The Prison Litigation Reform Act—A Proposal For Closing the Loophole For Rapists

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I. INTRODUCTION

Most Americans would be shocked to know that in this country, a rape victim might not be able to bring a suit for money damages against her or his attacker when that attacker is an employee of the state, specifically an employee of a prison or jail.[1] Internationally, custodial rape is considered torture. Domestically, in order to allow suits by rape victims, courts hold that rape simply is "not part of the penalty" offenders should pay for their criminal conduct.[2] All fifty states, the District of Columbia and the federal government now criminalize sexual contact between correctional staff and prisoners. These statutes reflect the belief that the power imbalance between guard and guarded renders true consent impossible. Unfortunately, some correctional staff do abuse their authority and sexually assault those in their custody. When the victims try to seek redress in court, they are forced to overcome a congressionally created obstacle. The Prison Litigation Reform Act ("PLRA") may prevent rape victims from bringing lawsuits against their attackers. In order to receive monetary compensation, the PLRA requires that any plaintiff demonstrate that she or he has a physical injury. In the current legal system, this torture must be analyzed within the framework created by the PLRA that "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."[3] The PLRA leaves one with a simple choice in a complex area. Is rape an emotional injury or a physical one? Rape must leave a physical injury within the meaning of the 42 U.S.C. § 1997e(e) to be actionable. However, to avoid judicial confusion and wasted judicial resources, Congress should amend the PLRA to make it clear that rape and all forms of sexual assault are compensable injuries, whether there is discernable physical injury or not.

In this paper, I first examine the landscape of custodial rape and sexual assault. I examine the data regarding the number of rapes behind bars and the enactment of the Prison Litigation Reform Act. I next review the case law analyzing rape under the Act,

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[1] "Prison" and "jail" have distinct meanings within the criminal justice system. As the particular distinctions are not relevant the analysis presented in this article, the terms will be used interchangeably. If a distinction needs to be made, it will be noted.

[2] *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (*quoting Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

[3] 42 U.S.C. § 1997e(e).

looking at cases where courts declare without analysis that rape is a physical injury, cases where courts focus on other less serious injuries, and one case where a court ruled sexual assault was not a physical injury. I then suggest that courts must be clearer and rule that rape is a compensable injury. Finally, I conclude that the best solution is for Congress to amend the PLRA to read:

> 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 sexual assault or abuse.**

II. PREVALENCE OF RAPE BEHIND BARS

Just as the prevalence of rape in the free world is hard to quantify, so is the frequency of rape behind bars. Even the studies of custodial sexual misconduct that do exist must be viewed with a skeptical eye, as the nature of imprisonment, with its complex inmate and staff subcultures, encourages opacity.[4] Recognizing this knowledge void, Congress passed the Prison Rape Elimination Act of 2003 ("PREA") to "provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape."[5] The House Report on the Act summarized the findings of the Congressional hearings:

> Insufficient research has been conducted and insufficient data reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.[6]

The Bureau of Justice Statistics has only begun the complicated process of fulfilling its statutory obligation to quantify sexual assaults in prison. The first report under the Prison Elimination Act of 2003 found that facilities holding 79% of all children and adults in the Unites States reported 2,922 allegations of sexual harassment or sexual misconduct in 2004.[7] That is a rate of 1.67 allegations per 1,000 people incarcerated per year.[8] Shocking as these numbers are, the report's authors caution that the statistics are not necessarily reliable, as they depend entirely on information reported by the very correctional facilitates under study. The true numbers are undoubtedly much higher.

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[4] D. J. Cotton & A. N. Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47, 48 (1982).

[5] Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003) (herein PREA).

[6] H.R. Rep. No. 108-219, at § 2(2) (2003).

[7] *See* Allen J. Beck & Timothy A. Hughes, *Sexual Violence Reported by Correctional Authorities, 2004*, BUREAU OF JUSTICE STATISTICS, 7 (2005).

[8] *See id*.

III. THE ENACTMENT AND EFFECT OF THE PRISON LITIGATION REFORM ACT

Congress enacted the PLRA in 1996, ostensibly intending to unclog the federal courts from frivolous prisoner litigation, but unwittingly erecting major road blocks to federal civil right actions for rape.[9] The law mandates that, "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."[10]

There is no reason to assume that Congress intended to prevent a woman raped by a prison guard from being remunerated for the violation of her Eighth Amendment right against cruel and unusual punishment.[11] "The U.S. Constitution's prohibition against cruel and unusual punishment is a clear indication that the founding fathers did not intend jails or prisons to be institutions where correctional officials could deliberately harm inmates through odious policies or specific abusive actions."[12] Unfortunately, because Congress did not define what constitutes a mental or emotional injury or a physical injury, some argue for an interpretation of the PLRA that prevents redress for prison rape victims. It is hard to imagine this particular result was intended or desired.

Statements by the PLRA's sponsors indicated a basic regard for rights of the incarcerated. Senator Spencer Abraham, one of the bill's sponsors, remarked:

> [C]onvicted criminals, while they must be accorded their constitutional rights, deserve to be punished. I think virtually everybody believes that while these people are in jail they should not be tortured, but they also should not have all the rights and privileges the rest of us enjoy, and that their lives should, on the whole, be describable by the old concept known as hard time.[13]

Senator Robert Dole stated that the purpose of the PLRA was to curtail frivolous suits that involved issues such as "insufficient 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 limited to these sorts of lawsuits.[14] It appears that no one considered the effect that the PLRA might have on rape cases, most likely because no one conceived of it possibly applying to rape cases.

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[9] As an advocate for human rights and the rule of justice and law, I believe the enactment of the PLRA was an assault on human dignity and the rule of law. This article focuses on only one aspect of that assault, but the PLRA provisions, from limiting access to in forma pauperis lawsuits (28 U.S.C. § 1915(b) (2004)), to limiting attorney fees (42 U.S.C. § 1997e(d) (2004)), to requiring exhaustion of inane grievance processes in all cases (42 U.S.C. § 1997e(a) (2004)), serve only to ensure prisoners can be mistreated and abused by guards and prison officials with impunity.

[10] 42 U.S.C. § 1997e(a) and (e) (2004).

[11] U.S. CONST. AMEND. VIII. The Constitution itself provides no mechanism for plaintiffs to enforce in court the rights it comprises. Plaintiffs must sue state actors under 42 U.S.C. § 1983 or federal actors under the theory delineated in *Bivens v. Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[12] Roger A. Hanson & Henry W.K. Daley, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION (U.S. Department of Justice 1994).

[13] 141 Cong. Rec. S14316 (1995) (remarks of Sen. Abraham.).

[14] *See, e.g.*, 142 Cong. Rec. S2292 (1996) (remarks of Sen. Graham).

Despite this history, rape victims must confront the PLRA and satisfy its dictates, and, because of the narrow statutory language, courts must ask what type of injury rape causes.

IV. STATE OF LAW UNDER THE PLRA

A. THE PHYSICAL INJURY REQUIREMENT GENERALLY

Before examining sexual assault case law specifically, it is helpful to understand the interpretation of the physical injury requirement in a non-rape context. One of the best expressions of the general rule is found in a case from the United States District Court for the Northern District of Texas: "would the injury require or not require a free world person to visit an emergency room, or have a doctor attend to, give an opinion, diagnosis and/or medical treatment for the injury? In effect, would only home treatment suffice?"[15]

Courts have dismissed cases involving inmates' nausea and vomiting, general bruising, bruised ribs, minor swelling, minor bleeding, abrasions and lacerations, skin fungus, dehydration, migraine headaches, increased blood pressure, aggravated hypertension, dizziness, insomnia, loss of appetite, burning eyes, shortness of breath, chest pain, mosquito bites resulting in fever, and the smell of cells smeared with feces rendering sleep impossible.

In cases where the symptom seems to be a physical manifestation of stress, courts are particularly reluctant to find a physical injury for PLRA purposes. As one court stated:

> The court notes [increased blood pressure, aggravated hypertension, dizziness, insomnia, and loss of appetite] are all symptoms typically associated with people suffering stress or mental distress. Prison itself is a stressful environment. If the symptoms alleged by [the plaintiff] were enough to satisfy the physical injury requirement … very few plaintiffs would be barred by the physical injury rule from seeking compensation on the claims for emotional distress. The court has no basis upon which to conclude that result was intended by Congress. The court finds that construing the allegations in the light most favorable to Plaintiff, the injuries alleged do not pass the de minimus test.[16]

The above approach is probably sensible in most cases, but its application to rape cases is problematic.

Very few courts have reached the direct questions of whether a rape, in and of itself, is a physical injury within the purview of the PLRA.[17] Only one circuit, the Second Circuit, has held that rape is inherently a physical injury. Most courts dodge

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[15] *Luong v. Hatt*, 979 F. Supp. 481, 486 (N.D. Tex. 1997). It is worth noting that nothing in this formulation states whether this reasonable person is insured or uninsured. This oversight may have class implications in future developments if courts expand upon this notion.

[16] *Todd v. Graves*, 217 F. Supp. 2d. 958, 960 (S.D. Iowa 2002).

[17] Rape is not the only area where courts are struggling with the definition of the PLRA's "physical injury" requirement. In *Clifton v. Eubank*, 418 F.Supp. 2d 1243 (2006), the court denied defendants' motion for summary judgment. At issue was alleged improper jail medical care which resulted Ms. Clifton having a stillbirth. The court held that delayed labor resulting in stillbirth was a PLRA physical injury and that it was unconstitutional for the PLRA to bar plaintiff's access to the only possible relief, damages. *Id*.

the issue by focusing on accompanying injuries, however minor. One court has gotten it wrong by implicitly ruling that rape is not a physical injury. The confusion evidenced by these decisions can only be solved by Congressional action.

B. SOME COURTS DECLARE RAPE A PHYSICAL INJURY, BUT PROVIDE NO USEFUL ANALYSIS

Some courts have held that rape is an inherent physical injury. Unfortunately, while setting good law, these cases have omitted any in-depth examination of the issues, limiting their usefulness as persuasive case law outside of their circuit.

The premiere example of this approach is *Liner v. Goord*.[18] Mr. Liner alleged, among other things, that prison guards had sexually assaulted him on three separate occasions.[19] The district court dismissed these claims for failure to allege a physical injury, but the Second Circuit, noting that the PLRA did not define a physical injury, reversed. [20] Its only explanation for its holding was that "the alleged sexual assaults qualify as physical injuries as a matter of common sense."[21]

One notable Second Circuit case has followed *Liner*, but it too lacks a satisfactory analysis.[22] In *Noguera v. Hasty*, a female inmate filed suit alleging that a male officer sexually assaulted her and then put her at further danger by spreading rumors that she was a snitch.[23] Defendants argued that the retaliatory rumor-spreading was not compensable, since there was no physical injury.[24] Citing *Liner*, the court held that the rape is a physical injury, and thus all the acts, considered together, were compensable.[25] The court justified its holding by noting that "[t]he potential for frivolous suits and feigned emotional injuries is greatly diminished in rape cases where the victim makes a showing of physical injury resulting from the rape itself."[26] This reasoning raises an important point. If Congress did not intend that the PLRA shut deserving plaintiffs out of court, then amending the PLRA to include rape makes sense and is faithful to the Act's original intent. Once rape is proven, it should follow that a suit is not frivolous.

Two district courts outside the Second Circuit adopt the reasoning of *Liner*. The first, *Nunn v. Michigan Department of Corrections*, denied defendants' motion to dismiss, holding, "that allegations of rape and sexual assault are latent with the notion of physical injury sufficiently to support Plaintiffs' claim and to survive a Rule 12(b)(6) motion."[27] The decision unfortunately provides no further analysis regarding the physical injury of rape.[28]

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[18] *Liner v. Goord*, 196 F.3d 132 (2d Cir. 1999).

[19] *Id*. at 133.

[20] *Id*. at 135.

[21] *Id*.

[22] *Noguera v. Hasty*, No. 99 Civ. 8786, 2001 U.S. Dist. LEXIS 2458 (S.D.N.Y. Mar. 12, 2001).

[23] *Id*. at *13. Being identified as a snitch inside the prison may have injurious and even fatal consequences for those so identified. *See* Jeffrey Ian Ross & Stephen C. Richards, BEHIND BARS: SURVIVING PRISON 23 (2002).

[24] *Noguera*, 2001 U.S. Dist. LEXIS 2458, at *14.

[25] *Id*.

[26] *Id*. at *15 (citation omitted).

[27] *Nunn v. Michigan Dept. of Corrections*, 1997 WL 33559323, at *4 (E.D.Mich. 1997).

[28] For another example of a case that bases its reasoning on *Liner* without any analysis, look to *Marrie v. Nickels*, 70 F. Supp. 2d 1252 (D. Kan. 1999). In that case the court was faced with a claim by two inmates involving separate incidents of sexual assault that fell short of rape. The court held that such allegations of "physical injury" were enough to survive a motion to dismiss. *Id*. at 1264.

These decisions provide limited persuasive authority for other courts, which might not share the same outlook or the same definition of "common sense." Other courts have taken a different tack.

C. SOME COURTS AVOID THE QUESTION BY FOCUSING ON ACCOMPANYING PHYSICAL INJURIES

A tempting alternative is to avoid the question of whether rape is a physical injury in and of itself by focusing on other, sometimes minor physical injuries that may be present after a rape. True, courts should refrain from deciding unnecessary questions, but these cases are different—courts are purposely avoiding the central question that needs to be addressed by exaggerating accompanying injuries that may actually be minor. With seemingly little regard for the insignificance of these injuries compared to the significance of the violation of the rape itself, some courts have latched onto minor injuries to get past the 42 U.S.C. § 1997e(e) requirements in male rape cases.

The Sixth Circuit, in a brief, unpublished decision, implicitly decided that a rape itself is not enough of a physical injury to overcome the PLRA requirement and looked to other injuries reportedly suffered by the inmate.[29] In *Styles v. McGinnis,* Mr. Styles, a prisoner in the Michigan state system, appealed the District Court's dismissal of his action alleging sexual assault during the course of a physical exam by an emergency room doctor after he was admitted for angina.[30] Mr. Styles complained that he received an unnecessary and nonconsensual rectal exam.[31] The trial court dismissed the case directly on the grounds that Mr. Styles did not allege a physical injury that would satisfy the requirements of 42 U.S.C. 1997e(e).[32]

The appellate court seemed concerned that an alleged "sexual assault" would not meet the requirements of the PLRA. The alleged assault was a digital rectal examination, assumed for the purpose of a motion to dismiss to be nonconsensual on the part of Mr. Styles.[33] This is not the typical conception of what constitutes sexual assault, and perhaps the court was therefore not as outraged. However, Mr. Styles did characterize this event as a sexual assault.[34] Rather than hold that unwanted penetration is a physical injury or conduct any analysis as to whether it should be so considered, the court skirted the issue by focusing on Mr. Styles' "increased blood pressure, chest pain, tachycardia, and numerous premature ventricular contractions."[35] In other words, the court focused on the relatively minor symptoms that Styles claimed to be a result of the "sexual assault" (rather than recognizing that these symptoms perhaps had resulted from the angina with which he was originally admitted to the emergency room) and concluded that these physical injuries allowed Mr. Styles to defeat a motion to dismiss.[36] It is not clear in the court's short decision how they distinguished the symptoms resulting from the sexual assault from the increased blood pressure and chest pain that accompanies angina.[37] Additionally, the court never discussed how tachycardia (i.e., rapid heart beats)

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[29] *Styles v. McGinnis*, 28 Fed. Appx. 362 (6th Cir. 2001).

[30] *Id*. at 363.

[31] *Id*. at 364.

[32] *Id*. at 363.

[33] *See id*. at 364-65.

[34] *Id*. at 363.

[35] *Id*. at 364.

[36] *See id*. at 364-65.

[37] *See* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 501 (Robert Berkow ed., 16th ed. 1992).

and premature ventricular contractions, both of which occur in healthy people under stress, are cognizable physical injuries distinguishable from stress,[38] which is generally understood as an emotional, rather than a physical, state.

Despite its somersaults of reasoning, the court must have been uncomfortable with its own analysis and mentions *Liner v. Goord*[39] for the proposition that rape is a physical injury in and of itself, but does not go so far as to rule on these grounds. Because of its unwillingness to face the central issue, the opinion focuses entirely on the symptoms of the presenting disease or stress.

Kemner v. Hemphill is another case concerning a male inmate who was sexually assaulted.[40] The District Court for the Northern District of Florida performed analytical gymnastics similar to the court in *Styles*: reaching a conclusion that accompanying minor physical injuries (mostly symptoms of stress) allow a suit to survive the PLRA's limiting language.[41] The facts are this: Mr. Kemner alleged he was left alone in the cell with another inmate who sexually assaulted him and forced him to perform oral sex.[42] Mr. Kemner alleged that he suffered "physical pain, cuts, scrapes, and bruises," in addition to vomiting after the other inmate ejaculated in his mouth.[43] Faced squarely with a challenge from the defendants that these injuries were not sufficient under 42 U.S.C. § 1997e(e),[44] the court had to address what would be a sufficient physical injury under the PLRA. As the court stated, "The courts are troubled, however, where offensive bodily intrusion or sexual touching is involved."[45] In dicta, the court discusses the nature of sexual assault and rape:

> There can be no question, therefore, that sexual battery is an extreme act of violence to human dignity, and that sexual battery involving penetration is "repugnant to the conscience of mankind."
>
> Sexual battery often involves more than a *de minimus* use of force. But where only fear and intimidation are used, it might appear that no physical force is present. But that is error. A sexual battery involves, at a minimum, the physically forceful activity of the assailant. Copulation requires movement… . This kind of physical force, even if considered to be *de minimus* from a purely physical perspective, is plainly "repugnant to the conscience of mankind." Surely Congress intended the concept of "physical injury" in § 1997e(e) to cover such a repugnant use of physical force.[46]

In the end, though, the court was unwilling to hold that sexual assault was a *per se* physical injury. Resting on the plaintiff's claims of cuts, bruises, abrasions, shock, and

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[38] *See id*. at 488; STEDMAN'S MEDICAL DICTIONARY 1550 (25th ed. 1990).

[39] *See Liner v. Goord*, 196 F.3d 132 (2nd Cir. 1999).

[40] 199 F.Supp. 2d 1264 (N.D. Fla. 2002).

[41] *See id*.

[42] *Id*. at 1266. Because this assault appeared to have arisen from the purposeful ignorance of the correctional staff, Mr. Kemner was able to overcome the additional constitutional difficulties present in inmate on inmate rape cases. *See supra* Part IVA.

[43] *Kemner*, 199 F.Supp. 2d at 1266.

[44] *See id*.

[45] *Id*. at 1269.

[46] *Id*. at 1270.

vomiting, the court found that the plaintiff had suffered a physical injury.[47] This was despite the fact that bumps and bruises are often considered too mundane in other contexts to overcome the barrier of 42 U.S.C. § 1997e(e), and shock and vomiting are often considered signs of stress, not physical injuries.

Neither of the analyses in the above two cases is satisfying. First, they both avoid the central question: whether a rape itself is a physical injury. Second, they both avoid the question by focusing on injuries that in other contexts are not considered even remotely serious enough to defeat the requirements of 42 U.S.C. § 1997e(e).[48]

D. UNFORTUNATELY, AT LEAST ONE COURT HAS HELD THAT RAPE IS NOT AN INJURY

The lack of focus on the exact injury of rape is dangerous. While attempting to be true to the language of the PLRA, the above courts have left open the possibility of courts using "common sense" to reach opposite results. One such example comes out of a Fifth Circuit district court. In deciding a motion for summary judgment, the District Court for the Southern District of Mississippi held that the plaintiffs' allegations that the defendant "sexually battered them by sodomy, and committed other related assaults" were insufficient to satisfy the PLRA's physical injury requirement.[49] Displaying a disturbing application of "common sense," the court held, with no further analysis, that the victim needed to do more than "make a claim of physical injury beyond the bare allegation of sexual assault," to meet the requirements of 42 USC § 1997e(e).[50]

V. COURTS MUST BE CLEAR THAT RAPE IS PHYSICAL INJURY BY DEFINITION

By squarely confronting whether rape is in and of itself a physical injury, courts can avoid repetition of this sort of holding. In support of holdings that rule that rape is physical injury is the fact that, since the beginning of recorded law, rape has been considered a heinous crime. Rape has been classified as an offense worthy of the death penalty. It violates the boundaries of the physical body and intrudes into the sanctity of the sexual conception of the self.

Rape is simply not equivalent to receiving chunky peanut butter or bad hair cuts, examples of subjects of frivolous complaints cited by the PLRA's proponents. Rape is so heinous and injurious that it falls into that category that "virtually everybody believes" [51] is too torturous to force upon any convicted criminal. Rape is much more than an "emotional injury."[52] "Prison rape, like all other forms of sexual assault, is torture."[53] Rape, therefore, must be a compensable injury within the meaning of 42 U.S.C. § 1997e(e).

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[47] *Id*. at 1271.

[48] It is interesting to note that the only case holding that nausea is a qualifying physical injury is one where the nausea was caused by a man having to taste ejaculate.

[49] *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (D. Miss. Jan. 4, 2006).

[50] *Id*. at *10.

[51] 141 Cong. Rec. S14316 (1995) (remarks of Sen. Abraham).

[52] 42 U.S.C. § 1997e(e) (2004).

[53] *The Prison Rape Reduction Act of 2002*: *Hearing on S. 2619 Before the Sen. Judiciary Comm*., 107th Cong. (2002) (statement of Hon. Frank R. Wolf (R-VA)).

V. CONGRESS MUST ACT TO ENSURE THAT PRISON RAPE IS COVERED

While I believe that that rape must be considered a physical injury within the contours of the PLRA, as indicated by court holdings to date, it is not a foregone conclusion. To avoid future confusion and to clarify that custodial rape is a compensable Eighth Amendment harm, Congress should act.[54] If addressing the incidence of rape in custody is hindered by an unintended consequence of the PLRA, Congress must either accept the PLRA's formulation with the understanding that some courts may leave rapes unaddressed or amend the PLRA to remove the confusion.

Congress must either repeal the PLRA in its entirety; repeal the physical injury requirement of 42 U.S.C. § 1997e(e); or amend the PLRA to clarify that rape is a compensable injury, either as a physical injury or in its own right. The last option seems to have the least political downside and would do a great deal to address what Congress knows to be a great problem.

A. CONGRESS HAS ALREADY ESTABLISHED THAT RAPE IN PRISON IS A LARGE PROBLEM, AND IT SHOULD BE ADDRESSED

As discussed above, Congress recently passed the Prison Rape Elimination Act of 2003. The testimony presented at both Senate and House hearings and the official findings demonstrate that, at a minimum, Congress understands that rape in custody is a large problem. Congress has already recognized that custodial rape "involves actual and potential violations of the United States Constitution."[55] As part of our civilized society, Congress has also recognized that we must have "a zero-tolerance standard for the incidence of prison rape in prisons in the United States."[56]

B. AMENDING THE PLRA WILL REDUCE SPURIOUS CLAIMS OF QUALIFIED IMMUNITY

Another important consequence of amending the PLRA to explicitly include rape would be to reduce the potential for rapists to raise a qualified immunity defense. Qualified immunity is a doctrine that protects government agents from liability unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known;"[57] or it was not objectively reasonable for the defendant to believe that a right was not being violated.[58] To prevent a successful qualified immunity defense, plaintiffs are required to demonstrate that the specific law protecting their rights has been or is currently well-settled. Thus, given the possible ambiguities of the PLRA's physical injury requirement, Congress should clarify that rape is a physical injury.

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[54] Alternatively, the U.S. Supreme Court could definitively issue a decision that rape falls within the PLRA definition of "physical injury." The Court only has the opportunity to announce rulings in the less than 100 cases per year it hears, and real cases generally tend to have several legal issues presented, rather than one clear issue that forms the crux of the case. Rather than waiting for all the right circumstances to fall into place for a Supreme Court pronouncement, and letting countless victims suffer in the meantime, Congress should act now.

[55] PREA § 2(13).

[56] *Id*. at § 3(1).

[57] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[58] *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987).

While attempts to claim qualified immunity are generally unsuccessful in the rape context, government prison employees and agents assert it in every conceivable situation. The defense has been raised unsuccessfully by defendants asserting various excuses, such as that they did not know sexual assault was prohibited,[59] or that sexual contact was consensual,[60] that they were not guards but agents of the prison,[61] that they were only a lookout for the rapist,[62] that they were only supervisors,[63] and that the plaintiff was transgendered.[64]

Many conclusions could be drawn from this array of examples, but it is clear that custodial rapists will always assert that they did not realize that rape was a basic violation of a person's constitutional rights. Congressional action will thwart those arguments and free the judicial resources that are being wasted hearing them.

C. CONGRESS HAS CLARIFIED OTHER RAPE STATUTES IN SIMILAR CIRCUMSTANCES

In 1996, the First Circuit held that for purposes of sentencing enhancement, rape was not a "serious bodily injury" with in the meaning of the federal anti-carjacking statute.[65] Congress acted swiftly by passing the Carjacking Correction Act clarifying that rape was a serious bodily injury.[66] Upon signing the bill, President Clinton issued a statement calling the court decision "plain wrong," and stating that "[s]exual assault causes serious bodily injury."[67] Rape victims in prison deserve no less from Congress than any other rape victims, especially given the fact that they are being held in the care of the State, with little ability to protect themselves.

VI. CONCLUSION

The PLRA unfortunately erected an unintended major hurdle for prison rape victims to overcome before receiving compensation for this violation. The "physical injury" barrier forces victims to prove that rape was in and of itself a physical harm, rather than having that reality established within the statute's definition.

In the few cases that have arisen since the PLRA's enactment, courts have taken one of two approaches. They have either declared rape a physical injury without useful analysis or have focused on injuries that in other contexts would most certainly be ruled too minor to qualify as "physical injuries" in other contexts.

Most observers would consider this unjust. Rape may be different from other types of assaults, but it has long been recognized as among the most severe. It should be grounds for a constitutional suit for damages when it is perpetrated by a prison official against a prisoner.

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[59] *Williams v. Prudden*, 67 Fed. Appx. 976, 978 (8th Cir. 2003). *See also Mathie v. Fries*, 935 F. Supp. 1284, 1301 (E.D.N.Y. 1996) ("The Court finds that any reasonable prison Director of Security knew that to try to force unwanted and prohibited sexual acts on a powerless inmate is objectively unreasonable and in violation of the inmate's rights.").

[60] *Smith v. Cochran*, 216 F. Supp. 2d 1286, 1295 (N.D. Okla. 2001), *aff'd*, 339 F.3d 1205 (10th Cir. 2003).

[61] *Id*. at 1296.

[62] *DeFoor v. Rotella*, No. 99-1202, 2000 U.S. App. LEXIS 5028, at *10-11 (10th Cir. Mar. 24, 2000).

[63] *Morris v. Eversley*, 205 F. Supp. 2d 234, 242-43 (S.D.N.Y. 2002); *Noguera v. Hasty*, 99 Civ. 8786, 2000 U.S. Dist. LEXIS 11956, at *62 (S.D.N.Y. Jul. 21, 2000).

[64] *Schwenk v. Hartford,* 204 F.3d 1187, 1198 (9th Cir. 2000).

[65] *United States v. Rivera*, 83 F. 3d 542, 548 (1st Cir. 1996).

[66] Pub. L. 104-217 (1996).

[67] President on Signing the Carjacking Correction Act of 1996, 1996 WL 556455 (Oct. 2, 1996).

Congress needs to act in order to ensure that prison sexual assault that amounts to rape is in fact grounds for a suit. Failure to do so undermines the appearance of the strong commitment to ending custodial sexual assault that Congress made in passing the PREA. It also leaves federal judges without necessary guidance and leaves a gap in the basic net of human rights protections that our nation should provide to everyone.

The simplest way for Congress to fix this problem is to add five words to 42 U.S.C. § 1997e(e). The law would then read:

> 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 sexual assault or abuse.**

That simple addition would make clear that while rape is qualitatively different from other assaults, it is actionable. This change would allow plaintiffs to sue when they are raped by those charged with their orderly safekeeping. A simple amendment would make sure that those who would sexually assault other human beings held in the State's care are not unwittingly protected by law.