'Tis Enough, 'Twill Serve: Defining Physical Injury Under the Prison Litigation Reform Act

"Courage, man. The hurt cannot be much."[1]

I. INTRODUCTION

Congress passed the Prison Litigation Reform Act (PLRA) in 1995.[2] Since that time, no provision of the PLRA has created more confusion than the limitation-on-recovery provision, or § 1997e(e), commonly referred to as the "physical-injury requirement."[3] The provision reads: "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."[4] Because the statute itself does not define *physical injury*, the provision leaves the task of defining the phrase to the courts.[5]

The First Circuit has yet to address the physical-injury requirement of the PLRA.[6] Other courts of appeals have heard cases addressing the requirement, yet their definitions have varied substantially.[7] The language of the statute requires courts to draw a line between injuries that are physical in nature, and

1. WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 3, sc. 1.

2. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

3. *See* 42 U.S.C. § 1997e(e) (2006), *amended by* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1101(a), 127 Stat. 54, 134 (stating prisoners may not bring action for mental or emotional injuries without showing physical injury). The provision explicitly places this limit on federal civil actions. *See id.; see also Private Prison Information Act of 2007, and Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prisons and Abuses?: Hearing on H.R. 1889 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 99-100 (2007) [hereinafter *2007 Hearing*] (statement of Elizabeth Alexander, Director, National Prison Project, American Civil Liberties Union) (explaining unintended consequences of provision including increases in prison staff misconduct); James E. Robertson, *A Saving Construction: How To Read the Physical Injury Rule of the Prison Litigation Reform Act*, 26 S. ILL. U. L.J. 1, 2-4 (2001) (explaining impetus for enactment of PLRA). Robertson also notes the legislative history is "threadbare," as the bill received little debate before passage, and the record is "virtually silent" as to the physical-injury requirement. *See* Robertson, *supra*, at 4.

4. § 1997e(e).

5. *See* 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 17:25, at 623-24 (4th ed. 2009) (describing physical-injury requirement as "most cryptic provision" and "bristl[ing] with ambiguities").

6. *See* Shaheed-Muhammad v. DiPaolo, 393 F. Supp. 2d 80, 107 (D. Mass. 2005) (noting First Circuit has not addressed matter of constitutional violations of prisoners absent physical injury).

7. *See id.* at 107-08 (noting circuit split).

those that are purely mental or emotional.[8] Such a distinction, however, is often unclear.[9]

Congress enacted the PLRA to curb the tide of prisoner litigation, as increasingly frivolous lawsuits clogged the court system.[10] The statute may have succeeded in limiting the court access of many prisoners whose claims lacked merit, but it has also prevented some litigants with valid claims from having their day in court.[11] Federal judges continue to wrestle with the meaning of *physical injury* and its implications for constitutional violations.[12] In the First Circuit, district courts continue to address the merits of claims under the PLRA, but the court of appeals has yet to hear a case hinging on the definition of the provision.[13] As district court judges continue to draw their own distinctions between *physical injury* and *mental or emotional injury*, the

8. *See* Zehner v. Trigg, 133 F.3d 459, 461-63 (7th Cir. 1997) (denying recovery for asbestos exposure in absence of manifest illness). In *Zehner*, prison officials exposed the plaintiff to asbestos over a two-year period, and the court held that even though a proper § 1983 claim had been stated, § 1997e(e) barred recovery. *See id.* at 460, 462-63 (stating facts and declaring PLRA restriction on damages constitutional); *see also* 42 U.S.C. § 1983 (2006) (creating cause of action for deprivation of civil rights).

9. *See* James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 118 (2000) (noting failure to define "physical injury"). Robertson argues that, under the clearest reading of the statutory language, "physical injuries arising as manifestation of psychological harm do not count regardless of their severity." *Id.* at 119. *But see Developments in the Law—The Law of Mental Illness: The Impact of the Prison Litigation Reform Act on Correctional Mental Health Litigation*, 121 HARV. L. REV. 1145, 1152 (2008) [hereinafter *Developments*] (pointing to absence of clear legislative intent to bar claims involving serious mental illness). Because the congressional record itself is relatively sparse, it is possible to argue for a very broad application of "[t]he capacious phrase 'mental or emotional injury'" as a bar to damages. *See id.* at 1151.

10. *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 (interviewing prisoner who brought suit for "mental and emotional pain" after receiving wrong peanut butter); *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1577-78 (2003) (suggesting prison culture fosters litigiousness over otherwise "minor annoyances").

11. *See* Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 641-44 (2010) (discussing need to reduce flood of litigation without barring meritorious suits); *see also* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529-30 (1997) (suggesting "very small" chance of success may define "frivolous suit"); Anh Nguyen, Comment, *The Fight for Creamy Peanut Butter: Why Examining Congressional Intent May Rectify the Problems of the Prison Litigation Reform Act*, 36 SW. U. L. REV. 145, 157 (2007) (suggesting detrimental effect of PLRA on meritorious claims as well as frivolous ones). Bone cites not only huge case backlogs, but also high court costs among the ill effects of so many frivolous suits. *See* Bone, *supra*, at 520-21; *see also* BLACK'S LAW DICTIONARY 849 (9th ed. 2009) (defining *in forma pauperis* litigant as "indigent permitted to disregard filing fees and court costs"); Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1671 (2002) (noting need to prevent "frivolous, malicious, or repetitive lawsuits" by *in forma pauperis* litigants). Winslow argues that because only injunctive and declaratory relief are the available remedies under the PLRA, many legitimate claims are barred. *See* Winslow, *supra*, at 1677-80 (explaining remedies available under PLRA).

12. *See generally* Robertson, *supra* note 3 (explaining potential definitions of PLRA and its constitutional implications).

13. *See* Shaheed-Muhammad v. DiPaolo, 393 F. Supp. 2d 80, 107 (D. Mass. 2005) (noting eventual issue of first impression for First Circuit); *see also infra* Part II.D (examining existing case law regarding physical-injury requirement in each circuit).

First Circuit will eventually need to draw a line in the sand.[14]

This Note examines the jurisdictional split in defining *physical injury* under the PLRA.[15] Part II.A outlines the historical circumstances that brought about the need for such legislation, while Part II.B analyzes the congressional intent behind it.[16] Part II.C examines the major consequences of the statute (both intended and otherwise), while Part II.D surveys the circuit courts' conflicting interpretations of the PLRA.[17] Part III.A argues that the First Circuit must address the physical-injury provision before district-court case law becomes increasingly scattered in its application of the statute.[18] Finally, Part III.B recommends that the First Circuit define *physical injury* more broadly than its sister circuits.[19]

II. HISTORY

A. Prisoner Lawsuits Before the PLRA

Prior to the enactment of the PLRA, prisoners' rights were considered a relatively recent concern both in the United States and internationally.[20] In fact, there are no annual statistics of prisoner civil rights litigation prior to 1966.[21] While the international community agreed upon several human rights

14. *See, e.g.*, Skandha v. Savoie, 811 F. Supp. 2d 535, 541 (D. Mass. 2011) (interpreting physical-injury requirement as inapplicable merely to cold temperatures); Quinoñes-Pagán v. Administración de Corrección, No. 08-2199(JAF), 2009 WL 2058668, at *5 (D.P.R. July 10, 2009) (finding no physical injury where plaintiff failed to allege one); Boulanger v. U.S. Bureau of Prisons, No. 1:06-cv-308-WES, 2009 WL 1146430, at *15 (D.N.H. Apr. 24, 2009) (finding no physical injury from excessive use of restraints).

15. *See Shaheed-Muhammad*, 393 F. Supp. 2d at 107 (referencing split among circuit courts regarding physical-injury requirement).

16. *See infra* Part II.A-B.

17. *See infra* Part II.C-D.

18. *See infra* Part III.A.

19. *See infra* Part III.B.

20. *See* Alessandra Luini del Russo, *Prisoners' Right of Access to the Courts: A Comparative Analysis of Human Rights Jurisprudence in Europe and the United States*, 13 J. INT'L L. & ECON. 1, 1-2 (1978) (noting human rights groups' concern for prisoners' rights dated back only to 1960s). Even members of the judiciary lamented the manner in which the court system "brush[es] under the rug the problems of those who are found guilty and subject to criminal sentence." *See* Warren E. Burger, *Our Options are Limited*, 18 VILL. L. REV. 165, 167 (1972) (arguing for prison reform addressing security concerns in wake of recent outbreaks). The United States has a long history of restricting the rights of the convicted and imprisoned, dating back to the English common-law doctrine of *civil death*, aspects of which are still preserved in some laws today. *See* Luini del Russo, *supra*, at 25 (tracing history of civil death statutes in United States); R. Jason Richards, *Stop! . . . Go Directly to Jail, Do Not Pass Go, and Do Not Ask for a Notary*, 31 J. MARSHALL L. REV. 879, 893 (1998) (noting weakening of civil-death doctrine over time). *Compare* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 142 (2003) (arguing against felony conviction as per se disqualification from jury service), *with* Ryan Laurence Nelson, Comment, *Rearming Felons: Federal Jurisdiction Under 18 U.S.C. § 925(C)*, 2001 U. CHI. LEGAL F. 551, 575-76 (arguing against relaxing laws prohibiting felon firearm possession). *See generally* OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996), *available at* http://www.ncjrs.gov/pdffiles1/pr/195110.pdf (showing felons' restrictions of civil rights by state).

21. *See* Robertson, *supra* note 3, at 3 (noting inmates filed only 218 civil rights claims in 1966). By

standards, many global activists and lawmakers paid little attention to the enforcement of these same rights within the prison population.[22] As the issue of inmate access to courts gradually gained attention, the dramatic rise in prisoner litigation throughout the late 1960s and the 1970s provided an important context for the legislative response that followed.[23]

Prior to the PLRA, the number of inmates who filed lawsuits in district courts, many of them pro se, steadily increased each year.[24] By 1996, prisoner-litigants accounted for twenty-five percent of all lawsuits filed in federal courts.[25] Most of these lawsuits were unsuccessful, with one estimate placing

1995, prisoner litigation totaled approximately 40,000 lawsuits in federal court annually. *See* Schlanger, *supra* note 10, at 1557 (citing increase in prisoner lawsuits prior to PLRA enactment).

22. *See* Luini del Russo, *supra* note 20, at 1, 6 (noting "general dearth of provisions" regarding human rights of prisoners). In fact, the human rights community—including governing bodies such as the United Nations, the European Convention on Human Rights, and the American Convention on Human Rights—set no specific standards with regard to the issue of prisoners' access to the courts. *See id.* at 6 (explaining international silence regarding prisoner access to courts). Luini del Russo attributed this to an excessive deference to correctional officers in handling such matters. *See id.* at 24-25 (explaining widespread indifference to prisoners' rights). In discussing the passage of the PLRA, Senator Orrin Hatch claimed the legislation addressed a need to end courts' attempts to "micromanage our Nation's prisons." *See The Role of the U.S. Department of Justice in Implementing the Prison Litigation Reform Act: Hearing Before the Comm. on the Judiciary*, 104th Cong. 1 (1996) [hereinafter *1996 Hearing*] (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary). Even members of the judiciary seemed to acknowledge an overstepping of authority by the federal court system. *See* Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) (referencing need for PLRA to address "mollycoddling" of prisoners by courts), *aff'd in part*, *rev'd in part*, 172 F.3d 144 (2d Cir. 1999). *But see 1996 Hearing*, *supra*, at 65-66 (statement of Walter J. Dickey, Professor, University of Wisconsin Law School) (contesting idea of judges eager to micromanage, as corrections commissioners properly make such decisions). Professor Dickey also pointed out that litigation concerning prison conditions is often the only way such information comes to light, and it frequently benefits the safety of the plaintiff as well as other inmates and prison staff. *See id.* (explaining benefits of prisoners' rights litigation).

23. *See* Fred Cheesman, II et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POL'Y 89, 94 (2000) (noting 1153% increase in § 1983 lawsuits by state prisoners between 1972 and 1996); *see also* Bounds v. Smith, 430 U.S. 817, 821, 828 (1977) (holding constitutional right of access to courts required libraries and other legal assistance for prisoners). The number dropped sharply after the enactment of the PLRA. *See* Cheesman, II et al., *supra*, at 94 fig.2 (charting number of § 1983 lawsuits filed by state prisoners).

24. *See* William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 612 (1979) (suggesting many meritorious lawsuits suffer from "clumsy" pro se pleadings); *see also* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 273, 278-79 (2010) (describing limited legal resources available to pro se prisoner litigants). Even in the decades following enactment of the PLRA, pro se litigants make up as much as thirty-seven percent of lawsuits in federal court. *See* Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 592 (2011).

25. *See 1996 Hearing*, *supra* note 22, at 70 (statement of Sen. Spencer Abraham, Member, Comm. on the Judiciary) (noting rise in prisoner litigation and associated costs to court system). The rise in inmate population has contributed to several challenges burdening the Bureau of Prisons. *See* NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1 (2013), *available at* http://www.fas.org/sgp/crs/misc/R42937.pdf. The total population of inmates in federal correctional facilities has grown from 25,000 in 1980 to almost 219,000 in 2012, an increase of more than 700%. *See id.*

the success rate of prisoner-litigants below fifteen percent.[26] Inmates became increasingly aware of the right to both court access and other legal resources.[27]

B. Congress Takes Action

On May 25, 1995, Senator Bob Dole addressed his colleagues to introduce the Prison Litigation Reform Act and explain the need for such legislation:

> As Chief Justice William Rehnquist has pointed out, prisoners will now "litigate at the drop of a hat," simply because they have little to lose and everything to gain. Prisoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending a wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered.[28]

Dole's co-sponsor on the bill, Senator Jon Kyl of Arizona, also addressed the chamber, explaining a similar statute passed in his own state only one year earlier that had already cut the number of state-prisoner lawsuits in half.[29]

26. *See* Schlanger, *supra* note 10, at 1594 tbl.II.A (noting both high volume of prisoner lawsuits and low success rate from 1990 to 1995). Professor Schlanger's definition of a successful suit includes settlements and voluntary dismissals, as well as litigated victories for the prisoner-plaintiffs. *See id.* at 1594 n.111. Another estimate put prisoner-litigants' odds of success even lower, reporting federal judges dismiss up to ninety-seven percent of inmate lawsuits before trial. *See* Dunn, *supra* note 10 (noting thirteen percent of suits proceeding to trial resulted in success for prisoner-plaintiffs). Professor Schlanger's article prompted a sharp critique from her students. *See* Note, *The Indeterminacy of Inmate Litigation: A Response to Professor Schlanger*, 117 HARV. L. REV. 1661, 1664-65 (2004) (declaring need to define "frivolous" lawsuits before stating success of PLRA in achieving goals).

27. *See* S.C. DEP'T OF CORR., *Court Decisions*, *in* THE EMERGING RIGHTS OF THE CONFINED (1972) ("Today, activism is replacing mute acceptance by the inmates of the conditions of their incarceration and attendant problems."); DAVID RUDOVSKY, THE RIGHTS OF PRISONERS: THE BASIC ACLU GUIDE TO A PRISONER'S RIGHTS 42 (1973) (explaining prisoners' right to correspondence with lawyers and courts); *see also* Johnson v. Avery, 393 U.S. 483, 485 (1969) (noting fundamental right to court access).

28. 141 CONG. REC. 14,570 (1995) (statement of Sen. Robert Dole). The peanut-butter lawsuit had become a particularly notorious example of frivolous litigation. *See* Dunn, *supra* note 10 (interviewing prisoner who brought suit for "mental and emotional pain" after receiving wrong peanut butter); Schlanger, *supra* note 10, at 1577-78 (suggesting prison culture fosters litigiousness over otherwise "minor annoyances"). Four state attorneys general, in a letter to the *New York Times*, drew attention to the problem of frivolous prisoner lawsuits and the need for a system by which to determine which of those suits are with merit. *See* Dennis C. Vacco et al., Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, http://www.nytimes.com/1995/03/03/opinion/l-free-the-courts-from-frivolous-prisoner-suits-486495.html (noting cost to taxpayers of wasting court resources on frivolous suits). The question of distinguishing the frivolous suit from the meritorious one, however, often depends on the party making that determination. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 438-39 (1993) (suggesting dehumanizing treatment by correctional officer may seem frivolous to judge, but significant to prisoner). In the infamous peanut-butter case, Chief Judge Jon O. Newman of the Second Circuit pointed out that the prisoner's complaint was not about the mistake itself (between chunky and creamy), but the failure to refund him $2.50 for the jar he returned. *See* Jon O. Newman, *A Jarring Loss*, NEWSWEEK, Jan. 29, 1996, at 16 (noting $2.50 not trivial to someone incarcerated).

29. *See* 141 CONG. REC. 14,572 (1995) (statement of Sen. Jon Kyl) (explaining benefits of PLRA's

"Most inmate lawsuits are meritless," stated Senator Kyl, and they have "become a recreational activity for long-term residents of our prisons."[30] He then outlined the purpose of each section of the proposed bill, without defining the provision that would limit recovery to cases where there existed a *prior showing of physical injury*.[31]

The prospect of appearing "tough on crime" to their constituents proved difficult for many legislators to resist.[32] Politicians and the media alike focused on the most egregious, frivolous claims.[33] The persistence of this narrative made it easy to rally support for reform.[34] Both the National Association of Attorneys General and the National District Attorneys Association backed the legislation.[35] The PLRA eventually passed with very little legislative debate,

enactment).

30. *Id*.

31. *See id.* at 14,572-73 (failing to elaborate on physical-injury requirement of PLRA).

32. *See 1996 Hearing*, *supra* note 22, at 4 (statement of Sen. Paul Simon, Member, Comm. on the Judiciary) (expressing concern about effectiveness of recently passed PLRA); *see also* William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 667 (2004) (noting members of Congress eager to look tough on crime). Senator Simon pointedly commented that his colleagues could gain "political mileage [by] getting up and saying we ought to be tougher in our prisons . . . [and] should not have country clubs for our prisons." *See 1996 Hearing, supra* note 22, at 4 (statement of Sen. Paul Simon, Member, Comm. on the Judiciary); s*ee also id.* at 23-24 (statement of Governor John Engler, Michigan) (noting prisoner litigation "drives the public crazy" because of millions of dollars lost). *But see id*. at 59 (statement of Mark I. Soler, President, Youth Law Center) (noting federal judges' ability to dismiss frivolous suits existed long before PLRA). Professor Schlanger attributes the timing of this legislation, in part, to a "rightward move in American politics" during the mid-1990s. *See* Schlanger, *supra* note 10, at 1558 (explaining reason behind campaign against inmate lawsuits). The first version of the PLRA introduced to the legislature came as part of the Republican Party's *Contract with America*, specifically the Taking Back Our Streets Act. *See Contract with America 1994*, NAT'L CENTER FOR PUB. POL'Y RES., http://www.nationalcenter.org/ContractwithAmerica.html (last visited Sept. 13, 2013) (pledging enactment of tough mandatory sentences and exceptions to exclusionary rule); *Taking Back Our Streets Act of 1995—H.R. 3*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, http://judiciary.house.gov/legacy/007.htm (last visited Sept. 13, 2013) (outlining provisions of Act expected for introduction to Congress); *see also* Schlanger, *supra* note 10, at 1566-67 (connecting PLRA passage to Republicans' *Contract with America* heading into 104th Congress). A district court judge's ability to dismiss a frivolous claim predates the PLRA, and his decision to do so may be based on the entirely unbelievable nature of the claim. *See* Denton v. Hernandez, 504 U.S. 25, 33 (1992) (noting irrational or "wholly incredible" claims may be dismissed).

33. *See 1996 Hearing*, *supra* note 22, at 49 (statement of Sarah Vandenbraak, Former Lead Counsel for the Philadelphia District Attorney) (noting frequency and cost to taxpayers of meritless or harassing lawsuits); Dunn, *supra* note 10 (reporting on peanut-butter litigation).

34. *See* 141 CONG. REC. 14,570-71 (1995) (statement of Sen. Robert Dole) (noting unanimous consent to passage of bill and focusing on frivolous claims); Collins, *supra* note 32, at 667 (noting many state attorneys general voiced support for legislation). *But see* Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 301 (2007) (noting "scholarly criticism and legal challenges" prior to enactment).

35. *See* Schlanger, *supra* note 10, at 1566 (noting "potent alliance" of groups in favor of PLRA); *see also* Vacco et al., *supra* note 28 (offering support for reform from coalition of four state attorneys general). The statute proved to be so politically popular, as well as so intuitively essential to an efficient court process in the eyes of many lawmakers and citizens, that several states followed the PLRA enactment with passage of their own prison litigation reform laws, creating additional burdens upon prisoners seeking their day in court. *See* Alexander Volokh, *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 AKRON L. REV. 287, 315-

and with no mention whatsoever of the limitation-on-recovery provision requiring prisoner-plaintiffs to show physical injury.[36]

There was so much confusion and concern regarding the PLRA that the Senate held hearings regarding the effectiveness of its implementation a mere five months after the law took effect.[37] This is likely due to the fact that the language of § 1997e(e) defies easy interpretation.[38] Furthermore, there is no

17 (2013) (listing state laws similar to PLRA); *see also, e.g.*, LA. REV. STAT. ANN. §§ 15:1181-:1191 (2013) (providing exhaustion and physical-injury requirements for prisoner litigation); MD. CODE ANN., CTS. & JUD. PROC. §§ 5-1001 to -1007 (LexisNexis 2013) (providing exhaustion requirement and limiting compensatory or punitive damages); OR. REV. STAT. ANN. §§ 30.642-.650 (West 2013) (denying waiver or deferral of court fees for inmate after three dismissals); 42 PA. CONS. STAT. ANN. §§ 6601-6608 (West 2013) (restricting *in forma pauperis* filings); TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001-.014 (West 2013) (creating exhaustion requirement); WIS. STAT. ANN. § 814.25 (West 2013) (prohibiting costs awarded to prisoner against state). A more cynical reason for some attorney groups to favor amending the PLRA is the current statute's limits on attorney's fees. *See* Shepherd v. Goord, 662 F.3d 603, 606-07 (2d Cir. 2011) (upholding award of $1.50 in attorney's fees). The PLRA restricts any award of attorney's fees to 150% of the total monetary judgment awarded to the plaintiff. *See* 42 U.S.C. § 1997e(d)(2) (2006); *Shepherd*, 662 F.3d at 606 (noting excess fees paid by defendant). The attorney in *Shepherd* had calculated his total fees to be over $99,000, but because the PLRA denied his client any punitive damages, he was limited to 150% of the inmate's $1.00 monetary award. *See Shepherd*, 662 F.3d at 605. The Second Circuit further noted similar cases in its sister circuits, which had also declined to create an exception to § 1997e(d)(2). *See id.* at 609; *see also* Keup v. Hopkins, 596 F.3d 899, 905-06 (8th Cir. 2010) (capping attorney's fees at 150% of $1 nominal damages under PLRA); Pearson v. Welborn, 471 F.3d 732, 743-44 (7th Cir. 2006) (denying attorney's fees or declaratory relief for First Amendment violation); Robbins v. Chronister, 435 F.3d 1238, 1241 (10th Cir. 2006) (refusing to apply "absurdity doctrine" to ignore plain language of 150% cap on fees); Volk v. Gonzalez, 262 F.3d 528, 533 (5th Cir. 2001) (noting PLRA capped inmate's damages for civil rights violation at three dollars); Boivin v. Black, 225 F.3d 36, 40-43 (1st Cir. 2000) (holding PLRA's cap constitutional and awarding $1.50 in damages). The Second Circuit conceded that a 150% cap was, in such cases, "the practical equivalent of no fee award at all." *Shepherd*, 662 F.3d at 609.

36. *See* Collins, *supra* note 32, at 667 (noting members of Congress eager to look tough on crime). *But see* Shay & Kalb, *supra* note 34, at 301 (noting "scholarly criticism and legal challenges" prior to enactment); Sharone Levy, Note, *Balancing Physical Abuse by the System Against Abuse of the System: Defining "Imminent Danger" Within the Prison Litigation Reform Act of 1995*, 86 IOWA L. REV. 361, 369 (2000) (noting Senator Edward Kennedy's criticism of bill as "constitutionally dubious"). Robertson notes the PLRA's "hurried enactment" after very little debate, with § 1997e(e) "receiv[ing] less congressional deliberation" than any other provision. *See* Robertson, *supra* note 9, at 113-14; *see also* Zehner v. Trigg, 952 F. Supp. 1318, 1325 (S.D. Ind. 1997) ("The legislative history contains virtually no discussion specifically concerning . . . § 1997e(e)."), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

37. *See 1996 Hearing*, *supra* note 22, at 4 (statement of Sen. Edward Kennedy, Member, Comm. on the Judiciary) (criticizing quick enactment of bill, and its consequences). *But see id.* at 16 (statement of Governor John Engler, Michigan) (praising PLRA among "under-publicized accomplishments of the 104th Congress"). Governor Engler, however, spoke almost entirely about enforcement of consent decrees and the automatic-stay provision, while the physical-injury requirement was never mentioned in his testimony or anyone else's that day. *See generally id.* (lacking discussion of physical-injury requirement).

38. *See* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 434-35 (2001) (describing injury provision as "highest concentration of poor drafting in . . . entire United States Code"). The statute offers no distinction between that which constitutes physical injury, and that which is mental or emotional. *See id.* at 437 (questioning drafters' definition of mental or emotional injury). Boston also notes that "[t]he Bill of Rights . . . protects more than just freedom from physical, mental, or emotional injury and to characterize its violation solely in those terms trivializes it." *Id.* at 440. Shortly after its enactment, Senator Kennedy called the PLRA "poorly drafted." *See 1996 Hearing*, *supra* note 22, at 3 (statement of Sen. Edward Kennedy, Member, Comm. on the Judiciary).

unanimity among jurists, lawyers, or legislators as to the true meaning and intent of the statute.[39] Because the statute does not define *physical injury*, courts will "construe [the] statutory term in accordance with its ordinary or natural meaning."[40] However, no such ordinary meaning of the phrase *physical injury* exists.[41] The limitation on recovery applies to claims of *mental or emotional injury*, but the statute left this phrase undefined as well, and thus in need of statutory interpretation.[42]

39. *See* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 3 (1997) (using PLRA as example of problematic and ineffective statutory design). The authors note a "host of interpretive issues" raised by the PLRA and suggest that legislators have developed a pattern of inattentiveness to the details of statutory design, not to be easily fixed in either the instant statute or in the process of statutory drafting as a whole. *See id.*

40. *See* FDIC v. Meyer, 510 U.S. 471, 476 (1994).

41. *See* MUSHLIN, *supra* note 5, § 17:25, at 624-25 (noting several possible "literal" interpretations, none of them practical, nor adopted by any court). One interpretation "conjures up visions of hopeful litigants, with their crutches and bandages and wheelchairs and eye patches" while another, equally impractical, suggests that a prisoner suffering extreme abuse or torture would have no recourse in the absence of demonstrable physical harm. *See id.* (internal quotation marks omitted). Mushlin notes this particular provision of the PLRA has been singled out for criticism by human rights groups. *See id.* at 625 (citing criticism by Human Rights Watch). The unclarified requirement most negatively impacts juvenile offenders. *See* Anna Rapa, Comment, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263, 288-90 (2006) (noting damaging effects to juvenile identity and character remain unrecognized under PLRA). There could be a very real, absolutely unconstitutional violation of a juvenile detainee's civil rights, but without physical harm there will be no remedy effective to stop the behavior. *See id.* at 288-90 (noting likelihood of repeat violations where there exists no risk of prospective relief or damages). Juvenile offenders are less mature than their adult counterparts, which further hinders their ability to navigate the PLRA's administrative-exhaustion requirement as well. *See id.* at 290-91 (explaining administrative-exhaustion requirement of PLRA as harsher for juveniles). Regardless of how the courts ultimately define *physical injury*, it remains apparent to many social scientists that the *failure* to provide necessary medical care can amount to physical torture. *See* Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 B.U. PUB. INT. L.J. 73, 82 (2001) (noting denial of medical services can result in physical pain and suffering). Smith notes the "malleability of legal language" gives rise to "ingenious and creative uses of phrases and concepts to advance policy objectives contrary to those [objectives] for which" the law was in fact written. *See id.* at 95. The stated purpose of the PLRA may have been to curb frivolous litigation, but some of its provisions are easily interpreted to have nothing in common with that goal. *See* Ricardo Solano Jr., Note, *Is Congress Handcuffing Our Courts?*, 28 SETON HALL L. REV. 282, 309-10 (1997) (predicting PLRA would weaken federal judiciary); *see also* Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1520 (2004) (suggesting PLRA removes judicial oversight of prisons, absent very specific circumstances).

42. *See* Robertson, *supra* note 9, at 117 (noting particular difficulty of mental- or emotional-injury claims by pro se litigants). Many prisoner lawsuits are filed pro se and the wording of these complaints is often imprecise, adding to the vagueness of the statutory language to be applied. *See id.* (noting judges struggle to define mental or emotional injuries); *see also* WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 56 (5th ed. 1984) (describing "grief, anxiety, rage, and shame" as physical injuries for tort purposes); Robertson, *supra* note 3, at 4-7 (discussing physical-injury requirement of emotional distress tort claims). Four circuits—the Second, Third, Tenth, and D.C.—have explicitly held that any claim brought under 42 U.S.C. § 1983 not alleging physical injury is a claim only "for mental or emotional injury," as barred by the PLRA. *See* 42 U.S.C. § 1983 (2006) (creating cause of action for civil rights violations); *id.* § 1997e(e) (barring action brought for mental or emotional injury without showing of physical injury); Molly R. Schimmels, Comment, *First Amendment Suits and the Prison Litigation Reform Act's "Physical Injury Requirement": The Availability of Damage Awards for Inmate Claimants*, 51 U. KAN. L. REV. 935, 960 (2003)

C. Impact on Prisoner Litigation

The passage of the PLRA resulted in a sharp decrease in prisoner litigation almost immediately.[43] Between 1995 and 2001, while the total incarcerated prison population increased by twenty-three percent, the number of inmate filings decreased by forty-three percent.[44] Few doubted that the PLRA had achieved its goal of preventing most frivolous lawsuits, but the extent to which the statute also barred meritorious claims remains unclear.[45]

The PLRA's impact on damages also remains unclear and, in particular, its application to punitive damages continues to be the subject of some debate.[46] Although an inmate may seek nominal damages without showing prior physical injury, there is a split among the circuits as to his ability to collect anything

(noting circuit split in statutory interpretation). The Sixth, Seventh, and Ninth Circuits, on the other hand, more narrowly construe the phrase *for mental or emotional injury*, allowing the distinction between a constitutional claim and one that would be barred by the statute. *See* Schimmels, *supra,* at 956 (noting circuit courts holding First Amendment violation as compensable injury).

43. Brian J. Ostrom et al., *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1527-28 (2003) (noting "immediate and contentious" impact of PLRA); *see also* Geoffrey Donald Petis, Note, *Evening Out a Stacked Deck: A Suggestion for Improving Judicial Economy and Promoting Prisoner Access to Justice*, 43 NEW ENG. L. REV. 571, 580 (2009) (noting dramatic decrease in prisoner litigation following PLRA passage).

44. *See* Schlanger, *supra* note 10, at 1559-60 (noting immediate, enormous impact of PLRA enactment); *see also* Michael W. Martin, *Foreward: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1223-24 (2011) (chronicling prisoner population boom and analyzing contributing factors).

45. *See* Eisenberg, *supra* note 28, at 438 (noting issues appearing frivolous to judges may not seem so to inmates). A prisoner's objective in filing suit—to gain medical attention, for example—may frequently result in the relief sought, even though the suit itself is dismissed as frivolous. *See id.* at 439-40 (describing examples where inmate litigation seems trivial or frivolous). *But see* Tucker v. Branker, 142 F.3d 1294, 1300 (D.C. Cir. 1998) (suggesting requirement of ordinary filing fee to curb meritless inmate litigation); Carl B. Rubin, *Section 1983: A Limited Access Highway*, 52 U. CIN. L. REV. 977, 978 (1983) (arguing few prisoners file suit seeking actual relief). Because filing a lawsuit is usually a "'no lose' situation" for prisoner-litigants, especially those filing *in forma pauperis*, these inmates have every reason to file a claim for even the least legitimate of grievances. *See* Rubin, *supra*, at 978; *see also* U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000, at 3-4 (2002) (Nat'l Criminal Justice No. 189430), *available at* http://bjs.gov/content/pub/pdf/ppfusd00.pdf (noting *in forma pauperis* filing unavailable to litigants with previously dismissed "frivolous or malicious" petitions); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1230 (1998) (asserting courts reduced litigation indirectly by curtailing prisoners' constitutional rights).

46. *See* Robertson, *supra* note 3, at 20 (arguing denial of punitive damages would result in unconstitutional interpretation of statute); Lisa Benedetti, Comment, *What's Past is Prologue: Why the Prison Litigation Reform Act Does Not—and Should Not—Classify Punitive Damages as Prospective Relief*, 85 WASH. L. REV. 131, 148-55 (2010) (arguing against PLRA interpretation barring punitive damages). Lower courts have been uniform in holding that the physical-injury provision of the PLRA does not apply to plaintiffs seeking injunctive relief, rather than damages. *See* MUSHLIN, *supra* note 5, § 17:26, at 626 (noting judicial exception to allow injunctive relief despite "all inclusive" statutory language). In *Zehner v. Trigg*, the Seventh Circuit held that an alternate reading of the statute—one that bars injunctive relief—would impermissibly strip the courts of the power to remedy constitutional violations. *See* Zehner v. Trigg, 133 F.3d 459, 461 (7th Cir. 1997); *see also* Harris v. Garner, 216 F.3d 970, 1000-01 (11th Cir. 2000) (noting statutory language only precludes damages); Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999) (reversing dismissal of claim for injunctive relief based on PLRA).

more.[47] While some courts have declined to apply the limitation on recovery to punitive damages, others have refused to treat punitive damages any differently than compensatory damages, noting no evidence of congressional intent to distinguish between the two.[48]

As prisoners' rights continue to gain traction as an area of concern relating to both civil and human rights, prisoners must increasingly rely on outside legal help to navigate the confusing language of the statute.[49] In addition to the poorly understood physical-injury requirement, the PLRA also created administrative-exhaustion requirements and limited *in forma pauperis* filings, all of which gave rise to a host of additional legal issues in the wake of the law's enactment.[50]

The law's financial impact has also been the subject of much debate.[51] The

47. *See* Schimmels, *supra* note 42, at 945-46 (noting three-way split among circuits regarding First Amendment claims).

48. *See* Robertson, *supra* note 3, at 10-11 (discussing courts' interpretation of physical-injury requirement and impact on damages). *Compare* Allah v. Al-Hafeez, 226 F.3d 247, 251-52 (3d Cir. 2000) (holding § 1997e(e) inapplicable to First Amendment violation and thus allowing punitive damages), *with* Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (asserting award of punitive damages for privacy violation would thwart legislative intent), *and Zehner*, 133 F.3d at 461 (holding plaintiffs may not recover damages without showing physical injury).

49. *See generally* FED. JUDICIAL CTR., RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION (1996) (offering instruction to prison litigants in wake of PLRA enactment). *But see* Hudson v. Penaflor, 448 F. App'x 623, 625 (7th Cir. 2011) (stating policies underlying PLRA enable fair adjudication and discourage plaintiffs from "skirting the administrative process"). There have also been increasing concerns of the effect on prison morale—which becomes a safety issue for both prisoners and corrections personnel—if the ability to seek redress for claims of infringement on constitutional rights continually faces statutory roadblocks. *See* Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WIS. L. REV. 1275, 1286 (warning PLRA could have severely negative effect on behavior and morale of prison population).

50. *See* 28 U.S.C. § 1915(b) (2006) (restricting *in forma pauperis* filing by prisoners); 42 U.S.C. § 1997(e) (2006) (requiring exhaustion of all administrative remedies); *see also* Elizabeth Alexander, *Getting to Yes in a PLRA World*, 30 PACE L. REV. 1672, 1673 (2010) (noting difficulty of litigating cases under PLRA exhaustion requirement); Michael Irvine, *Chapter 17: Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 To Obtain Relief from Violations of Federal Law*, 31 COLUM. HUM. RTS. L. REV. 305, 345-46 (2000) (offering complex instructions for filing suit *in forma pauperis* post-PLRA). Furthermore, the PLRA also impacts the doctrine of permissive joinder by means of its new filing and relief limitations. *See* Caitlin Overland, Comment, *Permissive Joinder Under the Prison Litigation Reform Act: More Than Just a Procedural Tool*, 15 LEWIS & CLARK L. REV. 289, 302 (2011) (noting "faulty" legal mechanisms implemented as a result of PLRA, unforeseen by Congress); *see also* Elizabeth S. Hess, Comment, *Administrative Exhaustion and Class Actions: Rules, Rights, Requirements, Remedies, and the Prison Litigation Reform Act Issue Resolved*, 2003 U. CHI. LEGAL F. 773, 779-80 (warning agency bias may prevent adequacy of administrative remedy); Joshua S. Moskovitz, Note, *The Usual Practice: Raising and Deciding Failure To Exhaust Administrative Remedies as an Affirmative Defense Under the Prison Litigation Reform Act*, 31 CARDOZO L. REV. 1859, 1872 (2010) (noting difficulty in determining appropriate circumstances for exceptions to administrative-exhaustion requirement).

51. *See* Herman, *supra* note 45, at 1278 (suggesting PLRA may have actually *increased* costs to federal courts, at least in short-term implementation); Mallory Yontz, Comment, *Amending the Prison Litigation Reform Act: Imposing Financial Burdens on Prisoners over Tax Payers*, 44 J. MARSHALL L. REV. 1061, 1075-76 & n.113 (2011) (suggesting PLRA falls short of desired economic impact, as litigants avoid exhaustion requirements). The higher rate of mental illness among female inmates over males makes it difficult for their

PLRA may improve the financial accountability of our federal court and prison systems by limiting inmate-litigants' ability to seize limited time and resources for their own (sometimes meritless) claims.[52] On the other hand, if the physical-injury requirement and administrative-exhaustion provisions of the statute bar meritorious claims, the system will never adequately address instances of actual inmate abuse.[53]

Civil rights claims, in particular, have felt the impact of the physical-injury requirement.[54] Because many legitimate constitutional violations fail to meet the more-than-de-minimis physical-injury standard set by various circuit courts, a large number of prisoners find themselves with no remedy for these abuses.[55] The PLRA's provisions affect a broad range of constitutional claims, which are interpreted differently from court to court.[56] As a result of the physical-injury requirement, it is insufficient for an inmate to allege constitutional violations conducted in prisons without a showing of actual, physical harm.[57]

claims to be litigated within the administrative parameters of the Act's reporting guidelines, ultimately resulting in higher incarceration costs than would be spent litigating such claims in court. *See* Amy Vanheuverzwyn, Note, *The Law and Economics of Prison Health Care: Legal Standards and Financial Burdens*, 13 U. PA. J.L. & SOC. CHANGE 119, 126 (2010) (noting difficulty of compliance with, and impact of, administrative remedies unique to female inmates).

52. *See* Sarah Vanderbraak Hart, *Evaluating Institutional Prisoners' Rights Litigation: Costs and Benefits and Federalism Considerations*, 11 U. PA. J. CONST. L. 73, 84-86 (2008) (noting importance of cost-benefit and cost-effectiveness analysis in prisoner litigation).

53. *See* Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 944 (2009) (warning of "vulnerable class of plaintiffs without meaningful opportunity for redress"). *See generally* Bone, *supra* note 11 (calculating costs of various hypothetical inmate suits of varying merit). Bone suggests adopting a system of judicial screening early in the litigation, offering the judge a preliminary determination on the merits of the case. *See id.* at 593. This could perhaps lower both court costs as well as the rate of frivolous suits. *See id.* at 594 (explaining benefits of preliminary screening for frivolous suits).

54. *See 2007 Hearing*, *supra* note 3, at 99-100 (statement of Elizabeth Alexander, Director, National Prison Project, American Civil Liberties Union) (listing causes of action failing physical-injury threshold).

55. *See* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 117-18 (2008) (discussing psychological effects of long-term solitary confinement); David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need To Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 422 (2009) (noting detainees' difficulty in collecting damages for conditions-of-confinement claims); Miller, *supra* note 53, at 944 (noting courts must not deny remedies to meritorious prisoner-litigants).

56. *See* Irvine, *supra* note 50, at 307-26 (comparing approaches to seeking damages under various claims); Jeffrey Smith McLeod, Note, *Anxiety, Despair, and the Maddening Isolation of Solitary Confinement: Invoking the First Amendment's Protection Against State Action That Invades the Sphere of Intellect and Spirit*, 70 U. PITT. L. REV. 647, 674-75 (2009) (noting certain courts found PLRA limits Eighth Amendment claims, but not First Amendment claims). *See generally* Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189 (1997) (discussing range of prisoners' constitutional-rights claims excluded by PLRA); Jason E. Pepe, *Challenging Congress's Latest Attempt To Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58 (1999) (discussing how courts applied § 1997e(e) to various § 1983 claims).

57. *See* Tushnet & Yackle, *supra* note 39, at 15 (noting lack of remedy available to inmates facing likely constitutional violations without actual harm).

Prison litigation encompasses a wide range of topics related to medical care, all of which are affected by provisions of the PLRA.[58] Beyond access to general medical care, these problems include pregnant female inmates seeking adequate pre- and postnatal care.[59] Furthermore, Congress has only recently addressed the all-too-frequent need for medical attention and care following prison rape and sexual assault.[60] In a pre-PLRA case, the Supreme Court

58. *See* Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635, 639-40 (2010) (noting demands of growing and aging prison population on prison healthcare services); *see also* Robert Gatter, *A Prisoner's Constitutional Right to Medical Information: Doctrinally Flawed and a Threat to State Informed Consent Law*, 45 WAKE FOREST L. REV. 1025, 1044 (2010) (suggesting prisons must provide access to medical information, but not ensure patients actually get it); Dana O'Day-Senior, Note, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453, 457 (2008) (noting gender identity disorders can lead to depression or suicide if untreated). Protecting the health and safety of transgender inmates presents a particularly difficult problem for corrections officers, regardless of the fact that those inmates are sometimes unable to seek proper remedies and damages in the wake of constitutional violations. *See* O'Day-Senior, *supra*, at 458-62 (discussing difficulties for transgender detainees).

59. *See* Robin Levi et al., *Creating the "Bad Mother": How the U.S. Approach to Pregnancy in Prisons Violates the Right To Be a Mother*, 18 UCLA WOMEN'S L.J. 1, 16-24 (2010) (noting constitutional grounds for reproductive rights); *see also* Elizabeth Alexander, *Unshackling Shawanna: The Battle Over Chaining Women Prisoners During Labor and Delivery*, 32 U. ARK. LITTLE ROCK L. REV. 435, 436-38 (2010) (noting legislative battles in many states over banning use of restraints during labor). Most states currently have no legislation barring or even limiting the use of shackles during delivery, despite near-unanimous sentiment that a female prisoner giving birth presents little risk either of flight, or of harm to prison officials. *See* Alexander, *supra*, at 437-38 (noting majority of jurisdictions lack policies prohibiting shackling prisoners during childbirth).

60. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1101(a), 127 Stat. 54, 134 (to be codified at 42 U.S.C. § 1997e(e) (2012)) (adding "or the commission of a sexual act" before period at end of § 1997e(e)); *see also* Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705, 705-06 (2010) (estimating rate of prison rape at thirteen percent of inmates). For the first time, courts across the circuits will view sexual assault as a legitimate claim for damages. *See* Violence Against Women Reauthorization Act of 2013 § 1101(a) (permitting sexual acts to satisfy threshold requirement for recovery of damages); *see also* 42 U.S.C. § 1997e(e) (2006) (limiting prisoner recovery to physical injuries). The congressional record indicates some recognition of the problem of sexual violence within the prison system, as well as a determination to curb it. *See* 158 CONG. REC. S407-08 (daily ed. Feb. 9, 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). The National Sheriffs' Association offered its support of the amendment to § 1997e(e) during congressional testimony. *See id*. (noting sexual violence and abuse have no place in correctional facilities); *see also* 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) (suggesting prison rape remains widespread problem and PLRA limits options for redress). Robb specifically called for an amendment to the PLRA that would allow for the prosecution of prison rape cases. *See* Robb, *supra*, at 751. *But see* James E. Robertson, *The "Turning-Out" of Boys in a Man's Prison: Why and How We Need To Amend the Prison Rape Elimination Act*, 44 IND. L. REV. 819, 851 (2011) (noting ineffectiveness of statutory remedy intended to permit sexual-assault claims). *See generally* DEBORAH M. GOLDEN, THE PRISON LITIGATION REFORM ACT—A PROPOSAL FOR CLOSING THE LOOPHOLE FOR RAPISTS (2006), http://www.justdetention.org/pdf/the%20prison%20litigation%20reform%20act%20-a%20proposal.pdf (arguing courts should view rape as compensable injury). Congressional action to close this loophole does not obviate a need for remedies available to victims of sexual assaults in the prison setting. *Cf.* United States v. Stepanian, 570 F.3d 51, 58 n.12 (1st Cir. 2009) (noting Sentencing Commission deliberations over guideline

declined to "unjustly require" a showing of physical injury for a claim of inhumane prison conditions.[61] However, neither the courts nor the language of the statute itself provides clear guidance on how emotional or psychological injuries—even those resulting from torture or abuse—might satisfy the physical-injury requirement.[62]

Psychological harm may be similarly egregious, but perhaps still not compensable under the PLRA.[63] In *Oses v. Fair*, a prison guard struck an inmate, forced the barrel of his gun into the prisoner's mouth, and then cocked it.[64] This pre-PLRA civil rights action under § 1983 illustrates the potential severity of prison abuse and resulted in damages for the plaintiff, even in the absence of "actual" physical injury.[65]

D. The Circuit Split

The Supreme Court has long affirmed that the restriction of prisoners' rights is inherent in their confinement.[66] In 1964, however, the Court opened wide the floodgates of inmate litigation by recognizing the rights of prisoners to

language do not eliminate court's duty to resolve issue).

61. Farmer v. Brennan, 511 U.S. 825, 845 (1994). To hold in the alternative would be to clash with common sense. *See id*. (declaring unsafe prison conditions merit injunction even without resulting injury).

62. *See* Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 20 (2009) (noting sexual abuse may cause severe physical and psychological harm, yet not pass physical-injury test); Robertson, *supra* note 9, at 143 (discussing frequency of psychological brutalization by correction officers following PLRA enactment); *Developments*, *supra* note 9, at 1151 (suggesting narrow circumstances permit mental illness claims under PLRA); Darryl M. James, Comment, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465, 468 (2011) (noting type of abuse at Abu Ghraib prison in Baghdad not compensable under PLRA). Even in the absence of outright physical abuse, prison conditions such as solitary confinement can produce extreme emotional damage. *See* Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265, 276-77 (1977) (comparing mental effects of solitary confinement to physical harm). Physical manifestations of psychological abuse—and solitary confinement, in particular—can include "[h]yper-responsivity to external stimuli" as well as "motor excitement" causing sudden, violent outbursts. *See* Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J.L. & PSYCHIATRY 49, 54 (1986). Prison officials have the right to use solitary confinement as a disciplinary and security measure, and abuse of that tool is not compensable under the PLRA. *See* Robertson, *supra* note 3, at 17-18 (noting solitary confinement specifically tests mental well-being).

63. *See* MUSHLIN, *supra* note 5, § 17:25, at 624-25 (suggesting statutory language on its face gives "free rein" to psychologically torture inmates).

64. *See* Oses v. Fair, 739 F. Supp. 707, 709 (D. Mass. 1990). The guard also forced the inmate to kiss the shoes of the guard's wife, as the incident stemmed from a rumor—circulated by the plaintiff—that he was having an affair with the defendant-guard's wife. *See id.*

65. *See id.* at 710 (awarding damages of $1000 for Eighth Amendment claim). Damages might have been higher, but were reduced due to the plaintiff's own role in what the court determined had been "extreme provocation" of the prison guard, in the form of taunting the guard with love letters purportedly written to the inmate by the guard's own wife. *See id.* at 709-10. The district court found that the plaintiff had "goaded [the] defendant into a violent response." *Id.* at 710.

66. *See* Bell v. Wolfish, 441 U.S. 520, 537 (1979) (noting "[l]oss of freedom of choice and privacy are inherent incidents of confinement").

challenge the conditions of their confinement.[67] By mandating access to prison libraries and legal materials, the Court defined the right of court access in such a way that allowed prisoners to become increasingly litigious.[68] Although the Supreme Court has reviewed part of the PLRA, it has yet to address the limitation-on-recovery provision.[69]

While the First Circuit has never defined the PLRA's physical-injury requirement, the other courts of appeals continue to vary in their own definitions of the provision.[70] In 1997, the Fifth Circuit offered a more-than-de-minimis standard, to which several of the other circuits have adhered.[71] In that case, *Siglar v. Hightower*, 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.[72] More recently, the Fifth Circuit also denied a claim alleging the delay of necessary surgery, for failure to state a physical injury.[73] In addition, the Fifth Circuit held that pain and numbness resulting from handcuffs were only temporary, and without a physical injury of more lasting significance, the injury failed to pass the de minimis threshold.[74]

The Second, Third, Seventh, and District of Columbia Circuits have followed a similar vein of interpretation, at various times denying damages for claims of delayed medication, depression and insomnia, headaches and stress, sexual harassment, and unauthorized disclosure of the plaintiff's HIV-positive status.[75] The Seventh Circuit also addressed the question of asbestos exposure,

67. *See* Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam) (holding petitioner inmate adequately stated cause of action when denied permission to purchase religious publications); *see also* Benedetti, *supra* note 46, at 133-34 (recognizing punitive damages available to prisoners since eighteenth century).

68. *See* Bounds v. Smith, 430 U.S. 817, 825-26 (1977) (holding prisons to standard of "meaningful access" to legal materials).

69. *See* Woodford v. Ngo, 548 U.S. 81, 93-94 (2006) (upholding exhaustion requirement of PLRA).

70. *See* Shaheed-Muhammad v. DiPaolo, 393 F. Supp. 2d 80, 107-08 (D. Mass. 2005) (noting circuit split); *see also* Robertson, *supra* note 3, at 11-13 (discussing different lower-court interpretations of PLRA).

71. *See* Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (stating "injury must be more than *de minimus* [sic], but need not be significant").

72. *See id.*

73. *See* Jones v. Greninger, 188 F.3d 322, 326 (5th Cir. 1999) (per curiam) (affirming dismissal of Eighth Amendment suit for absence of physical injury); *see also* Robyn D. Hoffman, Note, *Adding Insult to Injury?: The Untoward Impact of Requiring More than De Minimis Injury in an Eighth Amendment Excessive Force Case*, 77 FORDHAM L. REV. 3163, 3174-75 (2009) (noting tension between indifference to prisoners' constitutional claims and "evolving standards of decency").

74. *See* Sublet v. Million, 451 F. App'x 458, 459 (5th Cir. 2011) (per curiam) (noting proper dismissal given evidence of only temporary injury).

75. *See* Davis v. District of Columbia, 158 F.3d 1342, 1345 (D.C. Cir. 1998) (affirming dismissal of claim alleging privacy violation for absence of physical injury); Cannon v. Burkybile, No. 99 C 4623, 2000 WL 1409852, at *6 (N.D. Ill. Sept. 25, 2000) (holding headaches, insomnia, stress, and anxiety insufficient to meet physical-injury requirement); Leon v. Johnson, 96 F. Supp. 2d 244, 248 (W.D.N.Y. 2000) (holding delay in administration of plaintiff's medication caused no physical injury); Speights v. Illinois, No. 99 C 4459, 2000 WL 263700, at *2 (N.D. Ill. Feb. 28, 2000) (holding prisoner's claim of taking medication against his will alleges no physical injury); Cloud v. Goldberg, No. CIV. A. 98-4250, 2000 WL 157159, at *5 (E.D. Pa. Feb.

where there existed no showing of physical injury at the time of the litigation.[76] The court dismissed the complaint while noting that the plaintiffs could potentially seek damages at a later date, should they develop an illness resulting from that exposure.[77]

In *Richmond v. Settles*, the Sixth Circuit affirmed the defendants' motion for summary judgment on a claim that the plaintiff had been denied meals and even drinking water.[78] The court held:

> The deprivation of life's necessities, such as food or water, can constitute a claim under the Eighth Amendment, but the withholding of meals, while it may result in some discomfort to the prisoner, does not result in a health risk to the prisoner sufficient to qualify as a wanton infliction of pain where the prisoner continues to receive adequate nutrition.[79]

The court held the plaintiff's claim to be reliant on the mental anguish associated with the deprivation, and thus barred him from asserting it.[80] The court's holding was despite the plaintiff's injuries on two occasions, including a knee injury, after which he claimed to have "pop[ped] his own knee back into place."[81]

Recent lawsuits affected by provisions of the PLRA illustrate the circuit courts' continuing struggle with vague statutory language requiring a demonstration of physical injury.[82] In *Williams v. Hobbs*, the plaintiff-inmate alleged two injuries suffered during his time in administrative segregation (commonly referred to as Ad. Seg.) and claimed that prison officials imposed the conditions of his confinement without procedural due process.[83] The

11, 2000) (holding mental and emotional effects of incarceration not more than de minimis to warrant recovery).

76. *See* Zehner v. Trigg, 133 F.3d 459, 460 (7th Cir. 1997) (noting plaintiffs claimed no physical injury, only mental and emotional).

77. *See id.* at 462-63 (requiring prior showing of physical injury for valid claim, not mere anticipation of illness).

78. *See* Richmond v. Settles, 450 F. App'x 448, 450, 455 (6th Cir. 2011) (noting claim of seven missed meals in six-day period). The plaintiff alleged that the denied meals were punitive in nature, resulting from his time confined to the behavioral management section of the facility. *See id.* at 451 (describing defendant's conditions while in behavioral management segregation).

79. *Id.* at 456 (citations omitted) (internal quotation marks omitted) (declining to hold conditions as constitutional violation).

80. *See id.* (holding claim barred by physical-injury requirement).

81. *Id.* at 450-51, 454 (internal quotation marks omitted) (noting details of alleged injuries). The plaintiff did not seek medical treatment following the incident, and the injury report indicated no redness, swelling, or abrasion of the knee. *See id.* at 451.

82. *See* Perez v. United States, 330 F. App'x 388, 389-90 (3d Cir. 2009) (per curiam) (remanding case under Federal Torts Claim Act, where "material" question of physical injury remained unanswered); Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding sexual assaults constitute physical injury as "matter of common sense").

83. *See* Williams v. Hobbs, 662 F.3d 994, 996-97, 1011 (8th Cir. 2011) (stating plaintiff's claims of

plaintiff dislocated his shoulder and suffered several injuries from a fall, and asserted that the injuries occurred as a result of security or transportation policies specific to Ad. Seg. inmates.[84] Nonetheless, the Eighth Circuit upheld the district court's decision to bar his claim for compensatory damages on the basis that the physical injuries, despite being real, were not the direct result of his continued Ad. Seg. incarceration.[85]

Similarly, the Fifth and Seventh Circuits have defined the physical-injury requirement narrowly, and literally.[86] In the Fifth Circuit, a prison nurse allegedly administered the wrong medication to an inmate, whose injuries nevertheless failed to meet the more-than-de-minimis *Siglar* standard.[87] That circuit also held that suggestions of asbestos exposure and erroneous HIV-positive test results failed to constitute a physical injury sufficient to sustain damages for emotional distress.[88] In the Seventh Circuit, a prison inmate was unable to show physical injury after he consumed significant amounts of lead in the prison's drinking water.[89]

In a recent case overturning a decision by the Ninth Circuit, the Supreme Court held that an inmate at a privately operated federal prison may not pursue an Eighth Amendment claim for damages against employees of the facility because adequate remedies are otherwise available under state law.[90] This raises additional concerns for prisoners asserting constitutional and civil rights claims, beyond the limitations of the physical-injury requirement.[91] An inmate

constitutional violations).

84. *See id.* at 1011 (offering detailed timeline of injuries).

85. *See id.* (affirming district court's denial of compensatory damages).

86. *See* Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 PRISON J. 290, 296-97 (2004) (chronicling circuit split and narrow interpretations of *physical injury*); Thomas Julian Butler, Commentary, *The Prison Litigation Reform Act: A Separation of Powers Dilemma*, 50 ALA. L. REV. 585, 587 (1999) (noting varied PLRA interpretations by circuit courts upholding constitutionality of PLRA provisions).

87. *See* Daniels v. Beasley, 241 F. App'x 219, 220 (5th Cir. 2007).

88. *See* Xuan v. Drago, 222 F. App'x 418, 418-19 (5th Cir. 2007) (per curiam) (dismissing claim of false HIV-positive notification as frivolous); Herman v. Holiday, 238 F.3d 660, 665 (5th Cir. 2001) (denying recovery for allegedly deliberate asbestos exposure absent showing of physical injury).

89. *See* Robinson v. Page, 170 F.3d 747, 748-49 (7th Cir. 1999) (remanding for factual consideration of whether plaintiff's allegations constituted physical injury or merely hazard thereof).

90. *See* Minneci v. Pollard, 132 S. Ct. 617, 620, 623 (2012) (denying Eighth Amendment claim of prisoner with adequate "alternative, existing" remedy under state tort law (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007))). The plaintiff asserted an Eighth Amendment claim for damages known as a *Bivens* action, alleging denial of adequate medical care during his period of incarceration. *See id.* at 620-21 (listing alleged injuries); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (upholding cause of action for damages alleging Fourth Amendment violation against federal government employee).

91. *See Minneci*, 132 S. Ct. at 625 (noting occasional incongruence between state law remedies and *Bivens* claims). The Court pointed out that state and federal laws place a number of limitations on the remedies available to prisoner-plaintiffs, § 1997e(e) among them. *See id.* (noting many limitations on relief). Similarly, in a *Bivens* action, the plaintiff is barred from asserting respondeat superior to recover from "a defendant's potentially deep-pocketed employer." *Id.*

at a federal prison, even one who asserts a more-than-de-minimis physical injury, may now find his constitutional claim barred by state tort law.[92]

The lower district courts within the First Circuit have had several occasions to address and define the physical-injury requirement, even though it has yet to be heard at the appellate level.[93] In *Skandha v. Savoie*, a prisoner sought damages following a precipitous drop in the temperature in his cell and throughout the prison wing during a winter night, alleging that a prison guard had purposely turned off the heat in retaliation against earlier misbehavior.[94] The prisoner claimed that his arthritis and other medical conditions had been adversely affected by this drop in temperature, and the District Court for the District of Massachusetts found that he did in fact state a sufficient claim to proceed under the PLRA, as his alleged physical maladies were sufficient to constitute more-than-de-minimis harm.[95]

Similarly, in *Boulanger v. U.S. Bureau of Prisons*, a district court judge denied the defendants' motion for summary judgment after a prisoner alleged the restrictions of his confinement were disproportionate to his risk of flight.[96] Here, yet again, the Massachusetts district court seemed more inclined than other courts to consider emotional and psychological effects, rather than employing a rigid formula that only recognized physical injury.[97] In contrast, the Ninth Circuit held that psychological harm resulting from a strip search fell short of the de minimis standard.[98] That court held that even if the plaintiff stated a claim alleging an illegal search, which violated his Fourth and Eighth Amendment rights, there was no statutory claim under the PLRA.[99]

While the First Circuit has yet to rule on the de minimis standard, a federal

92. *See id*. at 620 (barring recovery where X-ray showed potential fractures of both plaintiff's elbows following fall). The claims asserted in the case reflected plaintiff Pollard's significant physical injury. *See id.* at 620-21 (noting arm injury). In her dissent, Justice Ginsburg noted that Pollard would be entitled to a federal remedy under his Eighth Amendment claim, had he suffered the very same injuries "while incarcerated in a federal- or state-operated facility." *See id.* at 626 (Ginsburg, J., dissenting). Pollard was serving a federal sentence for a federal crime, and was placed in a privately operated facility only due to a federal contract. *See id.* at 627. Justice Ginsburg would, accordingly, have offered Pollard a remedy through the uniform rules of federal law. *See id.* (citing *Bivens*, 403 U.S. at 409 (Harlan, J., concurring)).

93. *See, e.g.*, Skandha v. Savoie, 811 F. Supp. 2d 535, 539 (D. Mass. 2011) (noting no First Circuit ruling on issue); Quiñones-Pagán v. Adminstración de Corrección, No. 08-2199(JAF), 2009 WL 2058668, at *5 (D.P.R. July 10, 2009) (ordering plaintiff to show cause to avoid dismissal based on lack of physical injury); Boulanger v. U.S. Bureau of Prisons, No. 1:06-cv-308-WES, 2009 WL 1146430, at *5 (D.N.H. Apr. 24, 2009) (reaffirming pretrial detainee's right to due process).

94. *See Skandha*, 811 F. Supp. 2d at 537-38 (detailing facts of case).

95. *See id.* at 539 (explaining court's reasoning).

96. *See Boulanger*, 2009 WL 1146430, at *2-3 (detailing facts of case).

97. *See id.* (denying defendant's motion for summary judgment); Robertson, *supra* note 9, at 118 (noting psychological harm manifest in many physical injuries).

98. *See* Acosta v. Arpaio, 466 F. App'x 556, 557 (9th Cir. 2011) (barring compensatory damages for psychological harm).

99. *See id.* (declaring no genuine dispute of material fact regarding physical injury). Without sustaining a physical injury in conjunction with the alleged activity and resulting psychological harm, the plaintiff was barred from compensatory damages. *See id.*

magistrate judge in the District of Massachusetts established that the failure to plead a physical injury is an affirmative defense to a § 1997e(e) action.[100] In *Ford v. Bender*, the plaintiff alleged that he had been confined to the Department Disciplinary Unit (DDU)—a solitary-confinement area of the facility—without a hearing, in violation of his right of due process under both the U.S. Constitution and the Massachusetts Constitution.[101] During this period of solitary confinement allegedly without due process, Ford claimed to have experienced a worsening of his preexisting medical conditions, including hepatitis C and type 1 diabetes.[102]

In addition to the alleged physical effects of his DDU confinement, Ford claimed to have suffered mental and emotional injuries, supported by a physician's undisputed testimony of the plaintiff's depression, anxiety, insomnia, and anorexia.[103] Ford ultimately spent 375 days in the DDU without a pretrial hearing.[104] The court agreed with the plaintiff that the physical-injury requirement is an affirmative defense—waived if not asserted—and thus the defendants, in failing to assert that bar to Ford's claims, had in fact waived the defense.[105]

The First Circuit will eventually hear a case in which it must resolve this issue.[106] The lower district courts currently operate without controlling precedent and may issue conflicting opinions as long as they lack a clear

100. *See* Ford v. Bender, No. 07-11457-JGD, 2012 WL 262532, at *11-12 (D. Mass. Jan. 27, 2012) (applying § 1997e(e) to prisoner's claim seeking compensatory damages for conditions of pretrial confinement).

101. *See id.* at *1-5 (chronicling plaintiff's detention history). Ford was initially incarcerated in 1980 and, during his confinement, he was housed in the DDU for a period of time following several disciplinary infractions. *See id.* at *2. In 2002, he received a ten-year DDU sanction for an incident in which he allegedly stabbed a correctional officer and held a nurse hostage. *See id.* In 2007, Ford was indicted on the assault charges, and upon completion of his original sentence his status changed to that of a pretrial detainee. *See id.* at *2-3. Ford brought suit because he was serving his pretrial detention in the DDU, a sanction not constitutionally imposed for an extended length of time absent a hearing. *See id.* at *4.

102. *See id.* at *9 (listing plaintiff's medical conditions and alleged effects of confinement). Ford did not claim either condition to have been caused by his time in the DDU, but the court found "credible" his evidence that his confinement worsened his condition due to the limited treatment options available to him there, and that he suffered further side effects as a result. *See id.*

103. *See id.* at *10 (accepting doctor's testimony for plaintiff and noting lack of dispute by defendants' medical expert).

104. *Ford*, 2012 WL 262532, at *1 n.3 (noting length of pretrial DDU confinement). Ford did not seek damages for the postconviction period of DDU confinement, which would be longer still, but which did not raise a constitutional question of due process. *See id*. The effects of the leg irons necessary for transporting Ford to and from his cell in the DDU were further exacerbated by his diabetic condition, leading to cuts that sometimes became infected. *See id.* at *9 (describing physical conditions and effects of DDU).

105. *See id.* at *13 (stating waiver of affirmative defense where not asserted). The court found persuasive the holding in *Douglas v. Yates*, 535 F.3d 1316, 1320 (11th Cir. 2008), declaring § 1997e(e) to be an affirmative defense—a question not yet addressed by the First Circuit. *See Ford*, 2012 WL 262532, at *12 (explaining procedural nature of statute). The district court awarded Ford $47,500 in damages against the defendants in their official and individual capacities. *See id.* at *18 (stating judgment in favor of plaintiff).

106. *See supra* note 93 and accompanying text (chronicling district court cases while noting First Circuit has not yet addressed issue).

interpretation of the physical-injury requirement.[107] Because so much of the language in the statute is ambiguous and undefined—including *mental or emotional injury* as well as *physical injury*—it is difficult to predict the opinions of lower courts within the circuit.[108] Our long-standing doctrine of stare decisis greatly values an element of predictability, for the sake of both our courts and our citizens.[109] Given the wide range of interpretations among the circuits, the First Circuit's first case involving the statutory requirements of the PLRA—whenever that may be—will set an important precedent for the lower district courts.[110]

III. ANALYSIS

A. Failures of the PLRA

The PLRA succeeded in accomplishing Congress's main objective: reducing the number of prisoner lawsuits.[111] However, the statute is overly broad, with the unintended consequence of perhaps barring many legitimate claims in addition to the meritless ones often used as examples of the need for such legislation.[112] Between the ambiguity of the statutory language and the breadth of its application, the physical-injury requirement in particular has succeeded in eliminating an overwhelming percentage of prisoner lawsuits, regardless of their merit.[113] Furthermore, because there is no clear line defining the term "frivolous lawsuit," courts differ in that characterization.[114]

The PLRA imposes exhaustion requirements that serve as an additional bar to prisoner lawsuits.[115] Furthermore, judges have the discretion to dismiss

107. *See supra* note 93 and accompanying text (pointing to need for authority of circuit courts in district court opinions).

108. *See* 42 U.S.C. § 1997e(e) (2006) (lacking definition of ambiguous statutory terms); *see also* MUSHLIN, *supra* note 5, § 17:25, at 624-25 (offering multiple interpretations of statutory language in PLRA).

109. *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 683 (1995) (noting importance of continuity in rule of law).

110. *See* Michael Abramowicz, *En Banc Revisted*, 100 COLUM. L. REV. 1600, 1605-06 & n.25 (2000) (describing public perception of some circuit courts as either conservative or liberal).

111. *See supra* notes 43-45 and accompanying text (detailing immediate decline in prisoner litigation); *see also* 141 CONG. REC. 14,570 (1995) (statement of Sen. Robert Dole) (declaring need to curb "astronomical" rise in prisoner lawsuits).

112. *See* Winslow, *supra* note 11, at 1657 (arguing PLRA inadvertently barred meritorious claims as well as meritless ones); *see also* 141 CONG. REC. 14,570-71 (1995) (statement of Sen. Robert Dole) (decrying frivolous lawsuits).

113. *See* Boston, *supra* note 38, at 434-35 (noting poor drafting of statute and its effect).

114. *See* Eisenberg, *supra* note 28, at 438 (noting inmate and judge may define "frivolous" very differently). The claim of a simple act of degradation or dehumanization—however small—may strike a judge as frivolous, but its impact on the prisoner may be quite real. *See id.* (noting prison life turns insignificant matters into real concerns).

115. *See supra* note 50 and accompanying text (outlining additional provisions of PLRA beyond physical-injury requirement).

claims that are frivolous or "wholly incredible."[116] For these reasons, Congress should narrow and clarify the language of the statute.[117] Although a recent amendment to the statute addressed one glaring oversight—the effective bar on claims of sexual abuse—it did little to address additional problems of statutory interpretation and constitutional fairness.[118]

The amendment was a critical first step toward fixing these shortfalls, but was nevertheless insufficient to address the many other problems with the current provision.[119] Congress should define *mental or emotional injury* and, most importantly, clarify the meaning of *physical injury*.[120] Until it does so, the courts must interpret the statute as written.[121] For the First Circuit, this will be a matter of first impression, and one of critical importance to the constitutional rights of an ever-increasing prison population.[122]

B. A Matter of First Impression for the First Circuit

The existing circuit split draws an entirely arbitrary line between true physical injury and that which is merely de minimis.[123] The First Circuit, when eventually addressing this issue as a matter of first impression, should attempt a logical interpretation of a statute drafted with less-than-impeccable logic.[124] The circuit courts have declared a vast range of injuries insufficient to meet the requirement of § 1997e(e).[125] In addition to the inconsistency of statutory application to a host of physical but seemingly minor injuries, the courts of appeals have held that many mental and emotional injuries fail to constitute a sufficient physical manifestation.[126]

On this last point, the First Circuit should start by defining a physical component to some of the mental or emotional injuries alleged in prisoner

116. *See* Denton v. Hernandez, 504 U.S. 25, 33 (1992) (noting judicial discretion to dismiss suits filed *in forma pauperis*); *see also* 28 U.S.C. § 1915(e)(2) (2006) (allowing court to request representation for any person unable to afford attorney).

117. *See supra* notes 32, 50 (noting PLRA exhaustion requirements and difficulties with respect to "wholly incredible" claims).

118. *See supra* note 60 (discussing recent amendment to close loophole for claims of sexual abuse).

119. *See supra* note 60 (emphasizing recent insertion of language related to claims of sexual abuse). The amendment addressed juvenile abuse claims and sexual abuse claims, but none of the other problems or ambiguities raised by the statutory language. *See* MUSHLIN, *supra* note 5.

120. *See* Robertson, *supra* note 3, at 11-13 (noting provision's failure to define terms, and multiple interpretations of each).

121. *See supra* notes 40-41 (identifying possible statutory interpretations by courts).

122. *See supra* notes 44-45 and accompanying text (considering correlation between increase in prisoner litigation and inmate population).

123. *See supra* notes 71-72 and accompanying text (explaining de minimis standard articulated in *Siglar*); *see also* Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) ("[T]he injury must be more than *de minimus* [sic] . . . .").

124. *See supra* note 38 (acknowledging poor drafting of PLRA).

125. *See supra* notes 75-76 (listing range of alleged physical injuries barred by provision).

126. *See Developments*, *supra* note 9, at 1151-52 (suggesting broad reading of statute allows for claims involving mental illness).

lawsuits, more broadly than its sister circuits have done.[127] The physical effects of dehumanizing behavior, psychological abuse, and torture are no longer mere speculation.[128] On the contrary, the medical community widely views these injuries as having a variety of potential physical manifestations.[129]

Doctors, as well as legal scholars, have studied the psychological impact of solitary confinement.[130] Such confinement is an essential option for maintaining a safe and orderly facility, but courts should be mindful of its potential for abuse.[131] If a prisoner's claim alleges due process violations related to placement in solitary confinement, an overly literal definition of physical injury is inappropriate.[132] Prisoners are not without civil rights, and a form of confinement specifically designed to weaken the spirit or test the psyche should be susceptible to judicial challenge and appropriate remedies.[133] A judge should not bar a claim of mental or emotional injury without even a glance at the merits of the claim.[134]

With respect to claims of purely physical injury, the First Circuit should clarify a threshold by which courts define such injuries as sufficient to meet the § 1997e(e) requirement.[135] It is a tenet of constitutional law that incarceration necessarily restricts the constitutional rights of prisoners, but evidence of physical injury such as sustained redness or bruising should be sufficient to file a complaint regarding that prisoner's treatment and conditions of confinement, rather than a court regarding this as de minimis.[136]

It is impossible for any court to interpret statutory language with such precision as to address all possible factual scenarios, but the First Circuit can do better than its sister circuits have done.[137] Using examples of case law from district courts—both within the First Circuit and beyond—the court can make a clear statement about the overreach of current statutory interpretation.[138] Defining physical injury more broadly, and conceding that physical

127. *See* Robertson, *supra* note 3, at 13 (noting failure of PLRA to define *mental or emotional injury*).

128. *See* Lobel, *supra* note 55, at 117 (noting "cruel and inhuman effects" of abuse even without long-term physical injury).

129. *See supra* note 62 (discussing psychological injuries from abuses in prison setting).

130. *See supra* note 62 (observing harms of solitary confinement).

131. *See supra* note 62 (recognizing legitimate security interests served by imposing solitary confinement with due process).

132. *See* Robertson, *supra* note 3, at 11-13 (suggesting possible definitions of *physical injury*).

133. *See id.* at 18 (noting solitary confinement used for purpose of testing mental state).

134. *See* Winslow, *supra* note 11, at 1672-73 (noting alternative means of dismissing cases without using PLRA provisions).

135. *See supra* note 75 (listing variety of alleged physical injuries barred by § 1997e(e)).

136. *See* Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (holding bruised ear insufficient to meet physical-injury requirement); *see also supra* notes 73-75 (discussing physical injuries and de minimis standard among circuits).

137. *See supra* note 75 and accompanying text (highlighting inconsistent standard across circuits for demonstrable prior physical injury).

138. *See supra* notes 93-97 and accompanying text (considering case history regarding PLRA in lower district courts within First Circuit).

manifestations are often inherent in situations of psychological abuse, will allow many meritorious lawsuits to proceed where they would currently be barred.[139]

IV. CONCLUSION

The First Circuit will be among the last to attempt to clarify the meaning and scope of the Prison Litigation Reform Act's physical-injury requirement. The court will have the opportunity to lead the way, however, as the first court of appeals to define the provision with any real clarity. Consistency of statutory interpretation is essential to the effectiveness of any law's application. While a contemplation of all possible fact patterns is impossible in the drafting of a federal statute, the First Circuit should strive to draw a clear line between potentially meritorious claims and those for which the court should reasonably require a demonstrable physical injury. Without a clear threshold by which to permit claims of injury, our courts will inevitably bar meritorious claims, the dismissal of which was never the purpose of the federal legislation.

Hilary Detmold

139. *See supra* note 75 (listing physical injuries for which other circuits barred claims).