

A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act

Hannah Belitz*

ABSTRACT

The Prison Litigation Reform Act, codified at 42 U.S.C. § 1997e, greatly curtails the ability of inmates to file suit in federal court. It imposes numerous obstacles to litigation, including a requirement in § 1997e(e) that an inmate may only file suit “for mental or emotional injury” if he or she can demonstrate the existence of a “physical injury” or “commission of a sexual act.” The statute differentiates a “sexual act” from “sexual conduct,” narrowly defining the former, and does not permit an inmate to file suit “for mental or emotional injury” if he or she has suffered sexual conduct alone. However, to avoid finding that the provision unconstitutionally bars access to the federal courts, no circuit has interpreted § 1997e(e) to prohibit inmates who have not demonstrated a “physical injury” or “sexual act” from filing suit. Instead, many circuits have held only that an inmate may not recover compensatory damages in such instances. This note argues that courts can and should interpret § 1997e(e) to allow inmates to file claims and recover compensatory damages for sexual abuse, as it is defined in 28 C.F.R. § 115.6 (2012), which includes actions that do not meet the statutory definition of a “sexual act.” When confronted with prisoner sexual abuse claims, courts can and should do one of the following: either construe § 1997e(e)’s “physical injury” requirement to encompass sexual abuse, or interpret § 1997e(e)’s limitation as not applying to constitutional violations, including sexual abuse.

INTRODUCTION

“Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most ‘fundamental political right, because preservative of all rights.’”
— *McCarthy v. Madigan*¹

In 1996, Congress passed the Prison Litigation Reform Act (“PLRA”). At the time, news media had documented the perceived excess of frivolous prisoner lawsuits.² The PLRA was designed to put an end to such suits.³ It

* J.D., Harvard Law School, 2017; B.A., Stanford University, 2013. The author would like to thank Professor Martha Minow for her guidance and feedback on this piece, as well as the editors of the *Harvard Civil Rights-Civil Liberties Law Review*.

¹ *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

² See Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort To Limit Filings*, N.Y. TIMES, Mar. 21, 1994, <http://www.nytimes.com/1994/03/21/nyregion/flood-of-prisoner-rights-suits-brings-effort-to-limit-filings.html?pagewanted=all> [<http://perma.cc/S5AJ-HJ7G>] (describing various frivolous prisoner lawsuits, including suits filed over melted ice cream and the type of peanut butter sold at the prison canteen).

applies to all cases brought by prisoners regarding prison conditions,⁴ and imposes a number of obstacles to filing suit, including a requirement of exhaustion,⁵ limitations on attorney fees,⁶ and an increase in filing fees for civil actions or appeals.⁷ The PLRA also mandates that a prisoner must have suffered a “physical injury” or “sexual act” before he or she may file suit “for mental or emotional injury.”⁸

The original version of § 1997e(e) of the PLRA did not include the term “sexual act”; instead, the PLRA provided only that a prisoner could not bring a federal civil action for mental or emotional injuries suffered while in custody without a prior showing of “physical injury.”⁹ The circuits split with respect to whether rape and/or sexual abuse¹⁰ constituted a “physical injury”

³ In introducing the bill, Senator Orrin Hatch made clear that the PLRA was intended to curb frivolous litigation:

This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation. . . . It is time to stop this ridiculous waste of the taxpayers’ money. The huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against law-abiding citizens.

141 CONG. REC. 26,553 (1995) (statement of Sen. Hatch).

⁴ 42 U.S.C. § 1997e(h) (2015) (defining “prisoner” as “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program”).

⁵ 42 U.S.C. § 1997e(a) (2015) (requiring prisoners to exhaust all administrative remedies before filing an action in federal court).

⁶ 42 U.S.C. § 1997e(d) (2015).

⁷ 28 U.S.C. § 1915(b) (2015) (excluding prisoners from the ordinary *in forma pauperis* ability to file civil suit without payment of fees).

⁸ 42 U.S.C. § 1997e(e) (2015) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).”).

⁹ 42 U.S.C. § 1997e(e) (2015)

¹⁰ In this note, I use “sexual abuse” in accordance with 28 C.F.R. § 115.6 (2012), which provides “[d]efinitions related to sexual abuse” under the Prison Rape Elimination Act. 28 C.F.R. § 115.6 defines “sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer” as including any of the following acts:

- (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;
- (3) Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (6) Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in paragraphs (1) through (5) of this definition;

under the Act.¹¹ As a result, many legal scholars and practitioners argued for reform of the PLRA to explicitly include rape and/or sexual abuse as a physical injury.¹² In *Preserving the Rule of Law*, for example, Margo Schlanger and Giovanna Shay observed that the PLRA had left open the question of whether prisoners could receive compensatory damages “for the constitutional violation of coerced sex,”¹³ and as a result, some courts had held that sexual assault does not constitute a “physical injury” under the PLRA.¹⁴ Schlanger and Shay argued that these decisions contradicted Congress’s efforts to eradicate sexual assault in prison by passing the Prison Rape Elimination Act (“PREA”) in 2003, which established a “zero-tolerance” for prison rape.¹⁵ They also posited that the PLRA’s ambiguity regarding compensation for “non-physical” constitutional injuries, and the court decisions it engendered, contradicted constitutional commitments and “undermined the important norm[] that such infringements of prisoners’ rights are unacceptable.”¹⁶ The authors concluded their article by calling on Congress to amend the PLRA so as to permit prisoners with constitutionally meritorious cases to file suit and recover compensatory damages.¹⁷

Deborah M. Golden made a similar argument, both in *The Prison Litigation Reform Act – A Proposal For Closing the Loophole for Rapists* and *It’s Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*.¹⁸ Golden noted that § 1997e(e) of the PLRA could prevent rape victims

(7) Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, and

(8) Voyeurism by a staff member, contractor, or volunteer.

28 C.F.R. § 115.6 (2012).

¹¹ See, e.g., *Styles v. McGinnis*, 28 F. App’x 362, 364 (6th Cir. 2001) (finding that the victim of an alleged involuntary rectal exam had suffered a “physical injury,” but basing the finding of injury on symptoms resulting from the alleged assault, such as increased blood pressure and chest pain, and not the assault itself); *Smith v. Shady*, No. 3:CV-05-2663, 2006 WL 314514, at *2 (M.D. Pa. Feb. 9, 2006) (“Plaintiff’s allegations in the complaint concerning Officer Shady grabbing his penis and holding it in her hand do not constitute a physical injury or mental symptoms.”); *Hancock v. Payne*, No. Civ.A.1:03-CV-671-JMR-JMR, 2006 WL 21751, at *1–3 (S.D. Miss. Jan 4, 2006) (holding that not even battery by sodomy constituted a “physical injury” under the PLRA). But see *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (holding that sexual abuse constitutes physical injury within the meaning of the PLRA).

¹² See, e.g., Deborah M. Golden, *It’s Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN’S L. J. 37 (2004) [hereinafter Golden, *It’s Not All in My Head*]; 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 (2008); Deborah M. Golden, *The Prison Litigation Reform Act – A Proposal For Closing the Loophole for Rapists*, AM. CONST. SOC’Y ISSUE BRIEF 1 (2006), https://www.acslaw.org/sites/default/files/Golden_-_Rape_and_PLRA.pdf [https://perma.cc/UAY9-6SDH] [hereinafter Golden, *A Proposal For Closing the Loophole for Rapists*].

¹³ See Schlanger & Shay, *supra* note 12, at 146.

¹⁴ See *id.* at 144–45.

¹⁵ *Id.* at 145.

¹⁶ *Id.* at 146.

¹⁷ See *id.* at 154.

¹⁸ See Golden, *It’s Not All in My Head*, *supra* note 12, at 38–39; Golden, *A Proposal For Closing the Loophole for Rapists*, *supra* note 12, at 1–2.

from filing suit against their assailants,¹⁹ and called on Congress to “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.”²⁰ As Golden put it, “the easiest way for Congress to fix this problem is to add four words to 42 U.S.C. § 1997e(e),” so that the law would 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, *sexual assault or abuse*.²¹

Nine years after Golden published her article, Congress would amend § 1997e(e), but would not go as far as Golden and others had proposed.

In February 2013, as part of the expansion of the Violence Against Women Act (“VAWA”), Congress added the phrase “commission of a sexual act” to § 1997e(e).²² The PLRA now mandates:

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).²³

As such, a currently detained prisoner²⁴ must demonstrate a threshold showing of a “physical injury” or the “commission of a sexual act” before he or she may file suit for mental or emotional injury. Although the addition of “sexual act” arguably broadens the category of abuse that is compensable, 18 U.S.C. § 2246 defines “sexual act” narrowly, covering only:

- a. Contact between the penis and the vulva and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight.

¹⁹ Golden, *A Proposal For Closing the Loophole for Rapists*, *supra* note 12, at 3.

²⁰ Golden, *It’s Not All in My Head*, *supra* note 12, at 60.

²¹ *Id.*

²² See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1101, 127 Stat. 54 (Sexual Abuse in Custodial Settings) (2013).

²³ 42 U.S.C. § 1997e(e) (2015).

²⁴ The overwhelming majority of court decisions have held that the PLRA does not apply to suits filed after a prisoner is released, even if the suit concerns events that took place in prison. *See, e.g.*, Norton v. City Of Marietta, 432 F.3d 1145, 1150 (10th Cir. 2005); Ahmed v. Dragovich, 297 F.3d 201, 210 n.10 (3d Cir. 2002) (citing cases); Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999). A few decisions have held that § 1997e(e) does apply to cases filed by released prisoners. *See* Lipton v. County of Orange, NY, 315 F. Supp. 2d 434, 456-57 (S.D.N.Y. 2004); Cox v. Malone, 199 F. Supp. 2d 135, 140 (S.D.N.Y. 2002), *aff’d*, 56 F. App’x 43 (2d Cir. 2003). But most circuits have held that § 1997e(e) does not apply to cases filed after release from prison. *See, e.g.*, Harris v. Garner, 216 F.3d 970, 976-80 (11th Cir. 2000) (en banc); Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (“The statutory language does not leave wriggle room; a convict out on parole is not a ‘person incarcerated or detained in any facility who is . . . adjudicated delinquent for, violations of . . . the terms and conditions of parole.’”).

- 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, degrade, or arouse or gratify the sexual desire of any person.
- 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.²⁵

For individuals over the age of 16, then, the term “sexual act” includes “essentially only genital, oral, anal or digital intercourse.”²⁶ Thus, although the addition of “sexual act” makes clear that certain types of sexual abuse are compensable, the statute still falls short of providing prisoners with sufficient recourse for all sexual abuse. Specifically, the PLRA seems to preclude those over the age of 16 who have suffered harm because of “sexual conduct”—defined elsewhere in the statute as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person”²⁷—from filing suit under the PLRA to gain compensatory damages for mental and emotional injuries.

This article argues that federal courts can and should construe § 1997e(e) to allow prisoners and pre-trial detainees to bring claims, and recover compensatory damages, for sexual abuse, including those actions that do not meet the narrow statutory definition of a “sexual act.” While extensive literature has been written on the PLRA,²⁸ little has been written on the impact of the PLRA following the 2013 amendment. This article endeavors to fill that gap. Some legal scholars have assumed that the 2013 amendment “closed the loophole” previously created by § 1997e(e): for those circuits that interpreted sexual abuse to be a “non-physical injury,” the original PLRA barred sexual abuse victims from filing suit.²⁹ However, by

²⁵ 18 U.S.C. § 2246(2)(a-d) (2016). Although this age restriction raises concern, it is highly unlikely that courts would be willing to entertain an age-based challenge to the statute. *See, e.g.,* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83 (2000) (“[A]ge is not a suspect classification under the Equal Protection Clause.”).

²⁶ United States v. Crowley, 318 F.3d 401, 406 (2d Cir. 2003).

²⁷ 18 U.S.C. § 2246(3) (2016).

²⁸ *See, e.g.,* Schlanger & Shay, *supra* note 12, at 146; Golden, *It’s All Not in My Head*, *supra* note 12, at 60; Golden, *A Proposal for Closing the Loophole for Rapists*, *supra* note 12, at 3.

²⁹ *See, e.g.,* Michele C. Nielsen, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons*, 64 UCLA L. REV. 230, 247 (2017) (“The Prison Litigation Reform Act (PLRA) required physical injury before a claim for emotional or mental violation could be heard. This created a loophole for some sexual abuse cases An amendment to the Violence Against Women Act (VAWA), however, eventually closed this loophole, barring

narrowly defining “sexual act,” the amendment has arguably created a new loophole: courts can still construe the revised PLRA to bar many sexual abuse victims from filing suit. This article confronts that problem.

Part I provides an overview of sexual abuse in prison and then addresses § 1997e(e) of the PLRA. Part II focuses on the “physical injury” requirement of § 1997e(e) and argues that even after the addition of the phrase “sexual act” to this section of the statute, courts can and should construe the “physical injury” prong of § 1997e(e) to encompass sexual abuse. Part III details how, in addition to being a “physical injury,” sexual abuse rises to the level of a constitutional violation under the Fourth, Eighth, and Fourteenth Amendments. Part IV provides an overview of the circuit split over whether § 1997e(e) applies to constitutional violations, and Part V contends that § 1997e(e) should not apply to constitutional violations, thereby allowing prisoners who have suffered sexual abuse to seek compensatory damages. Part VI analyzes the PLRA in light of the Prison Rape Elimination Act (“PREA”), and explains that construing § 1997e(e) to allow suits for sexual abuse has the added benefit of aligning with the intent and plain language of the PREA. The article concludes by calling on courts to allow prisoners’ claims for sexual abuse to proceed.

I. SEXUAL ABUSE IN PRISON: A BRIEF OVERVIEW

Sexual abuse in prison is an epidemic. The most recent Bureau of Justice Statistics (“BJS”) data, released in May 2013, indicate that between 2011 and 2012, 4% of prison inmates (57,900 people) and 3.2% of jail inmates (22,700 people) reported experiencing one or more incidents of sexual abuse.³⁰ In roughly half of these cases, prison and jail staff members were the perpetrators.³¹ These numbers alone give cause for concern, but they may

courts from defining sexual violence as less than physical injury by explicitly listing sexual acts as injury.”).

³⁰ ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 9 (2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [https://perma.cc/6XEX-JDER]. Although definitions may vary by state, prisons are generally longer-term facilities operated by either state government or the Federal Bureau of Prisons, while jails are locally operated short-term facilities. *See FAQ Detail*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=qa&iid=322> (last visited Oct. 19, 2017) [https://perma.cc/D4HW-9R9P]. This Note uses the term prison to refer to all of the above, and uses the term prisoner to include individuals held in prisons, jails, and pre-trial detention centers.

³¹ RAMONA R. RANTALA ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF SEXUAL VIOLENCE IN ADULT CORRECTIONAL FACILITIES, 2009–11 - STATISTICAL TABLES 1 (2014), <https://www.bjs.gov/content/pub/pdf/ssvacf0911st.pdf> [https://perma.cc/JZ9G-68QR]. Although inmates can file Eighth Amendment “failure-to-protect” claims against the state for inmate-on-inmate abuse, proving liability in such cases is extremely difficult. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding that prison officials may be held liable under the Eighth Amendment for “failure-to-protect” claims only if they knew that the inmate faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to end it). This Note focuses primarily on recourse for prisoners who have been the victims of sexual abuse by staff perpetrators.

fail to capture the full extent of sexual abuse in prison: it is likely that a large number of inmates who have been sexually abused in prison never report it.³² When the Department of Justice has directly surveyed inmates, as opposed to surveying the administrators that oversee them, the prevalence of reported abuse has been far greater.³³ The 2013 BJS report, for example, estimated that over 80,000 prisoners had been sexually victimized over a two-year period,³⁴ a number roughly five times the rate reported by administrators.³⁵ Even if these incidents are underreported, a comparison of the sexual abuse rates of prisoners and free persons underscores the severity of the problem. The 2013 National Crime Victimization Survey, also conducted by the BJS, found that the rate of rape and sexual abuse among free persons was 1.1 per 1000 persons.³⁶ In other words, a prisoner's likelihood of becoming a victim of sexual abuse is roughly thirty times higher than that of a person on the outside.

Policymakers, advocates, and scholars have debated the definition of consent in a non-custodial context,³⁷ but in the custodial context, consent between correctional staff and inmates "is a legal impossibility."³⁸ The federal government, the District of Columbia, and all fifty states now criminalize sexual contact between correctional staff and prisoners.³⁹ The criminalization of sexual contact between staff and prisoners reflects the conviction that "the power imbalance between guard and guarded renders true consent impossible."⁴⁰ Because staff members have the power to impose punishments that affect everything from the length of inmates'

³² See D. J. Cotton & A. N. Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47, 48 (1982) ("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."); David Kaiser & Lovisa Stannow, *Prison Rape and the Government*, N.Y. REV. BOOKS, March 24, 2011, <http://www.nybooks.com/articles/2011/03/24/prison-rape-and-government/#fnr-1> [<https://perma.cc/A4EN-7PAF>].

³³ See Joaquin Sapien, *Guards May Be Responsible for Half of Prison Sexual Assaults*, PROPUBLICA, Jan. 23, 2014, <https://www.propublica.org/article/guards-may-be-responsible-for-half-of-prison-sexual-assaults> [<https://perma.cc/2RWB-PWS5>].

³⁴ Beck, *supra* note 30, at 8.

³⁵ Sapien, *supra* note 33, at 2.

³⁶ JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2013 2 (2014), <https://www.bjs.gov/content/pub/pdf/cv13.pdf> [<https://perma.cc/84H8-R6XT>].

³⁷ See, e.g., Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L. J. 1372 (2013); Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L. J. F. 335 (2013).

³⁸ Golden, *It's Not All in My Head*, *supra* note 12, at 48.

³⁹ See Golden, *A Proposal For Closing the Loophole for Rapists*, *supra* note 12, at 1.

⁴⁰ See Golden, *It's Not All in My Head*, *supra* note 12, at 40; see also Falk, *supra* note 37, at 101–05; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 8–9 (1996).

sentences to their conditions of confinement, inmates may feel unable to say no to sexual advances.⁴¹

Nonetheless, staff perpetrators rarely face prosecution.⁴² Between 2009 and 2011, fewer than half of prison staff members shown to be involved in sexual misconduct were referred for prosecution,⁴³ and only 1% of those perpetrators were ultimately convicted.⁴⁴ Approximately one-third of staff members found to be abusing prisoners were permitted to resign before the investigation concluded, “meaning there [is] no public record of what exactly transpired and nothing preventing them from getting a similar job at another facility.”⁴⁵ This lack of punishment may deter inmates from reporting abuse.⁴⁶

The PLRA exacerbates the problem, as it closes the door to civil remedies. Most prisoner litigation is made possible through 42 U.S.C. § 1983,⁴⁷ which allows anyone who has suffered a violation of a federal right by a state actor to file suit against that actor.⁴⁸ In the context of prisoner suits, however, the PLRA greatly curtails the scope of § 1983.⁴⁹ Although § 1997e(e) reads as a jurisdictional bar to suit, courts have interpreted it as a

⁴¹ See Kaiser & Stannow, *supra* note 32, at 2 (“Since staff can inflict punishments including behavioral reports that may extend the time people serve, solitary confinement, loss of even the most basic privileges such as showering, and (legally or not) violence, it is often impossible for inmates to say no.”); see also Golden, *It’s Not All in My Head*, *supra* note 12, at 39.

⁴² See generally Sapient, *supra* note 33.

⁴³ Incidents of sexual abuse are often handled from entirely within the department of corrections or the prison itself, as opposed to being reported to the police and referred to the appropriate legal department for prosecution. See, e.g., HUMAN RIGHTS WATCH, *supra* note 40, at 9.

⁴⁴ Sapient, *supra* note 33.

⁴⁵ *Id.*

⁴⁶ See *id.* (quoting Professor Shayo Buchanan (“Inmates don’t report because of the way the institution handles these complaints: they’re afraid if they do report, then the staff will retaliate . . . Even if you report and they believe you, which they probably won’t, the most likely thing to happen is that the person will be suspended or maybe fired.” (internal quotation marks omitted))).

⁴⁷ See, e.g., William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 610 (1979) (“Prisoners, like other people, may sue state and local officials under 42 U.S.C. § 1983, to redress the deprivation of federal constitutional rights.”).

⁴⁸ § 1983 provides: “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. . . .” 42 U.S.C. § 1983 (2015).

⁴⁹ See 42 U.S.C. § 1997e(a) (2015) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”); 42 U.S.C. § 1997e(c) (2015) (authorizing courts to dismiss prisoner § 1983 suits “if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief”); 42 U.S.C. § 1997e(d) (2015) (restricting the attorney’s fees available to inmate § 1983 litigants).

limitation on recovery.⁵⁰ This is because applying the language of § 1997e(e) literally would likely render the statute unconstitutional.⁵¹ In the context of prison sexual abuse, victims may have cognizable Fourth, Eighth, and/or Fourteenth Amendment claims. Prohibiting them from filing suit would raise serious constitutional questions. As the Seventh Circuit has noted, “there is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights.”⁵² Such a limitation would “render those rights empty promises without meaningful value.”⁵³ To avoid this difficulty, courts have looked to the subsection’s title, “Limitation on recovery,” to find that § 1997e(e) limits the types of recovery available, not the types of claims that prisoners may pursue.⁵⁴

As a result, courts have held that prisoners who have not suffered a “physical injury” or “sexual act” may still file suit, but only for injunctive or declaratory relief. Similarly, in the context of constitutional claims, courts have held that prisoners may recover only nominal or punitive damages.⁵⁵ The Seventh Circuit has explained the rationale for this position: compensatory damages are awarded “for” an injury, which, according to § 1997e(e), may not be solely mental or emotional.⁵⁶ Thus, without a “physical injury” or “sexual act,” there is nothing to compensate. However, “[b]ecause punitive damages are designed to punish and deter wrongdoers for deprivations of constitutional rights they are not compensation ‘for’ emotional and mental injury.”⁵⁷ Similarly, nominal damages “are not compensation for loss or injury, but rather recognition of a violation of rights.”⁵⁸ As a result, prisoners may still recover nominal and/or punitive damages based on “sexual con-

⁵⁰ See, e.g., *Logan v. Hall*, 604 F. App’x 838, 840 (11th Cir. 2015) (“Section 1997e(e) is an affirmative defense—not a jurisdictional limitation.”); *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (“[A] physical injury is merely a predicate for an award of damages for mental or emotional injury, not a filing prerequisite for the federal civil action itself.”); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (explaining that all circuits that have addressed the issue have held that § 1997e(e) “does not prevent a prisoner from obtaining injunctive or declaratory relief” and further noting that “any ambiguity in the statutory language is cured by its section heading, ‘Limitation on recovery.’”); see also Corbett H. Williams, *Evisceration of the First Amendment: The Prison Litigation Reform Act and Interpretation of 42 U.S.C. § 1997e(e) in Prisoner First Amendment Claims*, 39 LOY. L. A. L. REV. 859, 866–67 (2006) (explaining that no court has applied language of § 1997e(e) literally).

⁵¹ See *Zehner v. Trigg*, 133 F.3d 459, 461 (7th Cir. 1997) (“Congress may not effectively nullify the rights guaranteed by the Constitution by prohibiting all remedies for the violation of those rights.” (internal citations omitted)).

⁵² *Id.* at 462.

⁵³ Williams, *supra* note 50, at 867.

⁵⁴ *Id.*

⁵⁵ See discussion *infra* pp. 36–37. Only the Eleventh Circuit has precluded the availability of punitive damages for constitutional violations. See *Logan*, 604 F. App’x at 840 (“We have held that . . . § 1997e(e) foreclosed claims for both compensatory and punitive damages . . . Nominal damages, however, are not precluded by § 1997e(e).” (internal citations omitted)).

⁵⁶ *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003).

⁵⁷ *Id.* at 942.

⁵⁸ *Id.* at 941 (internal citations omitted).

duct” if that conduct violated a constitutional right.⁵⁹ The primary question of this article thus centers on whether, and when, prisoners may recover *compensatory* damages for “sexual conduct” that falls outside the statutory definition of a “sexual act.” This article argues that compensatory damages should be available for any sexual abuse that violates a constitutional right. The availability of compensatory damages is critical because compensatory damages often provide the most effective, if not the only, means of vindicating and protecting constitutional rights.⁶⁰

II. THE EVOLUTION OF “PHYSICAL INJURY” AND ITS RELATIONSHIP TO SEXUAL ABUSE

Section 1997e(e) is not a paragon of clarity. As one legal scholar has put it, § 1997e(e) “may well present the highest concentration of poor drafting in the smallest number of words in the entire United States Code.”⁶¹ The statute itself does not define “physical injury,” and “no provision of the PLRA has created more confusion”⁶² than § 1997e(e). Courts have generally held that the threshold showing of a “physical injury” must be more than *de minimis*,⁶³ but circuits are split with respect to what “*de minimis*” entails, even outside the context of sexual abuse.⁶⁴

A. Defining “Physical Injury” Before the 2013 Amendment

After the initial passage of the PLRA in 1997, federal courts had to interpret the meaning of “physical injury.” Although every circuit analogized to Eighth Amendment standards to determine what constitutes “physi-

⁵⁹ See *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (“Section 1997e(e) does not limit the availability of nominal damages for the violation of a constitutional right or of punitive damages.”).

⁶⁰ See, e.g., *Butz v. Economou*, 438 U.S. 478, 506 (1978) (“In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.”); *Doe v. District of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir. 1983) (“While, as the Court has indicated, it is improper to award damages *merely* for the purpose of discouraging future constitutional violations by other governmental officials, protection of constitutional rights requires that compensation for actual injuries be adequate.”); see also Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242, 1246 (1979) (“The principal purpose of . . . compensatory damages is to put the plaintiff in the same position as the plaintiff would have been but for the defendant’s breach of a legal duty.”).

⁶¹ John Boston, *The Prison Litigation Reform Act: The New Fact of Court Stripping*, 67 BROOK. L. REV. 429, 434 (2001).

⁶² Hilary Detmold, Note, *‘Tis Enough, ‘Twill Serve: Defining Physical Injury under the Prison Litigation Reform Act*, 46 SUFFOLK U. L. REV. 1111, 1111 (2013); see also MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 17:25, at 623–24 (4th ed. 2009) (describing the physical-injury requirement as the “most cryptic provision” and “bristl[ing] with ambiguities”).

⁶³ See, e.g., *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).

⁶⁴ Elizabeth A. Etchells, *Please Pass the Dictionary: Defining De Minimis Physical Injury Under the Prison Litigation Reform Act § 1997e(e)*, 100 IOWA L. REV. 803, 815 (2015); see also Detmold, *supra* note 62, at 1123.

cal injury,” the circuits disagreed as to what those standards are or how to apply them. In 1997, the Fifth Circuit, in *Siglar v. Hightower*, articulated an analytical framework that several other circuits have adopted,⁶⁵ at least in part:⁶⁶ an inmate’s “injury must be more than *de minimis*, but need not be significant,”⁶⁷ to be actionable under the PLRA. The court noted that the Supreme Court had firmly established the parameters for Eighth Amendment claims in the prison context: “whether force was applied in [a] good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”⁶⁸ Although the absence of serious injury is “relevant to the inquiry,” it does not necessarily preclude relief. However, *de minimis* uses of force do not rise to the level of a constitutional violation unless the use of force is “of a sort repugnant to the conscience of mankind.”⁶⁹ Because the PLRA did not define “physical injury,” the Fifth Circuit held that “the well-established Eighth Amendment standards guide [the] analysis in determining whether a prisoner has sustained the necessary physical injury to support a claim for mental or emotional suffering. That is, the injury must be more than *de minimis*, but need not be significant.”⁷⁰

Other circuits have adopted a somewhat more expansive definition of *de minimis* injury. In *Oliver v. Keller*, for example, the Ninth Circuit affirmed the *Siglar* standard as consistent with congressional intent and well-established Eighth Amendment standards,⁷¹ but refused to subscribe to the Fifth Circuit’s reasoning that “the injury must be more than *de minimis*.”⁷² The court explained that the Fifth Circuit’s analysis did not accurately describe the standard announced by the Supreme Court in *Hudson v. McMillian*,⁷³ which focused “on the amount of *force* used, not the nature or severity of the *injury* inflicted.”⁷⁴ The *Hudson* Court explicitly held that “the use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury,”⁷⁵ and the Ninth Circuit opined that the Fifth Circuit’s reasoning con-

⁶⁵ See, e.g., *Jarriett v. Wilson*, 162 F. App’x 394, 400 (6th Cir. 2005) (adopting the *Siglar* standard and reasoning).

⁶⁶ See, e.g., *Mitchell v. Horn*, 318 F.3d 523, 536 n.13 (3d Cir. 2003) (adopting “less-than-significant-but-more-than-*de minimis*” standard but explaining, “[o]ur requirement of more than *de minimis* physical injury for § 1997e(e) claims is not based on an analogy to Eighth Amendment jurisprudence, as is true in the Fifth and Eleventh Circuits.”).

⁶⁷ *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). In *Siglar*, the court held that the plaintiff’s injured ear—twisted by a corrections officer, causing bruising and soreness for three days—constituted only a *de minimis* injury, and the statute therefore barred recovery. *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Oliver v. Keller*, 289 F.3d 623, 627–28 (9th Cir. 2002) (noting with approval the Second, Fifth, and Eleventh Circuits’ use of the “less-than-significant-but-more-than-*de minimis*” standard).

⁷² See *id.* at 628.

⁷³ *Hudson v. McMillian*, 503 U.S. 1, 1–3 (1992).

⁷⁴ *Oliver*, 289 F.3d at 628 (emphasis in original).

⁷⁵ *Hudson*, 503 U.S. at 4.

tradicted that holding because it focused on the injury suffered, rather than the amount of force inflicted.⁷⁶

Similarly, the Third Circuit has adopted the “more than *de minimis*, but need not be significant” standard,⁷⁷ but has not adopted the same Eighth Amendment analogy to determine what constitutes *de minimis* injury.⁷⁸ So too has the Tenth Circuit.⁷⁹ By focusing on the force used and not the resulting injury, this type of formulation more closely tracks that of the Supreme Court, both in *Hudson* and more recently.⁸⁰ As the Supreme Court explained in *Hudson*, the Eighth Amendment inquiry “ultimately turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’”⁸¹ In 2010, the Supreme Court rejected a Fourth Circuit decision that had expanded the *Siglar* approach,⁸² and affirmed that the “core judicial inquiry” is the one which is articulated in *Hudson*.⁸³ The *Hudson* formulation more comfortably encompasses sexual abuse, as one would be hard-pressed to argue that sexual abuse of a prisoner constitutes “a good faith effort to maintain or restore discipline.”⁸⁴

In sum, the law regarding what constitutes “physical injury” varies by jurisdiction. All circuits have analogized to Eighth Amendment standards in determining what constitutes “physical injury,” but the courts disagree with respect to what those standards are or how to apply them. The Fifth, Sixth, and Eleventh circuits, for example, have adopted the approach that an injury “must be more than *de minimis*, but need not be significant,”⁸⁵ and have focused their inquiry on both the amount of force used and the severity of

⁷⁶ *Oliver*, 289 F.3d at 628.

⁷⁷ See *Mitchell v. Horn*, 318 F.3d 523, 536 (3d Cir. 2003) (“We therefore follow the approach of . . . requiring a less-than-significant-but-more-than-*de minimis* physical injury as a predicate to allegations of emotional injury.”).

⁷⁸ *Id.* at 536 n.13 (“Our requirement of more than *de minimis* physical injury for § 1997e(e) claims is not based on an analogy to Eighth Amendment jurisprudence, as is true in the Fifth and Eleventh Circuits.”); see also *Brooks v. Kyler*, 204 F.3d 102, 108 (3d Cir. 2000) (“[T]he absence of significant resulting injury is not a per se reason for dismissing a claim based on alleged wanton and unnecessary use of force against a prisoner. Although the extent of an injury provides a means of assessing the legitimacy and scope of the force, the focus always remains on the force used (the blows).”).

⁷⁹ See *United States v. LaVallee*, 439 F.3d 670, 688 (10th Cir. 2006) (“[W]e agree with the Third Circuit that in *Hudson*, the Supreme Court evidenced its “commit[ment] to an Eighth Amendment which protects against cruel and unusual force, not merely cruel and unusual force that results in sufficient injury.”).

⁸⁰ See, e.g., *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (“[The focus is] not whether a certain quantum of injury was sustained, but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” (internal citations omitted)).

⁸¹ *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320–321 (1986)).

⁸² See *Norman v. Taylor*, 25 F.3d 1259, 1262 (4th Cir. 1994) (holding that evidence that injury was *de minimis* was conclusive evidence that *de minimis* force was used).

⁸³ *Wilkins*, 559 U.S. at 37 (2010).

⁸⁴ *LaVallee*, 439 F.3d at 684.

⁸⁵ *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).

the resulting injury. The Third, Ninth, and Tenth Circuits, in contrast, focus their inquiry “on the amount of *force* used, not the nature or severity of the *injury* inflicted.”⁸⁶ The Supreme Court has not yet addressed the question of what constitutes a “physical injury” under the PLRA, but has made clear that when evaluating what constitutes an Eighth Amendment violation, the inquiry ultimately turns on the force employed, not the resulting injury.⁸⁷

B. Relationship Between “Physical Injury” and Sexual Abuse Before the 2013 Amendment

The case law on whether rape and sexual abuse constitute “physical injury” is relatively thin, but prior to the 2013 amendment of § 1997e(e), courts reached varying conclusions on that question.⁸⁸ A number of courts interpreted the term “physical injury” to include sexual abuse—including abuse involving unwanted contact with an inmate’s genitals that would not meet the current definition of “sexual act,”⁸⁹ as it is defined in 18 U.S.C. § 2246.⁹⁰ In *Liner v. Goord*, for example, the Second Circuit observed that although “there is no statutory definition of ‘physical injury’ as used in section 1997e(e),”⁹¹ alleged sexual abuse—in this case, “intrusive body searches”—“qualify as physical injuries as a matter of common sense.”⁹² The court explicitly noted that such abuse “would constitute more than *de minimis* injury if they occurred.”⁹³

In other cases, courts “latched onto minor injuries [resulting from the abuse] to get past the 42 U.S.C. § 1997e(e) requirements.”⁹⁴ In *Styles v. McGinnis*, for example, the Sixth Circuit “looked to other injuries reportedly

⁸⁶ *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002) (emphasis in original).

⁸⁷ *Hudson v. McMillian*, 503 U.S. 1, 4 (1992).

⁸⁸ *See, e.g.*, *Smith v. Shady*, No. 3:CV-05-2663, 2006 WL 314514, at *2 (M.D. Pa. Feb. 9, 2006).

⁸⁹ *See, e.g.*, *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (providing no description of alleged sexual abuse except reference to “intrusive body searches” but stating, “[n]evertheless, accepting the allegations in the complaint, the alleged sexual assaults qualify as physical injuries [under the PLRA] as a matter of common sense. Certainly, the alleged sexual assaults would constitute more than *de minimis* injury if they occurred.”); *Duncan v. Magelessen*, No. CIV.A. 07-CV-01979-MSK-MEH, 2008 WL 2783487, at *4 (D. Colo. July 15, 2008) (concluding, where plaintiff alleged defendant repeatedly fondled his penis during pat-down searches, plaintiff not barred by the PLRA from seeking damages because “unwanted sexual contact, alone, is a physical injury for which there may be compensation”); *Marrie v. Nickels*, 70 F. Supp. 2d 1252, 1257, 1264 (D. Kan. 1999) (finding sufficient “physical injury” under the PLRA where defendant prison guard “placed his hands into [the inmate’s] pants, caressed his buttocks, and stroked his genitalia” on one occasion and, on separate occasion, another guard “caressed [the inmate’s] lower stomach, caressed his buttocks, and struck him in the genitals with sufficient force to cause him several hours of pain.”).

⁹⁰ *See* discussion *infra* pp. 6–7.

⁹¹ *Liner*, 196 F.3d at 135.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Golden, It’s Not All in My Head*, *supra* note 12, at 47.

suffered by [an] inmate⁹⁵ who alleged that he had received an unnecessary and nonconsensual rectal exam.⁹⁶ The district court had dismissed the case on the grounds that Mr. Styles had not alleged a physical injury meeting the requirements of § 1997e(e),⁹⁷ but the appellate court “seemed concerned that an alleged ‘sexual abuse’ would not meet the requirements of the PLRA.”⁹⁸ Rather than hold that sexual abuse constitutes physical injury, however, the court “skirted the issue by focusing on Mr. Styles’ ‘increased blood pressure, chest pain, tachycardia, and numerous premature ventricular contractions.’”⁹⁹ The District Court for the Northern District of Florida, in the case of *Kemner v. Hemphill*, “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.”¹⁰⁰ These cases avoid the central question of whether sexual abuse constitutes a physical injury, but they also underscore the idea that courts are uncomfortable finding that sexual abuse victims have no judicial recourse.

C. “Physical Injury” After the 2013 Amendment

In adding the term “sexual act” to the PLRA, Congress arguably attempted to clarify that some types of sexual abuse were compensable, but others were not.¹⁰¹ The statutory language seems to suggest that “sexual conduct” cannot lead to compensatory damages. However, the amendment did not purport to overturn cases decided prior to the expansion of VAWA, suggesting that “sexual conduct” can rise to the level of a physical injury. Indeed, those cases provide an analytical framework that supports treating these types of abuse as physical injuries. Although it is not clear whether the rationale of *Liner* survives the amendment,¹⁰² at least two cases decided after the expansion of VAWA have held that sexual abuse not meeting the defini-

⁹⁵ *Id.* at 48.

⁹⁶ *Styles v. McGinnis*, 28 F. App’x 362, 364 (6th Cir. 2001).

⁹⁷ *Id.* at 363.

⁹⁸ Golden, *It’s Not All in My Head*, *supra* note 12, at 49.

⁹⁹ *Id.* (quoting *Styles*, 28 F. App’x at 364).

¹⁰⁰ Golden, *It’s Not All in My Head*, *supra* note 12, at 49 (citing *Kemner v. Hemphill*, 199 F. Supp. 2d 1264 (N.D. Fla. 2002)).

¹⁰¹ See 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/> [http://perma.cc/P2QB-NLYP] (explaining that the VAWA amendment means “that a sexual act that does not fall under the provisions of 18 U.S.C. § 2246 cannot be the basis for a [compensatory] damages award in federal litigation brought by a prisoner.”).

¹⁰² *Id.* (“[I]t is possible that the ‘intrusive body searches’ referred to in *Liner v. Goord* would be excluded [after the expansion of VAWA] unless they involved actual vaginal or anal penetration, or the prisoner was under 16 years old.”).

tion of a “sexual act” can nonetheless constitute a compensable “physical injury.”¹⁰³

In the case of *Morton v. Johnson*, a district court noted that “[s]everal courts have found that intentional, unwanted sexual touching can show a sufficient ‘physical injury’ to authorize compensatory damages for the inmate’s resulting mental and emotional distress.”¹⁰⁴ In *Morton*, the court held that the plaintiff’s “undisputed allegation that [defendant] intentionally and without [plaintiff’s] consent ‘rubbed down to’ and ‘felt up’ [plaintiff’s] ‘private area’ is incompatible with contemporary standards of decency and, thus, states a claim that may warrant compensatory damages.”¹⁰⁵ The court explained that, liberally construed, the alleged sexual touching might rise to the level of “the commission of a sexual act,” but decided it need not answer that question because the “sexual battery itself shows ‘physical injury.’”¹⁰⁶ Similarly, in *Cleveland v. Curry*, a different district court found that the allegation that the defendant prison guard “grabbed and squeezed the genitalia of five inmates, some numerous times, while performing clothed-body searches” constituted an actionable “physical injury” under the PLRA.¹⁰⁷ In *Cleveland*, the court explicitly noted the 2013 amendment,¹⁰⁸ yet nonetheless held that the alleged sexual abuse constituted physical injuries under the PLRA.¹⁰⁹ Thus, both *Morton* and *Cleveland* could serve as persuasive authority for the proposition that “sexual conduct” that does not rise to the level of a “sexual act” may still qualify as a “physical injury” under the PLRA, even after the expansion of VAWA.

¹⁰³ See *Morton v. Johnson*, No. 7:13-CV-00496, 2015 WL 4470104, at *8 (W.D. Va. July 21, 2015); *Cleveland v. Curry*, No. 07-CV-02809-NJV, 2014 WL 690846, at *7 (N.D. Cal. Feb. 21, 2014).

¹⁰⁴ *Morton*, 2015 WL 4470104 at *7 (internal citations omitted).

¹⁰⁵ *Id.* at *8. The review of the docket in *Morton* suggests that the court decided it on the basis of an evidentiary hearing, oral argument, and the court’s review of the law, in the absence of formal briefing from the parties.

¹⁰⁶ *Id.* at *7.

¹⁰⁷ *Cleveland*, 2014 WL 690846 at *7–8.

¹⁰⁸ See *id.* at *6 n.2 (“The statute was amended in 2013 to add ‘or the commission of a sexual act as defined in [18 U.S.C. § 2246].’ Plaintiffs here do not allege that [defendant] committed ‘sexual acts’ upon them as defined in the statute.”).

¹⁰⁹ *Id.* at *7. (“Based on *Oliver* and *Wood*, and the out-of-circuit authorities [including *Liner*], this court finds that prisoners who establish that they were sexually abused by correctional officers in violation of the Eighth Amendment have established that their injuries are more than *de minimis* under the PLRA.”). A review of the docket in *Cleveland* suggests that the defendant did not directly address the expansion of VAWA. Instead, the defendant merely argued that the alleged abuses (inappropriate body searches) met neither the definition of “sexual act” nor “physical injury.” See Defendants’ Memorandum of Points and Authorities in Support of Renewed Motion for Judgment as a Matter of Law and Remittur at 4, *Cleveland v. Curry*, No. 07-CV-02809-NJV, 2014 WL 690846, (N.D. Cal. 2014).

III. SEXUAL ABUSE RISES TO THE LEVEL OF A CONSTITUTIONAL VIOLATION

The following section evaluates the extent to which sexual abuse perpetrated by state actors establishes a constitutional violation.¹¹⁰ It asserts that such abuse can and should be viewed as a violation of the Fourth and Eighth Amendments, as well as the Due Process Clause of the Fifth and Fourteenth Amendments. As such, § 1997e(e) should not apply to sexual abuse by state actors, as these abuses violate constitutional rights. The Fourth Amendment encompasses the right to privacy, and although the Supreme Court has left open the question of whether pre-trial detainees or prisoners are entitled to the protections of the Fourth Amendment,¹¹¹ a number of courts continue to apply the Fourth Amendment to such claims, including allegations of sexual abuse.¹¹² The Eighth Amendment protects prisoners from the use of excessive force,¹¹³ which has been interpreted to encompass sexual abuse,¹¹⁴ and the Due Process Clause applies similar protections to pretrial detainees.¹¹⁵

¹¹⁰ Prisoner sexual abuse victims may also have viable Eighth Amendment claims for abuse committed by other inmates, but because the Supreme Court has made it exceedingly difficult to make out a viable “failure-to-protect” Eighth Amendment claim, *see Farmer v. Brennan*, 511 U.S. 825, 837 (1994), this note focuses on sexual abuse perpetrated by state actors.

¹¹¹ *See Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989).

¹¹² *See, e.g., Watson v. Sec’y Pa. Dep’t of Corr.*, 436 F. App’x 131, 136 (3d Cir. 2011) (holding that a prisoner who alleged that a guard had grabbed his penis and testicles during a strip search and made comments that he would enjoy it had stated a Fourth Amendment claim); *Kent v. Johnson*, 821 F.2d 1220, 1227 (6th Cir. 1987) (concluding that an inmate who alleged that he had been surveilled by prison guards while in various states of undress had a cognizable Fourth Amendment claim).

¹¹³ *See Whitley v. Albers*, 475 U.S. 312, 327 (1986) (explaining that the Eighth Amendment “serves as the primary source of substantive protection” for convicted prisoners “in cases . . . where the deliberate use of force is challenged as excessive and unjustified.”).

¹¹⁴ *See, e.g., Crawford v. Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015) (“[A] single incident of sexual abuse, if sufficiently severe or serious, may violate an inmate’s Eighth Amendment rights no less than repetitive abusive conduct . . . [l]ess severe but repetitive conduct may still be cumulatively egregious enough to violate the Constitution.” (internal citations omitted)); *Wood v. Beauclair*, 692 F.3d 1041, 1050 (9th Cir. 2012) (holding that a prison guard’s “stroking” of an inmate’s penis constituted an Eighth Amendment violation).

¹¹⁵ *See Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979). The Due Process Clause includes the right to bodily integrity, *see Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (“The ‘liberty’ that the due process clauses secure . . . includes not only the right to be free, which pretrial detainees do not have, but also the right to bodily integrity, which they do.”), which can encompass the right to be free from sexual abuse, *see Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997) (A “liberty claim of a right to bodily integrity [in the context of sexual abuse] is . . . the type of claim that has often been recognized as within substantive due process.”).

A. Fourth Amendment

The Fourth Amendment encompasses the expectation of bodily privacy.¹¹⁶ Although the Supreme Court has not answered the question of whether this applies to pre-trial detainees or prisoners,¹¹⁷ lower courts continue to apply the Fourth Amendment to such claims, including allegations of sexual abuse. The Sixth Circuit, for example, “has found the ‘privacy’ right against the forced exposure of one’s body to strangers of the opposite sex to be located in the Fourth Amendment,”¹¹⁸ and has applied it to prisoners’ claims.¹¹⁹ In *Kent v. Johnson*, an inmate alleged that surveillance by prison guards of him in various states of undress violated his First, Fourth, Eighth, and Fourteenth Amendment rights.¹²⁰ In analyzing the plaintiff’s claims, the court explained that the “right to privacy claim is characterized as deriving from the fourth amendment Literally, the issue is the reasonableness of the surveillance by female prison guards of plaintiff’s person in various states of undress.”¹²¹ After noting that neither the Supreme Court nor the Sixth Circuit had “ever expressly recognized that the fourth amendment ‘right to privacy’ encompasses the right to shield one’s body from view by members of the opposite sex,” the court went on to explain:

Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one’s person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reasons, for the obverse would be repugnant to notions of human decency and personal integrity.¹²²

After reviewing other circuit precedent on analogous claims, the court concluded that the complaint “did state a constitutional claim upon which relief can be granted.”¹²³

The Third and Fourth Circuits have held similarly. In *Watson v. Secretary Pennsylvania Dept. of Corrections*, for example, the Third Circuit held that a prisoner who alleged that a guard had grabbed his penis and testicles

¹¹⁶ See *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 339 (2012) (finding the strip search policies at issue to be “a reasonable balance between inmate privacy and the needs of the institutions”); see also *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005) (“[P]risoners retain a right to bodily privacy.”); *Fortner v. Thomas*, 983 F.2d 1024, 1026 (11th Cir. 1993) (“[W]e hold that a prisoner retains a constitutional right to bodily privacy . . .”).

¹¹⁷ See *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989).

¹¹⁸ *Everson v. Michigan Dep’t of Corr.*, 391 F.3d 737, 757 n.26 (6th Cir. 2004) (citing *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992); *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987)).

¹¹⁹ See, e.g., *Kent*, 821 F.2d at 1226.

¹²⁰ *Id.* at 1221.

¹²¹ *Id.* at 1226.

¹²² *Id.*

¹²³ *Id.* at 1227.

during a strip search and made comments that the prisoner would enjoy it had stated a Fourth Amendment claim.¹²⁴ Similarly, in *Lee v. Downs*, the Fourth Circuit affirmed a jury verdict for the plaintiff, a female prison inmate, for the forced removal of her undergarments in the presence of male guards.¹²⁵ The court acknowledged that confinement in a prison setting necessarily results in the surrender of constitutional rights, particularly the right to privacy, but:

Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.¹²⁶

To the extent that prisoners and pre-trial detainees retain a right, albeit a limited one, to privacy, the Fourth Amendment should protect them from sexual abuse in prison.

B. Eighth Amendment

Sexual abuse perpetrated by a state actor against an inmate does not and cannot ever serve a valid penological purpose. As such, it violates the Eighth Amendment's prohibition on cruel and unusual punishment. The Supreme Court has made clear that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"¹²⁷ Applying this reasoning, numerous courts have held that sexual abuse may constitute a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.¹²⁸ The Second Circuit has articulated a cogent rationale for this proposition:

To show that an incident or series of incidents was serious enough to implicate the Constitution, an inmate need not allege that there was penetration, physical injury, or direct contact with uncovered genitalia. A correction officer's intentional contact with an inmate's genitalia or other inmate area, which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or humiliate the inmate, violates the Eighth Amendment. Similarly, if the situation is reversed and the officer intentionally brings his or her genitalia into contact with the inmate in order to arouse or gratify the officer's sexual desire or humiliate

¹²⁴ See *Watson v. Sec'y Pa. Dep't of Corr.*, 436 F. App'x 131, 136 (3d Cir. 2011).

¹²⁵ See *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981).

¹²⁶ *Id.*

¹²⁷ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

¹²⁸ See discussion *supra* note 114.

the inmate, a violation is self-evident because there can be no penological justification for such contact.¹²⁹

Other courts have set forth similar reasoning. In *Wood v. Beauclair*, for example, the Ninth Circuit explained that under the Eighth Amendment, “there is no requirement that the plaintiff produce evidence of injury; ‘rather, the only requirement is that the officer’s actions be offensive to human dignity.’”¹³⁰ According to the court, “sexual assault on a prisoner by a prison guard is always ‘deeply offensive to human dignity,’ and is completely void of penological justification.”¹³¹ In that case, an inmate had alleged that a corrections officer had subjected him to “aggressive pat searches” and entered his prison cell and touched him “in an inappropriate way.”¹³² The court held that these abuses rose to the level of Eighth Amendment violations.¹³³

Under this reasoning, sexual abuse not rising to the level of a “sexual act,” as defined by the PLRA, would nonetheless constitute a violation of the Eighth Amendment, as it could not serve a valid penological purpose. The widespread criminalization of sexual contact between correctional staff and prisoners underscores this point.¹³⁴ Though there may be certain instances in which unwanted contact, such as a routine pat-down search, serves a valid penological purpose, this type of contact can be distinguished because it is neither intended to be “sexual” nor is it intended to humiliate the prisoner.¹³⁵ Contact that is sexual, however, is always prohibited by these criminal statutes, and courts should find that such contact violates prisoners’ Eighth Amendment rights as well.

C. *The Due Process Clause and the Constitutional Liberty Interest*

The Due Process Clause encompasses a general liberty interest,¹³⁶ and outside of the § 1997e(e) context, “[c]ourts. . . have consistently treated the loss of liberty as an independently cognizable injury, separate from any

¹²⁹ *Crawford v. Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015).

¹³⁰ *Wood v. Beauclair*, 692 F.3d 1041, 1050 (9th Cir. 2012) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000)) (internal quotations omitted).

¹³¹ *Id.* at 1050–51 (internal quotations omitted).

¹³² *Id.* at 1044.

¹³³ *Id.* at 1051.

¹³⁴ See *Golden, A Proposal For Closing the Loophole for Rapists*, *supra* note 12, at 1.

¹³⁵ Conversely, pat-down searches that are intended to be sexual or humiliate the prisoner would rise to the level of an Eighth Amendment violation. See *Crawford v. Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015).

¹³⁶ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848–849 (1992) (“[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . [T]he Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood, as well as bodily integrity.” (internal citations omitted)).

mental or emotional harm.”¹³⁷ A number of courts have applied this logic to the § 1997e(e) context as well. In the case of *Kerman v. City of New York*, for example, the Second Circuit held that the loss of liberty is a conceptually distinct injury for which damages may be available.¹³⁸ Although *Kerman* dealt specifically with wrongful confinement,¹³⁹ district courts in the Second Circuit have applied its logic regarding damages to other types of “loss of liberty” claims,¹⁴⁰ and “have concluded that a physical injury is not required for a prisoner to recover compensatory damages for the loss of a constitutional liberty interest.”¹⁴¹ The existing Second Circuit case law on this issue has thus far only recognized that prisoners can receive compensatory damages for deprivation of liberty interests in the context of Fourth Amendment,¹⁴² First Amendment,¹⁴³ and Equal Protection claims,¹⁴⁴ as well as Due Process claims for prolonged involuntary confinement.¹⁴⁵ That said, these cases do suggest in dicta that a prisoner or pre-trial detainee may recover compensatory damages for the loss of a liberty interest more generally.¹⁴⁶

¹³⁷ *Aref v. Lynch*, 833 F.3d 242, 264–65 (D.C. Cir. 2016) (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (“[A] successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for . . . loss of time and deprivation of the society.”); *Kerman v. City of New York*, 374 F.3d 93, 128 (2d Cir. 2004) (holding that the plaintiff “was, independently of his claims of physical, mental, emotional, or economic injury, entitled to be compensated for [his] loss of liberty.”); *Dellums v. Powell*, 566 F.2d 216, 277 (D.C. Cir. 1977) (affirming compensatory damage award for, *inter alia*, “the duration of loss of liberty” in a Fourth Amendment case).

¹³⁸ *Kerman*, 374 F.3d at 125 (“The damages recoverable for loss of liberty for the period spent in a wrongful confinement are inseparable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering.”).

¹³⁹ *Id.* at 124–25.

¹⁴⁰ *See, e.g., Rosado v. Herard*, No. 12 CIV. 8943(PGG)(FM), 2014 WL 1303513, at *13 (S.D.N.Y. Mar. 25, 2014) (maintaining that a “claim for compensatory damages flowing from the loss of [plaintiff’s] liberty interests under the First Amendment and the Equal Protection Clause [could] proceed.”); *Mendez v. Amato*, No. 9:12-CV-560 (TJM/CFH), 2013 WL 5236564, at *20 (N.D.N.Y. Sept. 17, 2013) (“[Claims] involv[ing] the loss of such intangibles as liberty through a lack of due process and equal protection . . . represent those which fall outside of the physical harm requirement of the PLRA.”); *Malik v. City of New York*, No. 11 CIV. 6062(PAC)(FM), 2012 WL 3345317, at *16 (S.D.N.Y. Aug. 15, 2012), *report and recommendation adopted*, No. 11 CIV. 6062 (PAC)(FM), 2012 WL 4475156 (S.D.N.Y. Sept. 28, 2012) (applying the logic of *Kerman* to First Amendment claims).

¹⁴¹ *Rosado*, 2014 WL 1303513 at *13 (citations omitted).

¹⁴² *See Kerman*, 374 F.3d at 125.

¹⁴³ *See Malik*, 2012 WL 3345317 at *16.

¹⁴⁴ *See Rosado*, 2014 WL 1303513 at *13.

¹⁴⁵ *See Mendez* 2013 WL 5236564 at *11. *Mendez* involved the “protected liberty interest to remain free from segregated confinement . . . [that is] atypical and significant in relation to ordinary prison life,” as well as Equal Protection and Eighth Amendment claims. *Id.* at *11–12. According to the court, claims “involv[ing] the loss of such intangibles as liberty through a lack of due process and equal protection . . . represent those which fall outside of the physical harm requirement of the PLRA.” *Id.* at *20.

¹⁴⁶ *See, e.g., Rosado*, 2014 WL 1303513 at *13 (“[C]ompensatory damages for intangible deprivations of [plaintiff’s] liberty and personal rights—as ‘distinct from pain and suffering, mental anguish, and mental trauma’—are not barred by the PLRA.”); *Mendez*, 2013 WL at *20 (“[Claims] involv[ing] the loss of such intangibles as liberty through a lack of due process and equal protection . . . represent those which fall outside of the physical harm requirement of the PLRA.”); *Malik*, 2012 WL 3345317 at *16 (“The Second Circuit has held . . . that

Sexual abuse of a prisoner or pre-trial detainee should constitute a violation of his or her constitutional liberty interest. The Supreme Court has held generally that the right to bodily integrity is a constitutional liberty interest.¹⁴⁷ The Second and Seventh Circuits have also recognized that prisoners retain a liberty interest in bodily integrity.¹⁴⁸ In addition, a number of courts have found that this liberty interest encompasses a right to be free from sexual abuse.¹⁴⁹ While the majority of these cases concern schoolchildren, “the fact that the abuse was perpetrated by a teacher upon a student is relevant only in that the perpetrator was a public official acting under color of law.”¹⁵⁰ Moreover, prisoners and schoolchildren arguably share characteristics that grant them the same liberty interest in avoiding sexual abuse. While schoolchildren are largely dependent on and subject to the control of their teachers and school administrators, so too are prisoners and pre-trial detainees largely dependent on and subject to the control of their corrections officers. Officers control every minute and every detail of detainees’ lives, and they have the power to impose punishments that affect everything from the length and conditions of a detainee’s sentence to his or her ability to take a shower.¹⁵¹

In addition, schoolchildren, as minors, are legally incapable of consenting to sexual conduct with an adult teacher. Inmates are also legally incapable of consenting to sexual conduct with prison staff: as the Department of Justice acknowledges, “the power imbalance in correctional facilities is such that it is impossible to know if an incarcerated person truly ‘consented’ to sexual activity with staff.”¹⁵² Recognition of this power imbalance

intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma.”)

¹⁴⁷ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848–849 (1992).

¹⁴⁸ See, e.g., *Pabon v. Wright*, 459 F.3d 241, 253 (2d Cir. 2006) (“The Fourteenth Amendment, by contrast, protects the individual’s liberty interest in making the decisions that affect his health and bodily integrity.”); *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (“The ‘liberty’ that the due process clauses secure . . . includes not only the right to be free, which pretrial detainees do not have, but also the right to bodily integrity, which they do.”).

¹⁴⁹ See, e.g., *Plumeau v. Sch. Dist. No. 40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997) (“Although this court has never explicitly stated that this liberty interest includes the right to be free from sexual abuse by school employees, a student’s liberty interest in bodily integrity logically encompasses such freedom.”); *Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997) (A “liberty claim of a right to bodily integrity [in the context of sexual abuse] is, on the other hand, the type of claim that has often been recognized as within substantive due process.”); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir. 1989) (“Reasonable officials would have understood the ‘contours’ of a student’s right to bodily integrity, under the Due Process Clause, to encompass a student’s right to be free from sexual abuses by his or her teachers.”).

¹⁵⁰ Andrew J. Simons, *Being Secure in One’s Person: Does Sexual Abuse Violate A Constitutionally Protected Right?*, 38 B. C. L. REV. 1011, 1046–47 (1997) (citing *Stoneking*, 882 F.2d at 724).

¹⁵¹ Kaiser & Stannow, *supra* note 32 (explaining that staff have the power to impose “punishments including behavioral reports that may extend the time people serve, solitary confinement, loss of even the most basic privileges such as showering, and (legally or not) violence.”).

¹⁵² Kaiser & Stannow, *supra* note 32.

ance has led the federal government, the District of Columbia, and all fifty states to “criminalize sexual contact between correctional staff and prisoners.”¹⁵³ Reflecting this concern, at least one court has held that a pretrial detainee—who alleged that a corrections officer sexually abused him on four separate occasions by reaching between his legs and grabbing his genitals from behind—had a liberty interest in avoiding sexual abuse by corrections officers.¹⁵⁴

Accordingly, grounds exist to assert that sexual abuse not meeting the definition of “sexual act”¹⁵⁵ nonetheless violates the liberty interest in bodily integrity, which includes the right to be free from sexual abuse by corrections officers. Because the loss of liberty can be construed as distinct from a mental or emotional injury, and rises to the level of a constitutional violation, it should remain outside the purview of § 1997e(e). A prisoner whose liberty interest has been violated in this manner should therefore be able to seek compensatory damages.

IV. APPLICABILITY OF § 1997E(E) TO CONSTITUTIONAL CLAIMS

The limitations imposed by § 1997e(e) can arguably be read as not applying to constitutional violations. Under this interpretation, if an incident of sexual abuse rises to the level of a constitutional violation, a prisoner could seek compensatory damages. In the context of § 1997e(e), circuits are split on whether constitutional claims are inherently suits “for” mental or emotional injury or whether they are separately cognizable claims. The debate over the applicability of § 1997e(e) to constitutional claims centers primarily on the question of whether the court should focus on “the nature of the relief sought” or “the underlying substantive violation.”¹⁵⁶ Courts that focus on “the nature of the relief sought” argue that § 1997e(e) also serves as a limitation on constitutional claims. By contrast, courts that focus on “the underlying substantive violation” maintain that the limitation of § 1997e(e) should not apply to constitutional claims.

¹⁵³ Golden, *A Proposal For Closing the Loophole for Rapists*, *supra* note 12, at 1.

¹⁵⁴ *Ojo v. Hillsborough Cty. Dep’t of Corr.*, No. 12-CV-204-SM, 2012 WL 4513944, at *2 (D.N.H. Sept. 25, 2012), *report and recommendation approved*, No. 12-CV-204-SM, 2012 WL 4514005 (D.N.H. Oct. 2, 2012) (explaining that “the Fourteenth Amendment protects a pretrial detainee from unwanted sexual contact by prison officials” and finding that “[a] pretrial detainee alleging a deprivation of his liberty interest in maintaining bodily integrity and avoiding a sexual abuse is entitled to at least as great protection under the Fourteenth Amendment as the Eighth Amendment would afford to a convicted inmate claiming a sexual abuse by a corrections officer.”).

¹⁵⁵ See Schlanger & Shay, *supra* note 12, at 247.

¹⁵⁶ *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005).

A. *The Sixth, Seventh, Ninth, and D.C. Circuits Have Held that Constitutional Injuries can Exist Outside the Reach of § 1997e(e)*

Courts in the Sixth,¹⁵⁷ Seventh,¹⁵⁸ Ninth,¹⁵⁹ and D.C. Circuits¹⁶⁰ contend that the phrase “for mental or emotional injury” restricts the types of injuries by § 1997e(e), and that constitutional injuries exist outside its reach. As the Sixth Circuit explained in *King v. Zamiara*:

The statute provides that a prisoner may not bring a civil action *for mental or emotional injury* unless he has also suffered a physical injury. It says nothing about claims brought to redress constitutional injuries, which are distinct from mental and emotional injuries . . . Were we to construe § 1997e(e) as the majority of courts have done, thereby grafting a physical-injury requirement onto claims that allege First Amendment violations as the injury, the phrase ‘for mental or emotional injury’ would be rendered superfluous.¹⁶¹

In other words, Congress could have stated that a prisoner may not bring any civil action unless he or she has also suffered a physical injury. The inclusion of the words “for mental or emotional injury” serves to confine the limitation of § 1997e(e) to only a narrow subset of claims. Although the specific holding of *King* was “that § 1997e(e) does not foreclose claims that allege violations of First Amendment-protected rights as injuries,”¹⁶² it suggested in dicta that its analysis encompassed most, if not all, constitutional violations, stating clearly that “the plain language of the statute does not bar claims for constitutional injury that do not also involve physical injury.”¹⁶³

The *King* court relied in large part on the Seventh Circuit’s analysis in *Robinson v. Page*, where Judge Posner explained that “[i]t would be a serious mistake to interpret section 1997e(e) to require a showing of physical

¹⁵⁷ See, e.g., *King v. Zamiara*, 788 F.3d 207, 212–13 (6th Cir. 2015) (rejecting the “broad view” of the “majority of circuits”).

¹⁵⁸ See, e.g., *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999) (“It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits . . . § 1997e(e) applies only to claims for mental or emotional injury . . . Claims for other types of injury do not implicate the statute . . . A deprivation of First Amendment rights standing alone is a cognizable injury.” (internal citations omitted)).

¹⁵⁹ See, e.g., *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002) (“To the extent that appellant’s claims for compensatory, nominal or punitive damages are premised on alleged Fourteenth Amendment violations, and not on emotional or mental distress suffered as a result of those violations, § 1997e(e) is inapplicable and those claims are not barred.”); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (“Therefore, § 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought.”).

¹⁶⁰ See *Aref v. Lynch*, 833 F.3d 242, 264 (D.C. Cir. 2016).

¹⁶¹ *King*, 788 F.3d at 213.

¹⁶² *Id.* at 213.

¹⁶³ *Id.*

injury in all prisoner civil rights suits. The domain of the statute is limited to suits in which mental or emotional injury is claimed.”¹⁶⁴ Judge Posner also explained that the existence of a claim for mental or emotional injuries does not invalidate a suit that also claims some other type of injury.¹⁶⁵ Although the Seventh Circuit’s holding in *Robinson* was limited only to an Eighth Amendment violation, and its decision in *Rowe v. Shake* was limited to a First Amendment violation,¹⁶⁶ the dicta in these cases also suggest that the analysis would extend to other constitutional violations.¹⁶⁷ This indicates that § 1997e(e)’s limitation would not apply to sexual abuse, to the extent that such abuse violates the Constitution.

This rationale has carried over to the Ninth Circuit, which held, in *Oliver v. Keller*, that § 1997e(e) “applies only to claims for mental and emotional injury,” and that “[t]o the extent. . . claims. . . are premised on alleged Fourteenth Amendment violations, and not on emotional or mental distress suffered as a result of those violations, § 1997e(e) is inapplicable.”¹⁶⁸ Prior to deciding *Oliver*, the Ninth Circuit had held in *Canell v. Lightner* that § 1997e(e) was inapplicable to First Amendment violations,¹⁶⁹ and in at least one case decided after *Oliver*, that § 1997e(e) was also inapplicable to a constitutional claim based on deliberate indifference.¹⁷⁰ These cases suggest that at least some—and likely many—constitutional violations fall outside of the purview of § 1997e(e). Because sexual abuse in the prison context almost always gives rise to a constitutional claim,¹⁷¹ this approach would permit prisoner sexual abuse victims to file suit, § 1997e(e) notwithstanding.

The D.C. Circuit has gone farthest and held definitively that § 1997e(e) does not apply to claims for constitutional violations that are neither mental nor emotional.¹⁷² In *Aref v. Lynch*, the D.C. Circuit addressed and rejected the objection that such an approach divorces the underlying substantive violation from the resulting injury, explaining that “the focus remains on the type of injury alleged, with an understanding that plaintiffs *can* allege intangible harms that are neither mental nor emotional, *i.e.*, not every non-physi-

¹⁶⁴ *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999).

¹⁶⁵ *Id.* at 749 (“If the suit contains separate claims, neither involving physical injury, and in one the prisoner claims damages for mental or emotional suffering and in the other damages for some other type of injury, the first claim is barred by the statute but the second is unaffected.”).

¹⁶⁶ *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999).

¹⁶⁷ *See, e.g., id.* (“[W]e have previously addressed the scope of the statute. In *Robinson*, we stated, ‘It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits.’ We further observed that § 1997e(e) applies only to claims for mental or emotional injury. Claims for other types of injury do not implicate the statute.” (internal citations omitted)).

¹⁶⁸ *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002).

¹⁶⁹ *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998).

¹⁷⁰ *Bryant v. Newland*, 64 F. App’x 58, 59 (9th Cir. 2003).

¹⁷¹ *See supra* Part III.

¹⁷² *See Aref v. Lynch*, 833 F.3d 242, 263 (D.C. Cir. 2016) (holding that constitutional injuries that are neither mental nor emotional are compensable under the PLRA without a prior showing of physical injury).

cal injury is by default a mental or emotional injury.”¹⁷³ *Aref* involved an action by three federal prisoners who alleged that their placement in Communication Management Units, which restricted their ability to communicate with the outside world, violated their protected speech under the First Amendment and their due process rights under the Fifth Amendment.¹⁷⁴ The D.C. Circuit found that the prisoners’ injuries were neither mental nor emotional, and therefore did not require a showing of physical injury.¹⁷⁵ In explaining its holding, the D.C. Circuit argued that the broad interpretation of § 1997e(e) adopted by other circuits:

would render the phrase “mental and emotional injury” superfluous. Had Congress intended to graft a physical-injury requirement onto every single claim, the statute could simply have provided: “No Federal civil action may be brought by a prisoner . . . for *any* injury suffered while in custody without a prior showing of physical injury.” . . . The “mental and emotional” language is significant precisely because prisoners can allege types of intangible injury that fall outside that ambit.¹⁷⁶

After surveying a broad array of case law concerning constitutional violations, the court concluded, “there exists a universe of injuries that are neither mental nor emotional and for which plaintiffs can recover compensatory damages under the PLRA.”¹⁷⁷

Many constitutional violations fall into that universe. For example, numerous courts have awarded compensatory damages for constitutional violations “that fall outside the domain of common-law injuries,”¹⁷⁸ including First Amendment rights;¹⁷⁹ the Eighth Amendment right to be free from unconstitutional placement in solitary confinement;¹⁸⁰ the constitutional right to be free from arrest in the absence of probable cause and the right to a fair trial;¹⁸¹ and loss of liberty claims.¹⁸² Although the *Aref* court did not deal

¹⁷³ *Id.* at 264 (emphasis in original).

¹⁷⁴ *Id.* at 246.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 263–64. *See also* *Amaker v. Haponik*, No. 98 CIV. 2663 (JGK), 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999) (“If Congress had intended to apply § 1997e(e)’s restriction to all federal civil suits by prisoners, it could easily have done so simply by dropping the qualifying language ‘for mental or emotional injury.’”).

¹⁷⁷ *Aref*, 833 F.3d at 265.

¹⁷⁸ *Id.* at 264.

¹⁷⁹ *See id.* at 265 (explaining that the violation of First Amendment rights will almost never lead to physical harm, but that courts frequently award compensatory damages for the violation of those rights).

¹⁸⁰ *Simmons v. Cook*, 154 F.3d 805, 808–09 (8th Cir. 1998); *see also* *Brooks v. Andolina*, 826 F.2d 1266, 1269–70 (3d Cir. 1987) (finding a prisoner entitled to compensatory damages for his unconstitutional placement in punitive segregation, including damages for the loss of visiting, phone, and library privileges).

¹⁸¹ *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997).

¹⁸² *See Aref*, 832 F.3d at 264 (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (“[A] successful malicious prosecution plaintiff may recover, in addition to general damages, com-

specifically with sexual abuse, it did address constitutional violations more generally, explaining, “not every non-physical injury is by default a mental or emotional injury.”¹⁸³ The court noted that even when constitutional violations produce mental or emotional harm, that harm is ancillary to the claim for the violation of a constitutional right, which is compensable.¹⁸⁴ In addition, the *Aref* court specifically addressed the compensability of Due Process rights,¹⁸⁵ explaining that a liberty interest can be located in the Due Process Clause,¹⁸⁶ and that the loss of liberty is an “independently cognizable injury, separate from any mental or emotional harm.”¹⁸⁷

This analysis is relevant and applicable to the sexual abuse of detainees: numerous Supreme Court and appellate decisions have recognized that the Due Process Clause protects the right to bodily integrity “insofar as it is conceptually integrated with both the idea of being secure in one’s person and the right to be free from bodily restraint.”¹⁸⁸ Sexual abuse is the “ultimate violation of self,”¹⁸⁹ and many, if not most, instances of sexual abuse will involve physical restraint.¹⁹⁰ Although the Supreme Court has yet to explicitly address the issue of sexual abuse as a due process violation, numerous courts of appeals have held that sexual abuse does violate a protected liberty interest.¹⁹¹

pensation for . . . loss of time and deprivation of the society.”); *Dellums v. Powell*, 566 F.2d 216, 277 (D.C. Cir. 1977) (affirming compensatory damages for “the duration of loss of liberty” in a Fourth Amendment case); *Kerman v. City of New York*, 374 F.3d 93, 128 (2d Cir. 2004) (holding a plaintiff is “entitled to be compensated for [his] loss of liberty” “independently of his claims of physical, mental, emotional, or economic injury.”).

¹⁸³ *Aref*, 833 F.3d at 264.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 252.

¹⁸⁶ *See id.*

¹⁸⁷ *Id.* at 264

¹⁸⁸ *Simons*, *supra* note 150, at 1040 n.279 (citing *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (“[T]he right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause.”); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (“Among the historic liberties . . . [protected by the Fourteenth Amendment is the] right to be free from and obtain judicial relief, for unjustified intrusions on personal security.”); *Rochin v. California*, 342 U.S. 165, 169 (1952) (holding that pumping the stomach of a suspect violates “personal immunities which . . . are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’” (internal citations omitted); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450–51 (5th Cir. 1994) (en banc) (“[T]he right to be free from state-occasioned damage to a person’s bodily integrity is protected by the [F]ourteenth [A]mendment guarantee of due process.”) (internal citations omitted); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir. 1989) (en banc) (“Reasonable officials would have understood the ‘contours’ of a student’s right to bodily integrity, under the Due Process Clause, to encompass a student’s right to be free from sexual abuses by his or her teachers.”); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (“[G]rounded in those constitutional rights given protection under the rubric of substantive due process . . . [is] the right to be free of state intrusions into realms of personal privacy and bodily security.”)).

¹⁸⁹ *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

¹⁹⁰ *See Simons*, *supra* note 150, at 1044 (“A person cannot be sexually assaulted without being physically restrained.”).

¹⁹¹ *See discussion supra* note 149. For a full discussion of how sexual abuse violates a protected liberty interest, *see infra* Part III(c).

B. The Remaining Circuits Have Held that § 1997e(e) Does Apply to (Most) Constitutional Violations

The remaining circuits have adopted different approaches. The First¹⁹² and Fourth¹⁹³ Circuits have not yet directly addressed the question of whether § 1997e(e) precludes compensatory damages for constitutional violations, while the Second,¹⁹⁴ Third,¹⁹⁵ Fifth,¹⁹⁶ Eighth,¹⁹⁷ Tenth,¹⁹⁸ and Eleventh¹⁹⁹ have held that § 1997e(e) does apply to constitutional claims, concluding that it is the nature of the relief sought that controls.²⁰⁰ However, many of these circuits have also made clear that even if a prisoner may not recover compensatory damages for constitutional violations, nominal and punitive damages remain available. The Third Circuit, for example, has explained that “[c]laims seeking nominal or punitive damages are typically

¹⁹² See *Kuperman v. Wrenn*, 645 F.3d 69, 73 n.5 (1st Cir. 2011) (noting that § 1997e(e) could preclude compensatory damages in a § 1983 action but declining to reach the issue); see also *Mattei v. Dunbar*, 217 F. Supp. 3d 367, 380 (D. Mass. 2016) (citing *Kuperman* and noting that the First Circuit has not yet decided the question).

¹⁹³ See, e.g., *Moore v. Easley City Police Dep’t*, No. CV 8:16-525-MBS, 2016 WL 1444414, at *3 (D.S.C. Apr. 13, 2016) (“Although the Court of Appeals for the Fourth Circuit has not addressed the issue, a majority of other Circuits that have addressed § 1997e(e)’s limitation on recovery have held that § 1997e(e) does not prevent an inmate from seeking nominal damages and punitive damages for violation of constitutional rights in the absence of injury.”).

¹⁹⁴ See, e.g., *Thompson v. Carter*, 284 F.3d 411, 417 (2d Cir. 2002) (“We agree with the majority of our sister circuits that Section 1997e(e) applies to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury.”).

¹⁹⁵ See, e.g., *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (rejecting argument that First Amendment claim for compensatory damages absent physical injury was outside the scope of the PLRA, because “[t]he plain language of § 1997e(e) makes no distinction between the various claims encompassed within the phrase ‘federal civil action’ to which the section applies.”).

¹⁹⁶ See, e.g., *Edler v. Hockley Cty. Comm’rs Court*, 589 F. App’x 664, 670 (5th Cir. 2014) (“Absent a physical injury, a prisoner in a federal civil action cannot recover compensatory damages for a constitutional violation.”).

¹⁹⁷ See, e.g., *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. Instead, we read section 1997e(e) as limiting recovery for mental or emotional injury in all federal actions brought by prisoners.”).

¹⁹⁸ See, e.g., *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (“We disagree with the reasoning . . . which would make application of the statute contingent on the nature of the plaintiff’s allegedly infringed rights The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted.”).

¹⁹⁹ See, e.g., *Brooks v. Warden*, 800 F.3d 1295, 1307 (11th Cir. 2015) (“This Court has held that § 1997e(e) applies to all federal civil actions, including constitutional claims brought under § 1983.”) (citing *Harris v. Garner*, 216 F.3d 970, 984–85 (11th Cir. 2000) (en banc)).

²⁰⁰ See, e.g., *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) (“We agree with the majority of the other federal circuits that have addressed this issue in holding that it is the nature of the relief sought, and not the underlying substantive violation, that controls.”); *Searles*, 251 F.3d at 876 (explaining that the plain language of § 1997e(e) “does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted.”).

not ‘for’ mental or emotion injury but rather ‘to vindicate constitutional rights’ or ‘to deter or punish egregious violations of constitutional rights.’”²⁰¹ Although the Fourth Circuit has not yet addressed the issue, at least one district court in that Circuit has adopted a similar rationale.²⁰² The Eighth Circuit²⁰³ and Tenth Circuit²⁰⁴ have also held that nominal and punitive damages remain available for constitutional violations. Only the Eleventh Circuit has precluded the availability of punitive damages, reasoning that “Congress has chosen to enforce prisoners’ constitutional rights through suits for declaratory and injunctive relief, and not through actions for damages.”²⁰⁵ The Eleventh Circuit does, however, permit nominal damages.²⁰⁶

These circuits have awarded nominal and/or punitive damages in recognition of the fact that barring all judicial relief would likely render § 1997e(e) unconstitutional. As the Seventh Circuit has explained, “Congress may not effectively nullify the rights guaranteed by the Constitution by prohibiting all remedies for the violation of those rights.”²⁰⁷ In many cases, however, nominal and punitive damages will be insufficient to protect and

²⁰¹ *Mitchell v. Horn*, 318 F.3d 523, 533 (3d Cir. 2003); *see also Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (holding that a prisoner who makes out a claim for a constitutional violation may not recover compensatory damages, but may recover nominal or punitive damages).

²⁰² *See Moore v. Easley City Police Dep’t*, No. CV 8:16-525-MBS, 2016 WL 1444414, at *3 (D.S.C. Apr. 13, 2016) (“Although the Court of Appeals for the Fourth Circuit has not addressed the issue, a majority of other Circuits that have addressed § 1997e(e)’s limitation on recovery have held that § 1997e(e) does not prevent an inmate from seeking nominal damages and punitive damages for violation of constitutional rights in the absence of injury . . . The court is persuaded by the majority view and holds that Plaintiff is not precluded from seeking nominal and punitive damages.”).

²⁰³ *See Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (“To the extent Royal argues nominal damages, punitive damages, and injunctive and declaratory relief are available to him, we agree. Congress did not intend section 1997e(e) to bar recovery for all forms of relief.”).

²⁰⁴ *See Searles v. Van Bebber*, 251 F.3d 869, 879–80 (10th Cir. 2001) (holding that “section 1997e(e) does not bar recovery of nominal damages for violations of prisoners’ rights” and “punitive damages may be recovered for constitutional violations without a showing of compensable injury.”).

²⁰⁵ *See Harris v. Garner*, 190 F.3d 1279, 1289 (11th Cir. 1999). It is worth noting that the decision to preclude punitive damages was based in large part on the D.C. Circuit’s holding in *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998), which has since been amended by *Aref v. Lynch*, 833 F.3d 242, 263 (D.C. Cir. 2016).

²⁰⁶ *See Logan v. Hall*, 604 F. App’x 838, 840 (11th Cir. 2015) (“We have held that . . . § 1997e(e) foreclosed claims for both compensatory and punitive damages . . . Nominal damages, however, are not precluded by § 1997e(e).” (internal citations omitted)).

²⁰⁷ *See Zehner v. Trigg*, 133 F.3d 459, 461 (7th Cir. 1997) (quoting *Zehner v. Trigg*, 952 F. Supp. 1318, 1329 (S.D. Ind.)) (“Congress may not effectively nullify the rights guaranteed by the Constitution by prohibiting all remedies for the violation of those rights.”).

effectuate constitutional rights.²⁰⁸ As a result, compensatory damages should remain available.²⁰⁹

C. Some Circuits Have Held that § 1997e(e) Does Not Apply to Certain Types of Constitutional Violations

Within this broad dichotomy, there exist more fine-grained distinctions. Some circuits, while holding that the limitation of § 1997e(e) generally applies to constitutional violations, have carved out exceptions for certain types of claims.²¹⁰ As mentioned, the Sixth, Seventh, and Ninth Circuits have made clear that the limitation of § 1997e(e) does not apply to First, Eighth, and Fourteenth Amendment claims, and have suggested that § 1997e(e) may not apply to other constitutional violations as well. The Second and Fifth Circuits, while holding generally that § 1997e(e) does apply to constitutional violations, have carved out exceptions for loss of liberty claims, First Amendment violations, and Eighth Amendment violations.

For example, although the Second Circuit has held that § 1997e(e) applies to constitutional violations, it has recognized an exception for the loss of a constitutional liberty interest²¹¹ and for First Amendment violations.²¹² In the case of *Kerman v. City of New York*, the Second Circuit held that “[t]he damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering.”²¹³ Apply-

²⁰⁸ See *Aref*, 833 F.3d at 265 n.17 (“Punitive damages are never awarded as a matter of right, and the standard is understandably high—requiring evil motive or reckless indifference to the rights of others. Finally, nominal damages do little to deter repetition of the illegal conduct and do not provide any compensation for actual harms suffered.” (internal citations omitted)).

²⁰⁹ See, e.g., *Butz v. Economou*, 438 U.S. 478, 506 (1978) (“In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.”); *Doe v. District of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir. 1983) (“[P]rotection of constitutional rights requires that compensation for actual injuries be adequate.”).

²¹⁰ See *Aref*, 833 F.3d at 264 (citing *Cassidy v. Ind. Dep’t of Corr.*, 199 F.3d 374, 375–77 (7th Cir. 2000) (allowing a prisoner’s claims regarding loss of access to prison programs, services, and activities to proceed); *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999) (“A deprivation of First Amendment rights standing alone is a cognizable injury.”); *Brooks v. Andolina*, 826 F.2d 1266, 1269–70 (3d Cir. 1987) (holding that a prisoner who had been subjected to unconstitutional placement in punitive segregation, and suffered loss of visiting, phone, and library privileges, was entitled to compensatory damages)).

²¹¹ See *Kerman v. City of New York*, 374 F.3d 93, 125–26 (2d Cir. 2004).

²¹² See, e.g., *Malik v. City of New York*, No. 11 Civ. 6062(PAC)(FM), 2012 WL 3345317, at *16 (S.D.N.Y. Aug. 15, 2012) (“[T]he PLRA’s physical injury requirement does not bar an award of compensatory damages for First Amendment violations.”); *Amaker v. Haponik*, No. 98 CIV. 2663(JGK), 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999) (“The term ‘mental or emotional injury’ has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts. The injury occasioned by a violation of a plaintiff’s First Amendment rights is not a ‘mental or emotional’ injury in the same sense as these injuries.”).

²¹³ *Kerman*, 374 F.3d at 125–26.

ing *Kerman*, a number of district courts in the Second Circuit “have concluded that a physical injury is not required for a prisoner to recover compensatory damages for the loss of a constitutional liberty interest.”²¹⁴

The Second Circuit is not alone in determining that certain constitutional violations fall outside the purview of § 1997e(e). The Fifth Circuit, for example, has suggested that “[t]he underlying claim of an Eighth Amendment violation . . . is distinct from [the] claim for resulting emotional damages.”²¹⁵ The Sixth Circuit, which has suggested, but not made explicitly clear, that constitutional violations are generally outside the purview of § 1997e(e), has made clear that § 1997e(e) does not apply to First Amendment violations.²¹⁶ So too has the Seventh Circuit.²¹⁷ The Seventh Circuit has also implied that § 1997e(e) does not apply to Eighth Amendment violations,²¹⁸ although it remains somewhat unclear whether Eighth Amendment violations can give rise to compensatory damages, or only nominal and punitive damages.²¹⁹ Similarly, the Ninth Circuit has held that compensatory damages remain available for First Amendment,²²⁰ Fourteenth Amendment,²²¹ and Eighth Amendment²²² claims. Because sexual abuse can constitute a due process violation (for pre-trial detainees) and an Eighth Amendment violation (for inmates), under this approach it would fall outside the purview of § 1997e(e).

D. Summary of the Competing Approaches

In sum, the courts have adopted two competing analytical models for evaluating whether the limitation of § 1997e(e) applies to constitutional claims. A growing number of circuits have focused their inquiry on the un-

²¹⁴ *Rosado v. Herard*, No. 12 Civ. 8943(PCG)(FM), 2014 WL 1303513, at *13 (S.D.N.Y. Mar. 25, 2014); see also *Mendez v. Amato*, No. 9:12-CV-560(TJM/CFH), 2013 WL 5236564, at *20 (N.D.N.Y. Sept. 17, 2013) (“The Second Circuit has determined that intangibles can serve as a basis for recovery . . . The claims surviving defendants’ motion involve the loss of such intangibles as liberty through a lack of due process and equal protection. Such claims represent those which fall outside of the physical harm requirement of the PLRA.”).

²¹⁵ *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999).

²¹⁶ See *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015) (“[W]e hold that § 1997e(e) does not foreclose claims that allege violations of First Amendment-protected rights as injuries.”).

²¹⁷ See *Rowe v. Shake*, 196 F.3d 778, 781–82 (7th Cir. 1999) (“A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.”).

²¹⁸ See *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003) (“Just as a ‘deprivation of First Amendment rights standing alone is a cognizable injury,’ so too is the violation of a person’s right to be free from cruel and unusual punishment . . . Although § 1997e(e) would bar recovery of compensatory damages ‘for’ mental and emotional injuries suffered, the statute is inapplicable to awards of nominal or punitive damages for the Eighth Amendment violation itself.” (internal citations omitted)).

²¹⁹ See *id.*

²²⁰ See *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998).

²²¹ See *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002).

²²² See *Bryant v. Newland*, 64 F. Appx. 58, 59 (9th Cir. 2003).

derlying violation, and as such, held that constitutional violations exist outside the purview of § 1997e(e). However, a number of circuits argue that the focus should be on the nature of the relief sought, meaning that § 1997e(e) does apply to constitutional violations. Even those circuits have carved out exceptions for punitive and nominal damages, and for specific types of constitutional claims, because they recognize that holding otherwise would violate constitutional commitments.²²³ These circuits, however, should go farther. They should hold that the limitation of § 1997e(e) does not apply to sexual abuse that violates a constitutional right, and permit sexual abuse victims to recover compensatory damages. As the next section will explain, allowing sexual abuse victims to recover compensatory damages is the most effective way of upholding and defending constitutional rights.²²⁴

V. OTHER CIRCUITS SHOULD ADOPT THE APPROACH OF THE D.C. CIRCUIT IN *AREF*

A. *Supreme Court Precedent Supports the D.C. Circuit's Approach*

Analogous Supreme Court precedent supports the D.C. Circuit's view that there can be real harms separate and apart from mental or emotional injury—and that many constitutional violations constitute such harm. For instance, in *Carey v. Piphus*, the Court held that a plaintiff is eligible to recover damages under 42 U.S.C. § 1983 if he can demonstrate “some actual, if intangible, injury” caused by a constitutional violation.²²⁵ *Carey* involved elementary and secondary school students who alleged that they had been suspended from school without procedural due process.²²⁶ The Court explained that damages end up being merely nominal if it was shown that the violation of the constitutional right had not caused “actual” injury,²²⁷ which on the facts of *Carey* would have been the appropriate finding if the students' suspensions were justified, meaning that they had only been subjected to a denial of due process.²²⁸ The implication was that an unjustified suspension would constitute “actual” injury—and, by extension, so too would unjustified denials of due process more generally. In the context of

²²³ Williams, *supra* note 50, at 867 (explaining that holding otherwise would “render [constitutional] rights empty promises without meaningful value.”).

²²⁴ See, e.g., *Butz v. Economou*, 438 U.S. 478, 506 (1978) (“In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.”); see also *Doe v. District of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir. 1983) (“While, as the Court has indicated, it is improper to award damages *merely* for the purpose of discouraging future constitutional violations by other governmental officials, protection of constitutional rights requires that compensation for actual injuries be adequate.”).

²²⁵ 435 U.S. 247, 264 (1978).

²²⁶ *Id.* at 247.

²²⁷ *Id.* at 266.

²²⁸ *Id.* at 267.

sexual abuse, the victim always suffers “actual” injury and the abuse is never justified. Describing rape, the Supreme Court has stated:

It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the . . . victim and for the latter’s privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the “ultimate violation of self.” It is also a violent crime because it normally involves force, or the threat of force or intimidation²²⁹

Though sexual abuse may not be as severe as rape, all of these components typically remain present: the violation of personal integrity and autonomy, the force or the threat of force or intimidation, and the “ultimate violation of self.”

B. The D.C. Circuit’s Decision in Aref Distinguished Prior Precedent Upon Which Other Circuits Had Relied, and Thus Warrants a Re-examination in Those Circuits

The D.C. Circuit’s opinion in *Aref* distinguished its prior decision in *Davis v. District of Columbia*,²³⁰ upon which many of the other circuits had relied in coming to the conclusion that § 1997e(e) does apply to constitutional violations and bars compensatory damages.²³¹ To the extent that these previous decisions had relied on the reasoning of *Davis*, the decision in *Aref* warrants re-consideration of these previous decisions.

Davis involved an inmate’s § 1983 action against the District of Columbia and a prison official for alleged violations of his Fourth Amendment right to privacy.²³² The D.C. Circuit noted that the PLRA did not bar actions for injunctions or declaratory relief,²³³ or nominal damages for constitutional violations,²³⁴ but held that without a prior showing of physical injury, the inmate could not recover compensatory or punitive damages.²³⁵ After the *Davis* decision, numerous other circuits relied on its reasoning to bar in-

²²⁹ *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (quoting LISA BRODYAGA ET AL., U.S. DEP’T OF JUSTICE, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (1975)).

²³⁰ 158 F.3d 1342, 1349 (D.C. Cir. 1998).

²³¹ See, e.g., *Brooks v. Warden*, 800 F.3d 1295, 1309 (11th Cir. 2015) (relying on *Davis* for the holding that, under § 1997e(e), a prisoner alleging a constitutional violation may not even recover punitive damages); *Thompson v. Carter*, 284 F.3d 411, 417 (2d Cir. 2002) (citing *Davis* for the proposition that § 1997e(e) applies to constitutional violations); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (“[A]s the District of Columbia Circuit has noted, damages may be unavailable for constitutional violations.”).

²³² *Davis*, 158 F.3d at 1342.

²³³ *Id.* at 1346.

²³⁴ *Id.* at 1349.

²³⁵ *Id.* at 1348.

mates from recovering compensatory damages for constitutional violations.²³⁶

In *Aref*, however, the D.C. Circuit rejected the contention that *Davis* stood for the proposition that the PLRA bars compensatory relief for all non-physical injuries.²³⁷ As the *Aref* court articulated:

[T]he *Davis* court . . . point[ed] out that *Davis* ‘alleged resulting emotional and mental distress, *but no other injury*’ when it held his claims for compensatory and punitive damages were foreclosed by the PLRA . . . Our circuit has therefore never squarely addressed whether actual injuries that are neither mental nor emotional are precluded under the PLRA absent a showing of physical injury.²³⁸

The court declared that the reasoning of *Davis* was therefore “inapt,”²³⁹ and held that the PLRA does *not* necessarily preclude compensatory and punitive damages for constitutional injuries, even if no physical injury is present.²⁴⁰ The *Aref* court’s distinguishing—or, one might say, re-characterizing—of *Davis* thus warrants reconsideration in the circuits that had relied on it to hold that the PLRA bars compensatory damages for constitutional injuries.

That other circuits have awarded compensatory damages for certain constitutional violations also supports the proposition that compensatory damages should remain available.²⁴¹ These circuits reason that certain types of injuries are sufficiently harmful—and unlikely to otherwise be redressed—that they deserve remediation. But why should, for example, First Amendment violations warrant compensation, and not sexual abuse that violates the Eighth Amendment? Some circuits have held that § 1997e(e) is inapplicable to Eighth Amendment violations. The inconsistency among circuits not only generates confusion, but also creates a situation in which a prisoner in State A may recover damages for a constitutional violation that a prisoner in State B may not. To the extent that a right deserves a remedy,²⁴² this situation is intolerable.

²³⁶ See cases cited *supra* note 231.

²³⁷ *Aref v. Lynch*, 833 F.3d 242, 262 (D.C. Cir. 2016).

²³⁸ *Id.*

²³⁹ *Id.* at 267.

²⁴⁰ *Id.* at 263.

²⁴¹ See *Aref*, 833 F.3d at 264 (citing *Cassidy v. Ind. Dep’t of Corr.*, 199 F.3d 374, 375–77 (7th Cir. 2000) (allowing claims of loss of access to prison programs and services); *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999) (“A deprivation of First Amendment rights standing alone is a cognizable injury.”); *Brooks v. Andolina*, 826 F.2d 1266, 1269–70 (3d Cir. 1987) (finding a prisoner entitled to compensatory damages for his unconstitutional placement in punitive segregation including for the loss of visiting, phone, and library privileges)).

²⁴² See *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”).

C. Nominal and Punitive Damages are Insufficient to Protect Constitutional Rights

The need for compensatory damages is also supported by the fact that in almost every circuit, even if a prisoner may not recover compensatory damages for constitutional violations, nominal and punitive damages remain available.²⁴³ As discussed,²⁴⁴ the literal language of § 1997e(e) would appear to preclude all suits.²⁴⁵ However, “no court has applied the language of § 1997e(e) literally,”²⁴⁶ as doing so would likely render the statute unconstitutional.²⁴⁷ As the Seventh Circuit has explained, “[t]here is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights.”²⁴⁸ Such a limitation would “render those rights empty promises without meaningful value.”²⁴⁹

To avoid this difficulty, courts have looked to the subsection’s title, “Limitation on recovery,” to find that § 1997e(e) “limits the types of recovery available . . . not the types of claims that prisoners may bring.”²⁵⁰ Circuits that have adopted a broader reading of § 1997e(e)’s bar—in other

²⁴³ See *supra* pp. 36–37; see also *Gray v. Hardy*, 826 F.3d 1000, 1007 (7th Cir. 2016) (“Furthermore, we have recognized that [a]lthough § 1997e(e) would bar recovery of compensatory damages ‘for’ mental and emotional injuries suffered, the statute is inapplicable to awards of nominal or punitive damages for the Eighth Amendment violation itself.” (internal citations omitted)); *Kuperman v. Wrenn*, 645 F.3d 69, 73 n.5 (1st Cir. 2011) (explaining that § 1997e(e) does not bar nominal and punitive damages for constitutional violations); *Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) (holding that § 1997e(e) does not preclude nominal damages); *Mitchell v. Horn*, 318 F.3d 523, 533 (3d Cir. 2003) (quoting *Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000) (“Claims seeking nominal or punitive damages are typically not ‘for’ mental or emotional injury but rather ‘to vindicate constitutional rights’ or ‘to deter or punish egregious violations of constitutional rights,’ respectively.”); *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002) (holding that compensatory, nominal, or punitive damages remain available if premised on alleged unconstitutional conditions of pre-trial confinement, and not emotional or mental distress suffered); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (holding that § 1997e(e) does not preclude injunctive relief or nominal damages); *Moore v. Easley City Police Dep’t*, No. CV 8:16-525-MBS, 2016 WL 1444414, at *3 (D.S.C. Apr. 13, 2016) (“Although the Court of Appeals for the Fourth Circuit has not addressed the issue, a majority of other Circuits that have addressed § 1997e(e)’s limitation on recovery have held that § 1997e(e) does not prevent an inmate from seeking nominal damages and punitive damages for violation of constitutional rights in the absence of injury . . . The court is persuaded by the majority view and holds that Plaintiff is not precluded from seeking nominal and punitive damages.”).

²⁴⁴ See *supra* p. 11.

²⁴⁵ 42 U.S.C. § 1997e(e) (“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).” (emphasis added)).

²⁴⁶ See *Williams*, *supra* note 50, at 866–67.

²⁴⁷ See *Zehner v. Trigg*, 133 F.3d 459, 461 (7th Cir. 1997) (“Congress may not effectively nullify the rights guaranteed by the Constitution by prohibiting all remedies for the violation of those rights.” (internal citations omitted)).

²⁴⁸ *Id.* at 462 (quoting *Zehner v. Trigg*, 952 F. Supp. 1318, 1329 (S.D. Ind.), *aff’d*, 133 F.3d 459 (7th Cir. 1997)).

²⁴⁹ *Williams*, *supra* note 50, at 867.

²⁵⁰ *Id.*

words, that have held it to preclude compensatory damages—therefore support the statute’s constitutionality by emphasizing the availability of alternative forms of relief: injunctive or declaratory relief, punitive damages, and nominal damages. But such relief is illusory. As the *Aref* court explained:

Injunctive relief is commonly moot by the time a case is heard and cannot provide relief for past harms. Punitive damages are never awarded as a matter of right, and the standard is understandably high—requiring evil motive or reckless indifference to the rights of others. Finally, nominal damages do little to deter repetition of the illegal conduct and do not provide any compensation for actual harms suffered.²⁵¹

Compensatory damages often provide the most effective, if not the only, means of vindicating and protecting constitutional rights.²⁵² They also benefit society at-large: “a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards,” and “the damages a plaintiff recovers [contribute] significantly to the deterrence of civil rights violations in the future.”²⁵³ In other words, compensatory damages further the interests not only of the affected prisoners, but also “our entire system of accountability that ensures that government officials comply with constitutional mandates.”²⁵⁴

D. The Availability of Attorney’s Fees Supports the Need for Compensatory Damages

The availability of attorney’s fees, or lack thereof, also underscores the need for compensatory damages awards. Litigating a constitutional claim can involve significant costs, as it requires “significant fact development, legal research, trial time, and briefing on appeal.”²⁵⁵ In many cases, particularly those involving prisoners, the potential plaintiff will have limited means and be unable to afford a private attorney.²⁵⁶ The prospect of attor-

²⁵¹ 833 F.3d at 265 n.17 (internal citations omitted).

²⁵² *See, e.g., Butz v. Economou*, 438 U.S. 478, 506 (1978) (“In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.”); *Doe v. District of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir. 1983) (“While, as the Court has indicated, it is improper to award damages *merely* for the purpose of discouraging future constitutional violations by other governmental officials, protection of constitutional rights requires that compensation for actual injuries be adequate.”); *see also* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242, 1246 (1979) (“The principal purpose of . . . compensatory damages is to put the plaintiff in the same position as the plaintiff would have been but for the defendant’s breach of a legal duty.”).

²⁵³ *City of Riverside v. Rivera*, 477 U.S. 560, 574–75 (1986).

²⁵⁴ Schlanger & Shay, *supra* note 12, at 154.

²⁵⁵ JOHN CALVIN JEFFRIES, ET. AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 329 (3d ed. 2013).

²⁵⁶ *See id.* (“In many cases [involving constitutional claims], the potential plaintiff will be an individual or group of modest means who cannot afford to retain a private attorney through

ney's fees, which may be available to the "prevailing party" in § 1983 litigation,²⁵⁷ may provide the only means by which prisoners can retain the assistance of an attorney.²⁵⁸ Although an award of nominal damages constitutes "prevailing" for the purposes of attorney's fees, in such cases a "prevailing party" may not recover actual attorney's fees.²⁵⁹ Specifically, the Supreme Court has held that "[w]hen a plaintiff recovers only nominal damages . . . the only reasonable fee is usually no fee at all."²⁶⁰ This problem is only exacerbated in prisoner litigation: the PLRA limits attorney's fees to an amount "proportionately related to the court ordered relief for the violation."²⁶¹ Thus, if a prisoner litigant receives a low damages award, attorney's fees will be low too. This limitation supports the idea that compensatory damages should be available for prisoners and pre-trial detainees who have suffered violations of constitutional rights. Without compensatory damages, attorney's fee awards may be too low to incentivize lawyers to represent prisoners, even when those prisoners have suffered constitutional wrongs. Litigating constitutional claims pro se is always exceedingly difficult, but it may be even more difficult for prisoners, given their lack of access to important resources, such as "libraries, legal materials, computers, the Internet, and even . . . paper, pens, and telephones."²⁶² Without the assistance of an attorney, prisoners have little to no chance of having their rights vindicated.²⁶³

the regular market, in which attorneys charge by the hour or set a fixed fee based for handling the case."); see also, Bruce Western and Becky Pettit, *Incarceration and Social Inequality*, DÆDALUS at 8, summer 2010, http://amacad.org/publications/daedalus/10_summer_cover.pdf [<https://perma.cc/672X-NXT9>]. (explaining how prisoners, as a group, overwhelmingly come from socio-economically disadvantaged backgrounds).

²⁵⁷ 42 U.S.C. § 1988(b) (2015) ("In any action or proceeding to enforce a provision of [§ 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .").

²⁵⁸ See Schlanger & Shay, *supra* note 12, at 329–30. Although the government funds legal services programs, "there is no constitutional requirement that it do so," and funds are limited. Similarly, although law firms undertake pro bono work, unmet legal needs remain. See, e.g., Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537 (2003). Contingent fee arrangements are another possibility, but many civil rights cases will produce monetary relief "too small to attract competent counsel." See Schlanger & Shay, *supra* note 12, at 330.

²⁵⁹ See *Farrar v. Hobby*, 506 U.S. 103, 115–16 (1992).

²⁶⁰ *Id.* at 115.

²⁶¹ 42 U.S.C. § 1997e(d)(1)(B)(i) (2015).

²⁶² Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 273 (2010).

²⁶³ See, e.g., Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 106 (2002) (explaining how pro se prisoners often lose their cases on procedural grounds before ever reaching a decision on the merits).

E. The Legislative History of the PLRA Supports the View that Prisoners Should Be Able to File Suit and Recover Compensatory Damages for Sexual Abuse

Allowing prisoners to file suit and recover compensatory damages for sexual abuse also “comports with the purpose of the PLRA.”²⁶⁴ This may seem surprising. However, while the statute’s plain language provides the starting point of analysis,²⁶⁵ the text of the PLRA is anything but clear. As the *Aref* court reiterated, § 1997e(e) “may well present the highest concentration of poor drafting in the smallest number of words in the entire United States Code.”²⁶⁶ The statute does not itself define “physical injury,” and “no provision of the PLRA has created more confusion”²⁶⁷ than has § 1997e(e). The circuit split over the meaning of “physical injury” and the applicability, or lack thereof, of § 1997e(e) to constitutional claims “can largely be traced to the ambiguity of § 1997e(e)’s language.”²⁶⁸ In addition, the fact that no circuit has read the language of § 1997e(e) literally reinforces the idea that the PLRA cannot be understood by looking to the text alone. As a result, there is a need to probe the statute’s purpose through its legislative history.

The PLRA’s legislative history makes clear that it was designed to prevent frivolous prison litigation.²⁶⁹ Examples of frivolous suits “ranged from due process cases alleging injuries like a defective haircut to, most famously, an inmate filing a cruel and unusual punishment claim after he was given chunky rather than creamy peanut butter.”²⁷⁰ However, members of Congress also made clear that the PLRA was not intended to block serious, potentially meritorious claims,²⁷¹ and even emphasized that the PLRA would

²⁶⁴ See *Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016).

²⁶⁵ See, e.g., *Consumer Prod. Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.”).

²⁶⁶ *Aref*, 833 F.3d at 263 (quoting *Boston*, *supra* note 61, at 434).

²⁶⁷ *Detmold*, *supra* note 62 at 1111; see also *MUSHLIN*, *supra* note 62 at 623–24 (4th ed. 2009) (describing physical-injury requirement as the “most cryptic provision” and “bristl[ing] with ambiguities”).

²⁶⁸ *Williams*, *supra* note 50 at 866–67 (2006) (citing *Royal v. Kautzky*, 375 F.3d 720, 729 (8th Cir. 2004) (Heaney, J., dissenting)) (“Courts interpreting the plain language of § 1997e(e) . . . have reached differing results which leads me to the conclusion that the language is neither plain nor unambiguous.”).

²⁶⁹ See 141 CONG. REC. 26,553 (1995) (statement of Sen. Hatch) (explaining that the PLRA was intended to “help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits”); see also *Royal*, 375 F.3d at 729 (Heaney, J., dissenting) (“The legislative history of the PLRA shows a clear legislative intent to decrease the number of frivolous lawsuits filed by inmates.”); 141 CONG. REC. 26,553 (1995) (statement of Sen. Kyl) (stating that the PLRA was aimed at prisoners who “file free lawsuits in responses to any perceived slight or inconvenience”).

²⁷⁰ *Aref*, 833 F.3d at 265 (citing 141 CONG. REC. 27,042 (1995) (statement of Sen. Dole)).

²⁷¹ See 141 CONG. REC. 26,553 (1995) (statement of Sen. Hatch) (“[The PLRA] will ensure that Federal court orders are limited to remedying actual violations of prisoners’ rights.”); 141 CONG. REC. 26,553 (1995) (statement of Sen. Kyl) (“Prisoners still have the right to seek legal redress for meritorious claims”); 141 CONG. REC. 27,044 (1995) (statement of Sen. Thurmond) (“This amendment will allow meritorious claims to be filed, but

“help protect convicted criminals’ constitutional rights.”²⁷² As the *Aref* court emphasized:

[W]e find it hard to believe that Congress intended to afford virtual immunity to prison officials even when they commit blatant constitutional violations, as long as no physical blow is dealt. 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, and a legislative record indicating an intention to still allow awards for meritorious claims, we believe our reading of Section 1997e(e) best aligns with the purposes of the PLRA.²⁷³

This rationale is not limited to First Amendment rights: many types of constitutional violations may not give rise to “physical harm,” but courts still conceptualize constitutional violations as injuries deserving a remedy. This is particularly true in the context of sexual abuse. As one legal scholar put it, sexual abuse is, “[q]uite simply . . . not equivalent to the ‘chunky peanut butter’ or bad hair cuts of the PLRA’s proponents’ statements.”²⁷⁴

Recognition of the problem of sexual abuse in fact led Congress to amend the PLRA in 2013. The legislative history of this amendment, although admittedly thin, indicates recognition of the problem of sexual violence and a resolution to combat it. Section 1997e(e) of the PLRA was amended through the Reauthorization of the Violence Against Women Act, Section 1002: Sexual Abuse in Custodial Settings. The Senate Committee Report explained that Section 1002 “reflects the congressional intent in passing the Prison Rape Elimination Act of 2003 (PREA) to prevent sexual abuse in Federal facilities.”²⁷⁵ The minority views expressed no opposition to this statement or amendment.²⁷⁶ As Senator Durbin, who co-authored the bill, put it, “[n]obody behind bars should have to fear abuse from others in detention or from those meant to protect them. Simply put: sexual abuse is not, and cannot be, part of the punishment for those accused of violating our laws.”²⁷⁷ The National Sheriffs’ Association also supported amending § 1997e(e), explaining that sexual violence and abuse have no place in correctional facilities,²⁷⁸ and the Special Rapporteur on Violence Against Women urged Congress to amend the PLRA to address the scourge of “sexual

gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.”).

²⁷² 141 CONG. REC. 26,449 (1995) (statement of Sen. Abraham) (emphasis added).

²⁷³ *Aref*, 833 F.3d at 265.

²⁷⁴ Golden, *supra* note 12, at 55.

²⁷⁵ S. REP. NO. 112-153, at 34 (2012) (Conf. Rep.).

²⁷⁶ *See id.* at 48.

²⁷⁷ 158 CONG. REC. 5712 (2012) (statement of Sen. Durbin).

²⁷⁸ *See* 158 CONG. REC. 1278-79 (2012) (statement of Paul H. Fitzgerald, President, National Sheriffs’ Association) (noting collaboration between Department of Justice and National Sheriffs’ Association on Prison Rape Elimination Act).

abuse and other misconduct towards prisoners.”²⁷⁹ None of these statements differentiated sexual “acts” from other types of sexual abuse. Instead, they made clear that all sexual abuse is unwarranted.

It is true that Congress chose the words “sexual act (as defined in section 2246 of title 18),” and not the words “sexual conduct,” or “sexual abuse.” However, this word choice is not dispositive, at least not in the context of constitutional claims. As the D.C. Circuit has explained, a broad interpretation of § 1997e(e):

would render the phrase “mental and emotional injury” superfluous. Had Congress intended to graft a physical-injury [or sexual act] requirement onto every single claim, the statute could simply have provided: “No Federal civil action may be brought by a prisoner . . . for *any* injury suffered while in custody without a prior showing of physical injury [or “. . . sexual act”].” . . . The “mental and emotional” language is significant precisely because prisoners can allege types of intangible injury that fall outside that ambit.²⁸⁰

The addition of the words “sexual act” to § 1997e(e) can and should be construed to mean that a prisoner may recover damages for mental and emotional injury *in addition to* damages for the “commission of a sexual act.” Where a prisoner can demonstrate a violation of a constitutional right that does not meet the definition of a “physical injury” or “sexual act,” he or she will not be able to recover additional damages for mental or emotional injury. She should, however, be able to recover damages for the violation of the constitutional right itself. As one legal scholar puts it, the correct analysis of the statute—one which gives effect to the statutory word ‘action’—would “[limit its application] to cases in which mental or emotional injury is central to or an element of the claim and not merely a potential element of damages.”²⁸¹ Conversely, “where the harm that is constitutionally actionable is the violation of intangible rights—regardless of actual physical or emotional injury—§ 1997e(e) does not govern.”²⁸² The addition of the words

²⁷⁹ 5 VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013: A HISTORY OF PUBLIC LAW NO. 113-4 232 (William H. Manz ed., 2014).

²⁸⁰ *Aref v. Lynch*, 833 F.3d 242, 263-64 (D.C. Cir. 2016); *see also* *Amaker v. Haponik*, No. 98 CIV. 2663, 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999) (“If Congress had intended to apply § 1997e(e)’s restriction to all federal civil suits by prisoners, it could easily have done so simply by dropping the qualifying language ‘for mental or emotional injury.’”).

²⁸¹ *Boston*, *supra* note 61, at 440 n.36 (citing *Shaheed-Muhammad v. Dipaolo*, 138 F.Supp.2d 99, 107 (D. Mass. 2001) (“Where the harm that is constitutionally actionable is physical or emotional injury occasioned by a violation of rights, § 1997e(e) applies.”)).

²⁸² *Shaheed-Muhammad*, 138 F.Supp.2d at 107; *see also* *Seaver v. Manduco*, 178 F.Supp.2d 30, 37-38 (D. Mass. 2002) (applying *Shaheed-Muhammad* to a body cavity search case); *Waters v. Andrews*, No. 97-CV-407, 2000 WL 1611126, at *4 (W.D.N.Y. Oct. 16, 2000) (holding that female prisoner’s Fourth Amendment and Eighth Amendment claims of being placed in a filthy punishment cell, kept in a soiled and bloody paper gown, denied a shower and other personal hygiene measures, and exposed to the view of male correctional

“sexual act” should thus be read to broaden the conduct that can lead to recovery of damages for mental or emotional injury. However, it should not foreclose the recovery of damages for other types of sexual abuse, provided that they do rise to the level of constitutional violations.

F. Permitting the Recovery of Compensatory Damages is Realistic and Manageable

Calculating the appropriate damage award for an intangible interest is admittedly difficult,²⁸³ but as the *Aref* court articulated, compensatory damages are necessary in order to vindicate constitutional rights.²⁸⁴ In holding that constitutional injuries can be compensable under the PLRA without a prior showing of physical injury, the *Aref* court explained that courts frequently allow plaintiffs in 42 U.S.C. § 1983 suits “to recover damages for constitutional violations that fall outside the domain of common-law injuries.”²⁸⁵ Although the Supreme Court has held that a § 1983 plaintiff may not recover damages for the abstract value of a constitutional right,²⁸⁶ it has also made clear that compensatory damages may include both “out-of-pocket loss and other monetary harms” as well as “such injuries as ‘impairment of reputation . . . , personal humiliation, and mental anguish and suffering.’”²⁸⁷ In the context of prisoner constitutional claims, compensation for mental anguish and suffering may be barred by the PLRA, but compensation should remain possible for, *inter alia*, past and future medical expenses, impairment of reputation, and personal humiliation.

Allowing constitutional claims to proceed and lead to the recovery of compensatory damages does invite the critique that it would open the floodgates to additional litigation and prove unmanageable. Because most prisoner litigation against state actors is made possible through § 1983,²⁸⁸ many,

staff and construction workers, were not subject to § 1997e(e) because mental or emotional distress is not an element of either claim).

²⁸³ See *Hobson v. Wilson*, 737 F.2d 1, 62 (D.C. Cir. 1984) (“[Q]uantification of the damage arising from such activity is especially difficult.”).

²⁸⁴ *Aref*, 833 F.3d at 265 (explaining that without compensatory damages, “[i]t 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.”); see also *Brooks v. Andolina*, 826 F.2d 1266, 1269 (“[T]he Supreme Court recognized that compensatory damages may be awarded once the plaintiff shows actual injury despite the fact the monetary value of the injury is difficult to ascertain.”).

²⁸⁵ *Aref*, 833 F.3d at 265 (citing *Simmons v. Cook*, 154 F.3d 805, 808–09 (8th Cir. 1998) (affirming an award of compensatory damages for Eighth Amendment claim of paraplegic prisoners unconstitutionally placed in solitary confinement); *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (finding damages to be an appropriate remedy for the harm caused by fabrication of evidence)).

²⁸⁶ See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

²⁸⁷ *Id.* at 307 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

²⁸⁸ § 1983 provides in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

if not most, prisoner lawsuits are premised on constitutional violations. However, the PLRA contains numerous other mechanisms to curb the filing of frivolous suits,²⁸⁹ and these other mechanisms have led to a severe drop in prisoner litigation.²⁹⁰ Between 1995 and 2006, the number of lawsuits filed per thousand prisoners fell 60%.²⁹¹ Since 2007, filing rates have remained steady.²⁹² The drop in prisoner suits can be attributed primarily to these other mechanisms, and in particular to the administrative exhaustion requirement.²⁹³ Moreover, “courts have always had the power to weed out claims that lack merit at earlier pleading stages, preserving judicial resources.”²⁹⁴ To the extent that the PLRA wanted to “reduce the burden” on courts, copious methods already existed to accomplish that goal without eliminating judicial recourse for sexual abuse victims.

Although permitting compensatory damages for prisoner sexual abuse claims may entail greater costs, those costs will be cabined by the Supreme Court’s holding in *Memphis Community School District v. Stachura*. There, the Court held that § 1983 does not authorize an award of compensatory damages “based on a subjective evaluation of the importance of particular constitutional values.”²⁹⁵ Instead, damages must be premised on the “actual” injury suffered, and juries are not free to award damages based on their “unguided estimation of the value of such rights.”²⁹⁶ In addition, damages awards are subject to numerous methods of review: the trial judge may grant a remittitur,²⁹⁷ or, if the judge finds that the jury’s verdict was “infected by fundamental error,” vacate the judgment and order a new trial on damages.²⁹⁸ The losing party may also file an appeal.²⁹⁹

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983 (2015).

²⁸⁹ See 42 U.S.C. § 1997e(a), (d) (requiring the exhaustion of administrative remedies and capping attorneys’ fees for successful claims at 150% of damages); see also 28 U.S.C. § 1915(b)(1), (g) (compelling personal payment of initial filing fees and imposing a limitation on filing *in forma pauperis* after having three suits previously dismissed). Many have argued that these mechanisms—in particular, the exhaustion requirement—already enact hurdles that are too high. See, e.g., Adam Slutsky, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(a) Unduly Burdens Courts and Prisoners*, 73 *FORDHAM L. REV.* 2289, 2315 (2005); see also Boston, *supra* note 61, at 430.

²⁹⁰ See generally Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 *UC IRVINE L. REV.* 153 (2015) (describing the PLRA’s effect on greatly reducing the number of prisoner lawsuits).

²⁹¹ See *id.* at 157.

²⁹² *Id.* at 156.

²⁹³ See Boston, *supra* note 61, at 431 (explaining that the PLRA has barred many inmate litigants from court “because of their ignorance and inadvertent non-compliance with the exhaustion requirement”).

²⁹⁴ *Aref v. Lynch*, 833 F.3d 242, 266 (D.C. Cir. 2016).

²⁹⁵ *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311 (1986).

²⁹⁶ *Id.* at 304.

²⁹⁷ See, e.g., *Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997) (explaining that a remittitur should be granted if the court finds that the jury’s damage award was excessive).

²⁹⁸ *Id.*

²⁹⁹ *FED. R. APP. P.* 4.

The holding in *Stachura* may invite the reverse critique that such cases would not generate sufficient damages to be worthwhile. However, the *Stachura* Court did not say that violations of constitutional rights can yield no compensatory damages. Instead, it explained that those violations should not yield compensation for the abstract value or importance of a right *in addition to* compensation for the actual injury.³⁰⁰ This framing mirrors § 1997e(e)'s provision that damages may not be recovered for mental or emotional injuries *in addition to* damages for the violation of a constitutional right that involves no physical injury or sexual act. However, damages should be recoverable for a violation of the right itself. Moreover, the *Stachura* Court accepted at least some uses of presumed damages as long as they act as “a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged injury.”³⁰¹ As the Court explained:

When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate . . . In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure.³⁰²

Stachura therefore establishes a framework that permits compensation for the violation of constitutional rights, even if those rights are intangible or hard to measure. Although calculating compensatory damages in these types of cases can be difficult,³⁰³ courts nevertheless manage to do it. Numerous cases exist in which courts have awarded compensatory damages for violations of intangible rights without reference to mental or emotional injury.³⁰⁴ Courts are fully capable of doing the same in cases involving sexual abuse.

³⁰⁰ *Stachura*, 477 U.S. at 309–13.

³⁰¹ *Id.* at 310 (emphasis in original).

³⁰² *Id.* at 310–11 (citing *Carey v. Piphus*, 435 U.S. 247, 262 (1978)).

³⁰³ *See, e.g., Williams v. Kaufman Cnty.*, 352 F.3d 994, 1016 (5th Cir. 2003) (“[A]ny punitive damages-to-compensatory damages “ratio analysis” cannot be applied effectively in cases where only *nominal* damages have been awarded.”) (emphasis in original); *Carlo v. City of Chino*, 105 F.3d 493, 495 (9th Cir. 1997) (noting nominal award for denial of telephone access to overnight detainee); *Sockwell v. Phelps*, 20 F.3d 187, 189 (5th Cir. 1994) (noting nominal award for racial segregation).

³⁰⁴ *See, e.g., Sallier v. Brooks*, 343 F.3d 868, 880 (6th Cir. 2003) (affirming jury award of \$750 in compensatory damages for each instance of unlawful opening of legal mail); *Goff v. Burton*, 91 F.3d 1188, 1192 (8th Cir. 1996) (affirming \$2250 award at \$10 a day for lost privileges resulting from a retaliatory transfer to a higher security prison); *Lowrance v. Coughlin*, 862 F.Supp. 1090, 1120 (S.D.N.Y. 1994) (awarding significant damages for repeated retaliatory prison transfers, segregation, and cell searches); *Vanscoy v. Hicks*, 691 F.Supp. 1336, 1338 (M.D. Ala. 1988) (awarding \$50 for pretextual exclusion from religious service, without evidence of mental anguish or suffering).

G. *The Prison Rape Elimination Act*

The Prison Rape Elimination Act (“PREA”) also supports interpreting the PLRA to allow sexual abuse victims to recover compensatory damages. The PREA was implemented in order to curb sexual abuse in prison, and construing the PLRA to allow prisoners to file suit for sexual abuse that meets the PREA’s definition of “prison rape” will help effectuate its purpose.

In 2003, Congress unanimously passed the PREA, which was intended to combat rape and all forms of sexual abuse in prison.³⁰⁵ The nine enumerated purposes of the PREA are: establishing a “zero tolerance” standard for prison rape,³⁰⁶ “mak[ing] the prevention of prison rape a top priority,”³⁰⁷ developing and implementing national standards to prevent and punish prison rape,³⁰⁸ increasing the data available on prison rape,³⁰⁹ standardizing the definition of prison rape,³¹⁰ increasing accountability of prison officials who fail to prevent, and punish prison rape,³¹¹ protecting the Eighth Amendment rights of federal and state prisoners,³¹² “increase[ing] the efficiency and effectiveness of federal expenditures,”³¹³ and “reduc[ing] the costs that prison rape imposes on interstate commerce.”³¹⁴

The passage of the PREA has influenced the development and interpretation of the PLRA, and it should continue to do so in the sexual abuse context. The amendment of the PLRA in 2013, for instance, appears to have come about at least in part due to “the urging of the National Prison Rape Elimination Commission [NPREC], a body established under the PREA.”³¹⁵ In a 2009 report, the NPREC stated that it was “convinced that the Prison Litigation Reform Act . . . has compromised the regulatory role of the courts and the ability of incarcerated victims of sexual abuse to seek justice in court.”³¹⁶ Although amending the PLRA to allow prisoners to file suits for “sexual acts” made steps towards ameliorating this problem, the amendment

³⁰⁵ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003) [hereinafter PREA].

³⁰⁶ PREA § 3(1).

³⁰⁷ PREA § 3(2).

³⁰⁸ PREA § 3(3).

³⁰⁹ PREA § 3(4).

³¹⁰ PREA § 3(5).

³¹¹ PREA § 3(6).

³¹² PREA § 3(7).

³¹³ PREA § 3(8).

³¹⁴ PREA § 3(9).

³¹⁵ 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, 297 (2010).

³¹⁶ NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 27 (2009), at 10, <https://www.ncjrs.gov/pdffiles1/226680.pdf> [<https://perma.cc/AZ73-HT34>] (“The Commission is convinced that the Prison Litigation Reform Act (PLRA) that Congress enacted in 1996 has compromised the regulatory role of the courts and the ability of incarcerated victims of sexual abuse to seek justice in court.”).

did not go far enough: it should have defined sexual acts to align with the PREA's definition of "prison rape."

The PREA defines "prison rape" to include the following:

(A) the carnal knowledge, oral sodomy, sexual assault with an object, *or sexual fondling of a person*, forcibly or against that person's will;

(B) the carnal knowledge, oral sodomy, sexual assault with an object, *or sexual fondling of a person* not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or

(C) the carnal knowledge, oral sodomy, sexual assault with an object, *or sexual fondling of a person* achieved through the exploitation of the fear or threat of physical violence or bodily injury.³¹⁷

The statutory language underscores that "fondling" should be understood as a form of prison rape. Department of Justice implementing regulations highlight that "rape" is not limited to forced penetration: the regulations define "sexual abuse" in different ways depending on the perpetrator,³¹⁸ but for staff perpetrators, "sexual abuse" includes conduct that would fall under "sexual contact" under 18 U.S.C. § 2246.³¹⁹ According to the regulations:

Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer includes any of the following acts, with or without consent of the inmate, detainee, or resident:

- (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;
- (3) Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the

³¹⁷ 42 U.S.C. § 15609 (2012) (emphasis added).

³¹⁸ Under 18 U.S.C. 2246, "the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. 2246 (2016).

³¹⁹ *Id.*

- staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (6) Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in paragraphs (1) through (5) of this definition;
- (7) Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, and
- (8) Voyeurism by a staff member, contractor, or volunteer.³²⁰

These definitions clearly encompass acts that would meet the definition of “sexual conduct” but not “sexual act” under the PLRA. The definitions also define conduct as sexual abuse regardless of consent, thereby highlighting the understanding that, due to the coercive environment of imprisonment and the power that guards exercise over inmates, inmates are not able to give true “consent” to sexual contact with guards.

Defining “sexual act” to align with the PREA’s definition of “prison rape” is particularly important because the PREA contains no private right of action, and although it has its own enforcement mechanisms, they have proved woefully inadequate.³²¹ A state risks losing only 5% of federal grant funding “for prison purposes” if it fails to certify that it is in full compliance with the PREA, and in some cases, it may actually cost less for states “not to abide by the PREA standards, as the cost of compliance could exceed the 5% loss of federal prison-related grant funding they receive.”³²² As others have noted, “Congress should have created a private right of action. However, even without one, courts should take [the] PREA into account in a way that is consistent with its language and goals.”³²³ Reading the PLRA to allow prisoners to file suit for sexual abuse that meets the definition of “prison rape” under the PREA will further effectuate its purposes and deter conduct that the PREA was ostensibly designed to combat.

³²⁰ 28 C.F.R. § 115.6 (2012).

³²¹ See, e.g., *Concluding Observations On The Third To Fifth Periodic Reports Of United States Of America*, U.N. COMMITTEE AGAINST TORTURE (Nov. 2014) at 10, http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_COC_USA_18893_E.pdf [<https://perma.cc/6D2X-FK4P>] (criticizing the “widespread prevalence of sexual violence” against American prisoners and the failure of the states to effectuate PREA); Laura Sullivan, *Enforcing Prison Rape Elimination Standards Proves Tricky*, NAT’L PUB. RADIO, Apr. 2, 2014, <http://www.npr.org/2014/04/02/298332579/enforcing-prison-rape-elimination-standards-proves-tricky>, [<https://perma.cc/65QM-SBVL>]; *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, U.S. DEP’T OF JUSTICE, at 10, <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<https://perma.cc/WR64-2ADA>] (explaining that nearly 200,000 people were sexually abused in American detention facilities in 2011, largely unchanged since the first PREA survey in 2007).

³²² Alex Friedmann, *Prison Rape Elimination Act Standards Finally in Effect, But Will They Be Effective?*, PRISON LEGAL NEWS (Sept. 15, 2013), <https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/> [<https://perma.cc/5CYX-GQXS>].

³²³ Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Prevention of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 801, 820 (2015).

CONCLUSION

Although the 2013 amendment of the PLRA clarified that rape and certain types of sexual abuse are compensable under the Act, the statute remains woefully unclear and inadequate. It establishes a regime in which some sexual abuse victims may recover compensation for their injuries, and others may not. To read the PLRA as precluding sexual abuse victims from judicial recourse contradicts constitutional commitments and the evolving consensus, both in Congress and society at-large, that sexual abuse is simply not “part of the penalty that criminal offenders pay for their offenses against society.”³²⁴ Fortunately, such a reading is unnecessary. When confronted with prisoner sexual abuse claims, courts can and should do one of the following: either construe § 1997e(e)’s “physical injury” requirement to encompass sexual abuse, as the Second Circuit did in *Liner v. Goord*,³²⁵ or interpret § 1997e(e)’s limitation as not applying to constitutional violations, including sexual abuse.

Sexual abuse can and does violate the Fourth Amendment, Eighth Amendment, and the Due Process Clause.³²⁶ The Sixth, Seventh, Ninth, and D.C. Circuits have laid out analyses explicating why § 1997e(e)’s limitation should not apply to constitutional violations. Simply put, many constitutional violations exist outside the ambit of “mental or emotional injury,”³²⁷ and allowing compensation for those harms is often the best, if not the only, way to vindicate constitutional rights.³²⁸ That other circuits have carved out exceptions to § 1997e(e) for certain types of damages and certain constitutional claims underscores the need to re-conceptualize its limitation as not applying to constitutional claims. Doing so also comports with the Supreme Court’s holding that constitutional violations can constitute harms distinct from mental or emotional injury.

Nominal and punitive damages are often insufficient to protect and advance constitutional rights, and without the availability of compensatory damages, attorneys may lack the incentive to represent prisoner litigants. Finally, the legislative history of the PLRA supports the view that compensatory damages should remain available for the violation of constitutional rights. Individuals may lose certain constitutional protections when they enter prison, but the protection against sexual abuse, and the ability to obtain compensation for such harm, is one that should be retained.

³²⁴ *Farmer v. Brennan*, 511 U.S. 825, 834 (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

³²⁵ *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (holding that sexual abuse constitutes physical injury within the meaning of the PLRA); see also *Morton v. Johnson*, No. 7:13-CV-00496, 2015 WL 4470104, at *8 (W.D. Va. July 21, 2015); *Cleveland v. Curry*, No. 07-CV-02809, 2014 WL 690846, at *7 (N.D. Cal. Feb. 21, 2014).

³²⁶ See *supra* Part III.

³²⁷ See *supra* Part IV.

³²⁸ See *supra* notes 60, 252.