts to remove § 1997e(e) and the exhaustion of administrative remedies provision of the PLRA).

134 H.R. 4335, 111th Cong. § 2 (2009); *see also* Editorial, *Combating Prisoner Abuse*, N.Y. TIMES (Dec. 20, 2009), http://www.nytimes.com/2009/12/21/opinion/21mon3.html (criticizing § 1997e(e) and describing Representative Scott's bill).

135 *H.R. 4335—Prison Abuse Remedies Act of 2009*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/house-bill/4335 (last visited Feb. 20, 2017).

136 S.1925, 112th Cong. § 1002(a) (2012).

137 Violence Against Women Reauthorization Act of 2013 § 1101(a). So far, courts have interpreted the amendment not to apply retroactively. *See* Doe v. United States, No. 12-00640, 2014 WL 7272853, at *6–7 (D. Haw. Dec. 17, 2014).

138 18 U.S.C. § 2246 (2012); Violence Against Women Reauthorization Act of 2013 § 1101(a). The Act also inserted the amendment into 28 U.S.C. § 1346(b)(2) (2012), another section of the PLRA.

> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.[139]

This definition certainly covers sexual acts involving any amount of penetration.[140] Additionally, it includes a broader definition of sexual acts not involving penetration with respect to minor victims.[141] It also includes oral sexual contact.[142] Since this definition provides such a detailed description of specific sexual acts, it could be viewed as creating greater protection for victims who experience crimes that fall within its explicit parameters. However, it also generates a risk that other types of sexual abuse will be left out if they do not fit within its unequivocal boundaries.

IV. The 2013 Amendment to the PLRA Changes Its Meaning and Affects How Each Side of the Circuit Split Should Interpret It with Respect to Constitutional Violations Absent Physical Injuries

The 2013 Amendment to § 1997e(e) allows prisoners who have been sexually assaulted in accordance with the definition in 18 U.S.C. § 2246 to seek justice, but it also changes the plain meaning of § 1997e(e), affecting the interpretations on both sides of the broader circuit split. The 2013 Amendment seems to reveal that Congress intends for the provision to bar prisoners claiming constitutional violations absent a physical injury from seeking compensatory damages. However, if the amended § 1997e(e) is read to bar constitutional violations absent a physical injury, it will result in unfair application for different defendants. Ultimately, this more restrictive interpretation of § 1997e(e) fails to further the policy goals of both the Prison Litigation Reform Act and the Prison Rape Elimination Act.

The 2013 Amendment changes the plain meaning of § 1997e(e) and, as a result, affects how courts should interpret its meaning on both sides of the circuit split. Section 1997e(e) now reads in full:

> 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

139 18 U.S.C. § 2246(2). Section 2246 also includes definitions for "prison," "sexual contact," "serious bodily injury," and "State." *Id.* § 2246.

140 *See id.* § 2246(2)(A); *id.* § 2246(2)(C).

141 *Id.* § 2246(2)(D).

142 *Id.* § 2246(2)(B).

> 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).[143]

Since 2013, courts generally have incorporated the amendment into the plain meaning of § 1997e(e) by interpreting "commission of a sexual act" as independent from, and not affecting, how they interpret the rest of the provision.[144] Thus, if a plaintiff alleges a sexual act as defined in 18 U.S.C. § 2246, absent a physical injury, he may now recover compensatory damages. However, courts have not wavered from their previous interpretations of the provision with respect to constitutional violations absent physical injuries. In *Woods v. United States*,[145] a prisoner alleged that a prison official violated his Eighth Amendment rights when he conducted a pat down of the plaintiff that included inappropriate touching of a sexual nature without the prisoner's consent.[146] The court held that under the amended § 1997e(e), the plaintiff could not recover compensatory damages because the sexual act did not meet the standard set out in 18 U.S.C. § 2246 as required by the 2013 Amendment.[147] As this case was decided in the Eleventh Circuit, which uses the more restrictive approach, the court held that this plaintiff could not recover under the plain language of the provision or through a constitutional violation because the plaintiff had not alleged a greater than *de minimis* physical injury.[148]

The courts using the less restrictive approach still treat sexual assault as a constitutional violation regardless of whether it fits within the definition provided by 18 U.S.C. § 2246. In *Cleveland v. Curry*,[149] the prisoner plaintiffs alleged that a prison guard had "squeezed their penises and/or their scrotums for several seconds while performing clothed-body searches."[150] They subsequently alleged violations of their Eighth Amendment rights and sought damages for physical, mental, and/or emotional injuries.[151] Although the plaintiffs had not shown evidence of sexual acts that fell within the definition in 18 U.S.C. § 2246, the Ninth Circuit looked to precedent from before the amendment, which aligned with the less restrictive approach, and held that "any type of sexual assault is 'always' deeply offensive to human dignity. . . . [P]laintiffs seeking compensatory damages for the violation of certain constitutional rights are not subject to the PLRA's physical injury requirement."[152] Thus, under the less restrictive approach, the court refused to eliminate a sexual assault claim that fell below the definition's

143 42 U.S.C. § 1997e(e) (2013).

144 *See, e.g.*, Woods v. United States, No. 1:14-cv-00713, 2015 WL 9947694 (N.D. Ala. Dec. 11, 2015).

145 *Id.*

146 *Id.* at *2.

147 *Id.*

148 *Id.*

149 No. 07-cv-02809, 2014 WL 690846 (N.D. Cal. Feb. 21, 2014).

150 *Id.* at *1.

151 *Id.*

152 *Id.* at *7.

threshold for sexual acts in the 2013 Amendment and instead allowed a broader interpretation of the provision.

While courts have avoided interpreting the 2013 Amendment as anything more than an addition to § 1997e(e) that should be treated as independent and should not affect the rest of the provision, the 2013 Amendment should change the way courts interpret § 1997e(e). The 2013 Amendment certainly affects the less restrictive interpretation of the language of § 1997e(e). As the court noted in *King v. Zamiara*, "[e]very word in the statute is presumed to have meaning, and we must give effect to all the words to avoid an interpretation which would render words superfluous or redundant."[153] In fact, the less restrictive approach relies on an interpretative approach that deems no words superfluous.[154] These courts have previously viewed the inclusion of "mental and emotional" in the statutory language to mean that the provision just excluded mental and emotional injuries and therefore did not intend to eliminate intangible injuries like constitutional violations absent physical injury.[155] These circuits must now incorporate the addition of "commission of a sexual act" into their interpretation of the provision, given the notion that every word must be presumed to have a meaning.

Additionally, since these courts using the less restrictive approach previously viewed sexual assault as a form of a constitutional violation,[156] they should now reexamine whether their chosen interpretation holds. If, as the court held in *Cleveland*,[157] sexual assault is to be considered an intangible harm comparable to a constitutional violation, and every word of the statute is to be interpreted with the presumption of having meaning, then the entire 2013 Amendment would be rendered superfluous. As the court wrote in *Morton v. Johnson*, where an inmate was rubbed "down to [her] private area"[158] by a prison guard, "[t]he Court need not decide [the question of whether the defendant's actions constituted the 'commission of a sexual act'] if sexual battery itself shows 'physical injury.'"[159] If courts are still finding that "sexual contact itself constitutes 'physical injury' without describing in detail the guard's alleged conduct,"[160] then these courts are essentially nullifying the 2013 Amendment. Alternatively, if these courts see sexual assault as fundamentally different from constitutional violations and thus choose to continue with their previous interpretation regarding constitutional viola-

153 788 F.3d 207, 212 (6th Cir. 2015) (quoting Walker v. Bain, 257 F.3d 660, 667 (6th Cir. 2001)).

154 *See id.*

155 *See id.*

156 Carrington v. Easley, No. 5:08-CT-3175, 2011 WL 2132850, at *3 (E.D.N.C. May 25, 2011).

157 *Cleveland*, 2014 WL 690846, at *7.

158 No. 7:13cv00496, 2015 WL 4470104, at *7 (W.D. Va. July 21, 2015) (alteration in original).

159 *Id.*

160 *Id.* (first citing Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999); and then citing Kahle v. Leonard, 563 F.3d 736, 739 (8th Cir. 2009)).

tions as intangible harms, they must grapple with the problem that Congress chose *not* to add constitutional violations to § 1997e(e) when it had the opportunity through the 2013 Amendment.

The 2013 Amendment also affects the more restrictive approach because it changes the basic premise upon which those circuits justify their approach. Whereas the circuits using the more restrictive approach focused on the language "[n]o Federal civil action" and "without a prior showing of physical injury," concluding that this applied to all cases regardless of what type of act had occurred,[161] now they must also grapple with "commission of a sexual act." This will refocus the inquiry from exclusively examining the plaintiff's injury to asking about injuries or particular sexual *acts*.[162] The practical outcome of the 2013 Amendment on the more restrictive approach is that these circuits will be forced to allow claims involving sexual acts absent a physical injury as somehow superior to constitutional violations, while still rejecting claims that constitute constitutional violations (because of the absence of a physical injury). Additionally, prisoners will be able to recover compensatory damages under the more restrictive approach for sexual acts directly committed against them by prison guards that do not result in physical injuries. Yet, prisoners will not be able to recover for Eighth Amendment violations absent physical injury when a prison guard has shown deliberate indifference or even subjective awareness of the risk of sexual assault against that prisoner.[163]

In fact, the impact of the 2013 Amendment on the meaning of § 1997e(e) may turn on whether sexual acts as defined by 18 U.S.C. § 2246 automatically constitute violations of the Eighth Amendment. If they do, then the circuits using the more restrictive approach may argue that the 2013 Amendment would be superfluous if prisoners alleging constitutional violations absent physical injury can already seek compensatory damages for constitutional violations. By contrast, if sexual acts under 28 U.S.C. § 2246 do not constitute Eight Amendment violations, then the circuits using the less restrictive approach could argue that the 2013 Amendment does not address constitutional violations absent a physical injury, thereby making the amendment additive and not duplicative or superfluous. However, the courts using

161 *See supra* notes 64–79.

162 *See* Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) ("The underlying substantive violation . . . should not be divorced from the resulting injury, such as 'mental or emotional injury,' thus avoiding the clear mandate of § 1997e(e). The statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional.").

163 *See supra* notes 106–17; *see also* Cleveland v. Curry, No. 07-cv-02809, 2014 WL 690846, at *7 (N.D. Cal. Feb. 21, 2014) ("[O]nly certain types of sexually [sic] assault will cause objective and observable physical injuries, but any type of sexual assault is 'always' deeply offensive to human dignity. As a matter of policy and of common sense, it would be illogical to allow guards who . . . assault prisoners without leaving observable physical injuries to escape liability under the PLRA because they have only caused psychological, emotional, dignitary and other injuries. Similarly, it would be illogical to allow guards to sexually assault large numbers of prisoners . . . but escape liability because they only assaulted each prisoner a 'small' amount." (footnote omitted)).

the less restrictive approach have actually been interpreting sexual assault absent a physical injury as the opposite—as Eighth Amendment violations—rendering cases like *Cleveland* problematic if they are supposed to treat the 2013 Amendment as something more than superfluous.

As a result, since the 2013 Amendment causes so many discrepancies for the courts using the less restrictive approach, it reveals that Congress intended for the more restrictive interpretation of § 1997e(e) to prevail. While the 2013 Amendment affects both interpretations in the split, it results in rendering the less restrictive interpretation's reasoning problematic and circular. Because sexual assault absent a physical injury would normally be categorized as an intangible harm, it would not make sense for these courts to still read intangible harms to be unaddressed by § 1997e(e) given that it now addresses one form of intangible harm. If Congress put in one type of intangible harm, then it must have purposefully chosen not to include other types of intangible harms. Under the more restrictive approach, courts must now consider that the practical consequences of the amendment are such that sexual acts falling below the bar of Eighth Amendment violations must be categorically allowed while still excluding other constitutional violations absent a physical injury. While this outcome may seem problematic, this reading of the provision still fits with the addition of the 2013 Amendment because it does not require any more reading between the lines by the courts—rather, it shows that Congress intends for prisoners to recover compensatory damages only for physical injuries and now also for sexual acts falling within the definition provided. Thus, the 2013 Amendment should be understood to show that Congress views the more restrictive approach as the appropriate way of applying § 1997e(e).

V. SOLUTION: NEEDED CLARIFICATIONS TO 42 U.S.C. § 1997E(E)

The circuit split between the methods of interpreting § 1997e(e) must be resolved, either by the Supreme Court or through a change made by Congress. If the Supreme Court were to grant certiorari on a case regarding the meaning of § 1997e(e),[164] it would likely look at the plain meaning of the provision first and then give some weight to Congress's intent with respect to § 1997e(e) and the PLRA overall, particularly if it found the language of the provision to be ambiguous.[165] If the Supreme Court were to hold that the

164 The Supreme Court most recently denied certiorari in *King v. Zamiara*. 788 F.3d 207 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 794 (2016) (mem.). The holding by the Sixth Circuit, using the less restrictive approach, controlled as a result. *Id.* at 213 ("Therefore, the plain language of the statute does not bar claims for constitutional injury that do not also involve physical injury."). However, since *Aref v. Lynch*, decided in August 2016, reversed what was previously understood to be the D.C. Circuit's approach to the circuit split and subsequently evened the number of circuits on each side of the split, the Supreme Court might be more amenable to granting certiorari in a future case on this subject. *See* 833 F.3d 242 (D.C. Cir. 2016).

165 While the circuit split itself seems to evidence the fact that § 1997e(e) is ambiguous on its face, the circuits using the more restrictive approach have held that the plain mean-

plain meaning of the provision was unambiguous and the more restrictive interpretation to be authoritative (a result more likely after the 2013 Amendment),[166] the PLRA would be even less likely to further its intended goals or those of the PREA.

While the 2013 Amendment might reveal that Congress intended for the more restrictive interpretation to prevail, that interpretation of § 1997e(e) fails to adhere to the goals of the Prison Litigation Reform Act or the Prison Rape Elimination Act because it narrows the definition of sexual assault in a way that prevents valid sexual abuse claims from reaching the courts. While the specificity of the definition of "sexual acts" in 18 U.S.C. § 2246 suggests that some particular types of sexual assault will be undeniably covered under § 1997e(e) in the future, so that prisoners who are unable to show a physical injury will be able to recover compensable damages, prisoners experiencing harms that do not fall within the § 2246 definition might be left out.[167] For example, this definition notably disregards sexual touching that does not involve penetration (except for unclothed touching of individuals younger than sixteen), as well as touching of women's breasts.[168] As the court emphasized in *Cleveland v. Curry*, excluding from the definition of sexual assault less extreme forms of abuse makes no sense in the context of a prison:

> [U]nlike in other situations where guards are accused of using "excessive" force, there can be no justification for sexually abusive conduct in a prison setting in any context; there is no level of sexual force that is "acceptable" due to exigent circumstances or the realities of prison life. No use of sexual force is required to maintain discipline. No prisoner can resist an order or behave in a manner that justifies, much less requires, sexual abuse by a guard.[169]

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ing of the provision is unambiguous. *See supra* Part II. If the Supreme Court were to find the language of § 1997e(e) to be clear, it could determine that the legislative intent behind the PLRA and the PREA are of little relevance to their inquiry. *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1709 (2012) (holding that consideration of legislative history was unnecessary because the statute at issue was unambiguous); *cf.* Watt v. Alaska, 451 U.S. 259, 265–66 (1981) ("'[T]he starting point in every case involving construction of a statute is the language itself.' But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." (footnote omitted) (citations omitted) (first quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring); and then quoting Bos. Sand Co. v. United States, 278 U.S. 41, 48 (1928)) (first citing Rubin v. United States, 449 U.S. 424 (1981); then citing Train v. Colo. Pub. Interest Research Grp., 426 U.S. 1, 10 (1976); and then citing United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940))).

166 *See supra* Part IV.

167 *See* Boston, *supra* note 118.

168 *Id.*

169 Cleveland v. Curry, 07-cv-02809, 2014 WL 690846, at *7 (N.D. Cal. Feb. 21, 2014) (footnote omitted).

Thus, if courts read the 2013 Amendment as covering all sexual acts absent a physical injury, then sexual acts that do not fall under the definition in 18 U.S.C. § 2246 will remain unpunished despite the fact that they can never satisfy a legitimate penal purpose and can still cause significant psychological and emotional injuries for prisoner victims.[170]

As a result, some cases that have previously been decided on the understanding that sexual assault falls under a person's Eighth Amendment rights as a matter of "common sense"[171] would be decided differently under the 2013 Amendment.[172] For example, the court would decide *Duncan v. Magelessen*[173] differently. In that case, a prisoner alleged that a guard sexually molested him by "playing with his penis" during pat-down searches multiple times over a period of months and the court held that he was entitled to seek compensatory damages because "sexual contact, alone, is a physical injury" even without a showing of an actual physical injury[174] after the 2013 Amendment. This prisoner would not be able to seek compensatory damages under the less restrictive approach because the alleged sexual abuse did not include penetration and the prisoner was older than sixteen years old. Likewise, the holding in *Marrie v. Nickels*[175] would be reversed under the more restrictive approach. In that case, the prisoner alleged that a guard sexually abused him during a frisk search when he put his hands down the prisoner's pants and "caressed his buttocks, and stroked his genitalia."[176] The touching occurred under the prisoner's clothing but he was an adult and no penetration occurred.[177] As a result, it would not be covered under the definition in the 2013 Amendment. Thus, while the 2013 Amendment helps prisoners seek justice when the sexual abuse they have experienced falls within the definition provided in 18 U.S.C. § 2246, it leaves out some acts that courts have previously considered to constitute sexual assault such that those victims are decidedly cut out from seeking compensatory damages by § 1997e(e). And, ultimately, since § 1997e(e) excludes nonfrivolous sexual assault claims that do not involve penetration, it fails to further the Prison Rape Elimination Act's purported goal of reducing sexual abuse in prisons.[178]

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170 *See supra* notes 95–105, 162.

171 Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999).

172 *See* Boston, *supra* note 118; *see also* Coker, *supra* note 108, at 442 (noting that before the amendment was enacted, "courts rested their interpretations of the PLRA on its ambiguity, declaring that Congress could not have meant to exclude *all* actions alleging only emotional injury for sexual abuse, or even all types of damages for those injuries. With this new clarification, courts may further limit inmates' causes of action" (footnote omitted)).

173 No. 07-cv-01979, 2008 WL 2783487 (D. Colo. July 15, 2008).

174 *Id.* at *1, *4.

175 70 F. Supp. 2d 1252, 1264 (D. Kan. 1999) ("[S]exual assaults would qualify as physical injuries under § 1997e(e).").

176 *Id.* at 1257.

177 *Id.*

178 *See supra* notes 122–23, 130–32 and accompanying text.

The 2013 Amendment also does not further the main goal of the PLRA, which is to reduce the number of frivolous lawsuits filed by prisoners.[179] While the 2013 Amendment certifies that certain sexual assault lawsuits will not be dismissed for failure to show a physical injury, and seems to point to the more restrictive approach as the method Congress intended for § 1997e(e), the amendment does little to definitively clarify the scope of § 1997e(e). Furthermore, data on prisoner lawsuits has shown that the PLRA as a whole has not furthered the goals it was intended to accomplish.[180] While the number of lawsuits filed by prisoners decreased by sixty percent between 1995 (when the Act was passed) and 2006,[181] the rate of claims that were dismissed as frivolous did not change in a significant way,[182] suggesting that the PLRA is not effective at filtering out frivolous lawsuits while retaining access to courts for meritorious lawsuits. On a broader scale, the PLRA has also essentially ended the use of litigation as a tool to spur prison reform[183] due to the barriers it sets for prisoners to get to court and the incentives it creates for lawyers not to accept cases.[184]

Not only does the 2013 Amendment throw a wrench into the interpretative methods on both sides of the circuit split, it may also create incentives for prisoners to file untruthful claims, a problem closely tethered to the issue of frivolous lawsuits. Because so many courts read § 1997e(e) using the more restrictive approach, one consequence of the 2013 Amendment could be that it incentivizes prisoners to adjust their allegations so that they hinge on an alleged sexual assault even if it was a minor aspect of the incident or did not happen, in order that they receive some form of remedy beyond nominal or punitive damages.[185] On the flipside, the 2013 Amendment could also motivate prison guards to deny that sexual abuse has occurred in order to maintain the previously high barriers set by the PLRA.[186] As a result, the 2013 Amendment to § 1997e(e) might, in fact, create some problematic incentives for prisoners and guards alike.

Additionally, the 2013 Amendment prioritizes sexual assault above other types of harms such that victims of sexual assault may gain easier and more effective access to courts than others who experience troublesome rights violations. As Giovanna Shay writes, legislation that focuses on reduction of rape in prisons "may create a kind of exceptionalism for incarcerated people's claims of sexual abuse, sometimes producing unintended consequences. . . . Other serious forms of abuse remain subject to the PLRA."[187] Thus, although it was very important for Congress to clarify that sexual abuse

179 *See supra* notes 2–4 and accompanying text.
180 *See* Schlanger, *supra* note 6, at 162.
181 *See* Doran, *supra* note 4, at 1041.
182 Schlanger, *supra* note 6, at 162.
183 *See supra* Section I.A.
184 *See* Ribet, *supra* note 102, at 296.
185 *See* Shay, *supra* note 130, at 32–33.
186 Schlanger & Shay, *supra* note 32, at 145–46.
187 Shay, *supra* note 130, at 32.

without a showing of physical injury should *not* be dismissed under the PLRA, the 2013 Amendment overlooked many fundamental constitutional violations in addition to forms of sexual abuse falling below the bar set by 18 U.S.C. § 2246 absent physical injuries. Ultimately, the effect of the circuit split and the 2013 Amendment has been that prisoners in different jurisdictions have unequal access to the courts. As a result, some prisoners may recover for violations for which others may not.

Congress should amend or remove § 1997e(e) so that the physical injury and sexual assault concepts under 18 U.S.C. § 2246 do not create such high barriers for prisoners seeking access to courts. While removing § 1997e(e) could potentially give rise to an increase in the number of frivolous lawsuits filed by prisoners, it currently does not successfully distinguish frivolous lawsuits from meritorious ones.[188] Thus, if the provision is to remain in the PLRA, Congress should revise it so that it better identifies which types of injury or which types of violations should merit compensatory damages. Since focusing solely on prisoners' injuries rather than the violation of their rights has given rise to so many problems with interpretation and sometimes bars prisoners from seeking compensatory damages for serious constitutional violations absent physical injury and sexual acts falling below the definition in the statute, Congress should amend § 1997e(e) so that it narrows prisoners' claims based on the violations they have experienced. If the goal is to limit frivolous lawsuits while increasing access for meritorious claims, then Congress should tailor the statute to more effectively weed out acceptable from problematic types of conduct rather than dividing physical from nonphysical injuries.

Conclusion

Ultimately, section 1997e(e) of the Prison Litigation Reform Act has created confusion and inconsistency across the federal circuits regarding how to interpret its ambiguous and imprecise language. The resulting circuit split has created a schism in how courts view constitutional violations in comparison to mental and emotional injuries, meaning prisoners in some jurisdictions may recover compensatory damages for violations for which prisoners in other jurisdictions cannot. Congress opted not to take the opportunity to fix that discrepancy through the 2013 VAWA Reauthorization, instead adding a few choice words to the end of the provision. While the 2013 Amendment surely was intended to help prevent sexual abuse in prisons and fill a needed gap in how prisoners are treated in the court system, it failed to provide a wide enough definition for sexual acts and thus excluded many prisoners who have experienced different forms of sexual abuse from recovering compensatory damages. Furthermore, it could incentivize prisoners and prison guards to file untruthful claims simply in order to access the courts. Ultimately, the 2013 Amendment provides little help in clarifying whether prisoners may recover compensatory damages for constitutional violations absent

188 *See supra* text accompanying notes 179–84.

physical injury or sexual assault falling below the threshold determined by 18 U.S.C. § 2246. While the 2013 Amendment points towards the more restrictive approach taken by half of circuit courts as Congress's intended meaning, this interpretation of 42 U.S.C. § 1997e(e) fails to further the stated goals of the PLRA or the PREA.

Historically, litigation has proven to be an effective tool for prisoners to utilize when seeking prison reform. The PLRA has removed this option and essentially left prisoners without a voice to share violations of their rights with the world outside of their confinement. Even when prisoners can overcome the other limitations set forth in the PLRA, they still must contend with the inconsistent application and sometimes prohibitively restrictive use of § 1997e(e) by courts against them. The Supreme Court or Congress must clarify the meaning of § 1997e(e) in order to resolve the discrepancies and confusion surrounding the meaning of this provision with respect to constitutional violations absent a physical injury and sexual assault that falls below the threshold set out by 18 U.S.C. § 2246.