CONCRETIZING ABSTRACT* RIGHTS: DAMAGES FOR INTANGIBLE CONSTITUTIONAL INJURIES UNDER THE PRISON LITIGATION REFORM ACT

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INTRODUCTION

On April 1st, 1997, Eric Oliver was arrested by the Las Vegas Metropolitan Police Department and detained at the Clark County Detention Center (CCDC).[1] For the first two days of his detention, Oliver was locked in a 404 square foot cell with around fifty other detainees. On April 3rd, he was transferred to a smaller cell, only 174 square feet, where he was kept with eighteen other people. For the following three days, Oliver was locked in the cell with no bed and no linens. He and the other detainees slept on the floors with intense overhead lighting and extreme air conditioning that "chilled [him] to the bone."[2] Oliver requested medical attention for a back condition, but his request was denied. After his release from jail, Oliver filed a § 1983 action against the management, Clark County, and the Clark County Sheriff, alleging violations of his Fourteenth Amendment rights.[3]

Since Oliver brought his suit in Nevada, his claim for compensatory damages survived a motion to dismiss, even though he was not able to demonstrate a physical injury. This was notable because § 1997e(e) of the

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* This title borrows the word "abstract" from the Supreme Court's holding that the abstract value of constitutional rights cannot form the basis for compensatory damages in civil rights lawsuits. Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (holding that "the abstract value of a constitutional right may not form the basis for § 1983 damages").

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1 Oliver v. Keller, 298 F.3d 623, 625 (9th Cir. 2002) (describing cell conditions).

2 *Id.*

3 *Id.* at 626 (reciting procedural posture).

Prison Litigation Reform Act (PLRA) creates a physical injury requirement for incarcerated people who bring § 1983 claims.[4] However, if Oliver had lived in Philadelphia, New York, or a number of other cities across the country, his claim for compensatory damages would have been dismissed.[5] These disparate outcomes would have been the result of the different ways courts interpret the physical injury requirement of the PLRA. In this particular instance, Oliver's claim survived because he was in the Ninth Circuit. Claims in Philadelphia or New York would have been governed by the Third and Second Circuits, respectively, both of which have case law that would prevent the award of compensatory damages.

Section 1997e(e) of the United States Code states that "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act . . . ."[6] Circuits are split in their interpretation of the statute. In the absence of a physical injury, some courts still allow for the award of compensatory damages to compensate for non-mental injuries caused by constitutional violations; others do not.[7] The availability of such compensatory damages is crucial for the vindication of civil rights and the sustainability of civil rights litigation, yet the Second, Third, Eighth, Tenth, and Eleventh circuits have interpreted § 1997e(e) in a restrictive sense that prohibits plaintiffs from accessing these damages. This article argues that the more restrictive method of interpretation is both harmful to plaintiffs and a misrepresentation of the law.

The plain text, legislative history, and spirit of the statute mandate that compensatory damages are available to compensate for intangible injuries caused by constitutional violations. Section 1997e(e) is not a complete bar on compensatory damages absent physical injury. This recognition is not only legally sound and faithful to the history and purpose of the PLRA; it is also a

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4 *Id.* at 630 (holding that "[t]o 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" in reversing the district court's granting of defendant's motion to dismiss).

5 See *infra* Section IIB.

6 42 U.S.C. § 1997e(e).

7 See *infra* Sections IIB(1), IIB(2).

moral imperative.[8] Interpreting § 1997e(e) to bar all compensatory damages in the absence of physical injury leaves incarcerated people with insufficient means for vindicating their civil rights.

The Sixth, Seventh, Ninth, and D.C. circuits have all recognized a less restrictive reading of § 1997e(e) that is more carefully aligned with its words, purpose, and history. However, these circuits are up against a challenge. The Supreme Court has been clear in its requirement that damages cannot compensate for the abstract value of constitutional rights.[9] When awarding damages to compensate for injuries caused by constitutional violations, circuits in this less restrictive category have been inconsistent in their recognition of the Supreme Court holdings, sometimes using language at odds with precedent.[10] This is not an insurmountable obstacle; rather, it is something courts must be aware of and address explicitly when awarding plaintiffs damages for lawsuits brought under the Prison Litigation Reform Act (PLRA).

This article makes two primary contributions. First, after presenting the history, context, and significance of the circuit split on the interpretation of the PLRA's physical injury requirement, this article will argue that the less restrictive approach is more faithful to the law's meaning, legislative history, and historical context. Next, this article will address the tension between the decisions made by circuits in this less restrictive category and the two Supreme Court holdings that address compensatory damages: *Stachura* and *Carey*.[11] This article will recommend strategies for navigating this tension in the context of First Amendment claims that rely on existing Supreme Court jurisprudence. For claims that fall under all other Amendments, including the Fourth, Eighth, and Fourteenth Amendments, this article will suggest a novel approach: using common law torts to concretize injuries suffered by incarcerated people.

This article will proceed in four parts. Part I describes the history and impact of the Prison Litigation Reform Act and introduces the physical injury requirement. Part II explains which forms of damages are universally available in all circuits under the PLRA and presents the circuit split on the availability of compensatory damages under § 1997e(e). Part III argues that the less

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[8] See *infra* p. 5–6 (explaining why access to federal courts is uniquely crucial for prisoners to vindicate their civil rights).

[9] Memphis Comty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (holding that "that the abstract value of a constitutional right may not form the basis for § 1983 damages").

[10] *Id.*

[11] 447 U.S. 299; Carey v. Piphus, 435 U.S. 247 (1978). In these two cases, the Supreme Court held that compensatory damages cannot be awarded to compensate for the abstract value of constitutional rights; there is a requirement of actual injury.

restrictive reading of § 1997e(e), which permits compensatory damages for intangible constitutional harms, is aligned with the text, legislative history, and common law background of the PLRA. Finally, Part IV addresses the legal tension between the holding in *Stachura* and the PLRA and suggests approaches for future litigation.

I. HISTORICAL CONTEXT

A. CONSTITUTIONAL RIGHTS IN PRISON

Before the 1960s, it was unclear whether people retained their constitutional rights while incarcerated.[12] Federal courts frequently deferred to the authority and knowledge of prison administrators and did not provide relief under § 1983.[13] Judges used a number of reasons to justify this "hands-off" approach, including their lack of expertise in prison administration, the potential for interfering with the prison staff's ability to exercise discretion, their fear of an influx of lawsuits, and respect for principles of federalism and the authority of state governments.[14]

This deferential approach shifted in 1964, when the Supreme Court decided that § 1983 did, indeed, apply to people who are incarcerated and allowed them to bring a lawsuit in federal court for a violation of his First Amendment rights.[15] Ten years later, the Court held explicitly that people still retain some constitutional protection when in prison, although the degree of that protection remained ambiguous.[16] The Court emphasized that courts needed to defer to "institutional needs" of prisons and that people's constitutional rights were "subject to restrictions imposed by the nature of the

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[12] Allison Cohn, Comment, *Can $ 1 Buy Constitutionality?: The Effect Of Nominal and Punitive Damages On the Prison Litigation Reform Act's Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299, 302 (2006) (noting that "[u]ntil the late 1960s, it was unclear whether prisoners retained any constitutional rights upon incarceration.") (citations omitted).

[13] *Id.* at 302 (summarizing judicial historical deference with regards to prisoner rights).

[14] James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 108–09 (2000) (stating rationale for historical judicial deference).

[15] Cooper v. Pate, 378 U.S. 546 (1964) (reversing the decision of the lower courts to dismiss the complaint of an incarcerated plaintiff since "[t]aking as true the allegations of the complaint [filed by the incarcerated plaintiff], as they must be on a motion to dismiss, the complaint stated a cause of action and it was error to dismiss it").

[16] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the Constitution and the prisons of this country.").

regime to which they have been lawfully committed."[17] After the Supreme Court gave incarcerated people access to federal courts, the number of such lawsuits grew rapidly. In 1966, 218 of these lawsuits were filed in federal court; in 1994 there were over 56,000 lawsuits filed by people incarcerated in jails or prisons.[18]

When a state actor violates an individual's constitutional rights, the resulting lawsuit is usually brought in federal court under 42 U.S.C. § 1983, which provides a cause of action against a state actor who, "under color of any statute, ordinance, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[19] Under the statute, federal courts can provide equitable relief or monetary damages for violations of civil rights.[20] Section 1983 is the mechanism used by incarcerated people to bring lawsuits when their constitutional rights are violated in prison.

While the ability to vindicate constitutional rights is crucial for everyone, the ability to do so in federal courts is particularly important for incarcerated people. Given the country's widespread policies of felon disenfranchisement, many presently or formerly incarcerated people do not have access to political processes such as elections.[21] In a 1996 speech, constitutional scholar Erwin Chemerinksy explained his belief that "prisoners . . . will get no protection from the political process. They have no political constituency. The only way to protect prisoners from inhumane treatment is [the] federal judiciary."[22] Access to courts is not sufficient; incarcerated people must have access to real remedies that create sustainability for future lawsuits. If they are unable to get damage awards in federal courts, their rights will not be vindicated.

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17 *Id.* at 556; *see also* Turner v. Safley, 482 U.S. 78, 89 (1987) ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.") (cited in Levine, *supra* note 9, at 2206).

18 James E. Robertson, *A Saving Construction: How to Read the Physical Injury Rule of the Prison Litigation Reform Act,* 26 S. ILL. L.J. 1, 3 (2001).

19 42 U.S.C. § 1983.

20 *Id.* (defining permissible forms of relief).

21 Eleanor M. Levine, *Compensatory Damages are Not for Everyone: Section 1997e(e) of the Prison Litigation Reform Act and the Overlooked Amendment*, 92 NOTRE DAME L. REV. 2203, 2207 (2017).

22 Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L. J. 17, 31 (1996) (remarks of Erwin Chemerinsky) (quoted in James E. Robertson, *Saving Construction: How to Read the Physical Injury Rule of the Prison Litigation Reform Act*, 26 S. ILL. U. L. J. 1, 14 (2001)).

Furthermore, without the availability of damage awards, civil rights attorneys are disincentivized from taking on lawsuits under the PLRA. [23]

The importance of access to federal courts—as opposed to state courts—has deep historical roots. The earliest version of § 1983 was passed as Section 1 of the 1871 Civil Rights Act.[24] Before the passage of the act, the Constitution provided a "shield rather than a sword" for civil rights.[25] Section 1 of the Civil Rights Act created civil remedies for the deprivations of any rights, privileges, and immunities guaranteed by the Constitution. At the time, it was the only "arrow [for prisoners] in this large federal quiver" of protections.[26]

The availability of this arrow was crucial for both practical and philosophical reasons. The majority opinion and concurrence in *Monroe v. Pape*, one of the first cases determining the contours of § 1983 actions, addresses these reasons directly.[27] The Court explained that state laws can be insufficient mechanisms for vindicating rights and, even if the laws are sufficient, the available remedies might not be.[28] Additionally, the availability of federal remedies is crucial when state remedies, though "adequate in theory," might not be "available in practice."[29] The unavailability could be tied to specific historical moments[30] or it could be a structural feature of state courts. Justice Harlan hypothesized that "state courts would be less willing to find a constitutional violation in cases involving 'authorized action' and . . . therefore the victim of such action would bear a greater burden in that he would more likely have to carry his case to this Court, and once here, might be bound by unfavorable state court findings."[31] The threat of state judges

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[23] *See infra* Section III(A)(3).

[24] 1871 Civil Rights Act, Ch. XXII, § 1 (giving ability for court redress of those who have been deprived of their rights as a result of the United States government).

[25] Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 3 (1985) (explaining the "limited [] role federal law played in protecting individual rights against state governments before the War Between the States" where "the Constitution, as amended by the Bill of Rights, provided a shield rather than a sword" for litigants seeking federal claims against state governments).

[26] *Id.* at 6.

[27] 365 U.S. 167, 168 (1961) ("This case presents important questions concerning the construction of . . . 42 U.S.C. § 1983.").

[28] *Id.* at 173 (stating the purpose of the law as "provid[ing] a remedy where state law was inadequate").

[29] *Id.* at 174.

[30] Justice Douglas explains that the precursor to § 1983, the Civil Rights Act of 1871, was passed by a Congress that was reacting to a report detailing "the activities of the Klan and the inability of the state governments to cope with it" and that "it was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [the bill]." *Id.* at 174–75.

[31] *Id.* at 195 (Harlan, J., concurring).

trying to protect state agencies and actors remains today, and is one of many reasons for the necessity of federal courts.[32]

Beyond this practical concern, Justice Harlan had a more philosophical rationale for supporting a cause of action in federal courts. He emphasized that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[33] This, too, remains a concern today and is part of why federal remedies remain crucial for plaintiffs in civil rights cases.

B. THE PRISON LITIGATION REFORM ACT

In the 1990s, Congress became concerned about the number of lawsuits filed by incarcerated people in federal court.[34] The Prison Litigation Reform Act (PLRA) was passed in response to these concerns and aimed to limit the number of such lawsuits.[35] Specifically, some members of Congress expressed concern that people were filing lawsuits from prison in response to "almost any perceived slight or inconvenience."[36] Such lawsuits included complaints about "insufficient locker space, a poor haircut given by a prison barber, being served chunky instead of creamy peanut butter, prison officials failing to invite a prisoner to a pizza party, being denied use of a Gameboy video game, and being issued Converse-brand shoes instead of Reebok or L.A. Gear."[37] During debate on the Senate floor, Senators emphasized their concerns about frivolous lawsuits and insisted that the PLRA would not prevent legitimate claims from being litigated.[38] The statute, however, did exactly that.[39]

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[32] *See* Note, *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 Harv. L. Rev. 1222 (2023) (discussing the limitations of using state courts to vindicate federal rights).

[33] *Id.* at 196.

[34] 142 Cong. Rec. S3703 (Statement of Sen. Spencer Abraham) (calling on President Clinton to enact Republican reforms aimed at reducing the 65,000 prisoner lawsuits filed in federal courts in 1995 by loosening federal oversight over prisons and transferring regulation of prisons to state and local governments).

[35] Prison Litigation Reform Act, 42 U.S.C. § 1997e (1996).

[36] Cohn, *supra* note 12, at 304.

[37] *See* 141 Cong. Rec. 27,042 (1995) (statement of Sen. Bob Dole) (providing examples of frivolous lawsuits, including claims brought for bad haircuts or being served chunky rather than creamy peanut butter).

[38] Cohn, *supra* note 12, at 304 (citing to the statements of Sen. Kyl and Sen. Abraham made on the floor of the Senate).

[39] Andra Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021),

The PLRA restricts access to court in a number of ways. These barriers begin before a someone can even file a claim. The PLRA prohibits indigent people from seeking filing fee waivers.[40] Additionally, incarcerated people must exhaust all administrative remedies within the prison system before filing their lawsuit.[41] These administrative remedies often begin with the complainant giving a written complaint to a prison official.[42] Some prisons require additional steps, such as appealing a decision to the warden.[43] All of these steps must be completed before a § 1983 claim can be filed.[44]

Those who succeed in overcoming these initial hurdles will still have a number of limitations on available relief. Section 1997e(e) of the PLRA, the focus of this Article, limits the recovery of damages for non-physical injuries.[45] While the provision does not limit nominal, punitive, or equitable relief, it makes compensatory damages unavailable for many litigants.[46] Additionally, attorney's fees, even for successful claims, are limited to 150% of the damages award.[47] The resulting inability to secure reasonable compensation limits the number of lawyers available to assist incarcerated people with navigating this maze of litigation.

C. THE PHYSICAL INJURY REQUIREMENT

Section 1997e(e) creates the physical injury requirement of the PLRA, which limits the type of relief available from civil actions in federal court without a showing of physical injury.[48] Specifically, it states: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other

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https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/ES5X-T9T7] (calling for the abolition of the PLRA based on twenty-five years of evidence showing that the statute places too high of a procedural burden on incarcerated litigants to access legitimate judicial remedies).

40 42 U.S.C. § 1915(b) (requiring prisoners to pay the full amount of the filing fee in civil actions).

41 42 U.S.C. § 1997e(a) (requiring prisoners to pursue remedies within prisons before seeking civil remedies).

42 *KNOW YOUR RIGHTS: THE PRISON LITIGATION REFORM ACT (PLRA)*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/know-your-rights/prisoners-rights [https://perma.cc/GFD2-73ZB] ("Prisoners who want to file a federal lawsuit about events in jail or prison must first complete the internal appeals process. This means that you need to know the rules of any appeals (or 'grievance') process in your facility, including time limits on filing an appeal after something happens. In most prisons or jails, you will have to file a written complaint on a form that is provided.").

43 *Id.*

44 *Id.* For a discussion of why these forms of relief are not adequate, *see infra* Part 2A.

45 42 U.S.C. § 1997e(e). One uncontested exception to this is claims for sexual assault, which do not require physical injury to survive § 1997e(e).

46 *Infra* p. 10–11.

47 42 U.S.C. § 1997e(d)(2). For a longer discussion of this provision, see Section III(A)(3).

48 42 U.S.C. § 1997e(e).

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."[49] The amendment permits people to bring lawsuits in federal court for mental or emotional injury with a prior showing of "commission of a sexual act," even if that act does not involve a physical injury.[50]

Section 1997e(e) caused immediate confusion. Just five months after the PLRA was passed the Senate held hearings to discuss the implementation of the law, partly because Section 1997e(e) was so difficult to interpret.[51] Decades later, courts still vary in their reading and application of § 1997e(e).

II. CURRENT CIRCUIT SPLIT

Circuit courts are in unanimous agreement that the physical injury requirement only applies to the award of compensatory damages; equitable relief, nominal damages, and punitive damages are available to incarcerated people even without a prior showing of physical injury.[52] However, circuits are split about the extent of § 1997e(e)'s limitations on compensatory damages. The Second, Third, Eighth, Tenth, and Eleventh circuits have maintained a strict bar against compensatory damages in the absence of physical injury or a sexual act. The Sixth, Seventh, Ninth, and DC circuits have all allowed for recovery of compensatory damages in the case of a pure[53] constitutional harms. The First and Fourth circuits have yet to decide whether § 1997e(e) bars

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[49] *Id.* The final phrase of this section was added in 2013 as part of the Violence Against Women Reauthorization Act. Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 1101(a), 127 Stat. 134.

[50] 42 U.S.C. § 1997e(e). *See* Levine, *supra* note 11, at 2217–20 (recounting the history of the Amendment and explaining the relevant definitions of sexual acts).

[51] Additionally, within a year of the PLRA's enactment, Senator Kennedy called it "poorly drafted." *Examining the Role of the Department of Justice in Implementing the Prison Reform Act, As Contained in Public Law 104–134 (Omnibus Consolidated Rescissions and Appropriations Act of 1996): Hearing Before the Committee on the Judiciary United States Senate*, 104th Cong. 2 (1996) (Statement of Sen. Paul Simon) (reading Sen. Edward Kennedy's statement where he describes the Prison Litigation Reform Act as "poorly drafted" and "constitutionally dubious").

[52] *See* e.g. Hoever v. Marks, 993 F.3d 1353, 1358 (11th Cir. 2021) (finding that damage limitations only apply to compensatory damages).

[53] In Bodnar v. Riverside Cty. Sheriff's Dept., 2014 WL 2737815, at *6 (C.D. Cal.), the court uses the phrase "pure constitutional violation" to describe a violation of a constitutional right that can be vindicated separately from a claim of emotional or physical harm.

compensatory damages for intangible constitutional harms, and district courts within each circuit are split and anticipating guidance from appellate courts.[54]

A. UNIVERSALLY AVAILABLE REMEDIES

The plain language of § 1997e(e) does not specify the kinds of relief it applies to; it says the section applies to any claims within the broad category of "[f]ederal civil action."[55] Circuits have interpreted it to apply only to compensatory damages; nominal damages, punitive damages, and injunctive relief are not affected by the physical injury requirement. The Eleventh Circuit, for example, found that the phrase "for mental or emotional injury" in § 1997e(e) suggests that the limitation on damages only applies to those damages that are granted to compensate for mental or emotional harm, which would be compensatory damages.[56]

Since nominal and punitive damages are not awarded to compensate for harms, Circuit courts have found that they are available even absent a physical injury.[57] Circuit courts have used the Supreme Court's decisions in *Carey*[58] and *Stachura*[59] to argue that the Court has recognized that constitutional rights can and must be vindicated by the award of nominal damages even in the absence of compensatory damages.[60] Punitive damages are also not awarded to

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54 *See, e.g.,* Shaheed-Muhammad v. Dipaolo, 393 F. Supp. 2d 80, 107-108 (D. Mass. 2005) ("The First Circuit has not addressed this question, and other courts are split . . . I continue to believe that § 1997e(e) is inapplicable to suits alleging constitutional injuries."); Cryer v. Spencer, 934 F. Supp. 2d 323, 338 (D. Mass. 2013) (declining to resolve an issue related to § 1997e(e) claims because of a pending First Circuit case that did not end up addressing the issue). For a discussion of § 1997e(e) in the Fourth Circuit, *see* Jones v. Price, 696 F. Supp. 2d 618, 624–625 (N.D.W.V. 2010) (acknowledging that the Fourth Circuit had not addressed the issue and determining that, in the meantime, the district court would adopt the decision of the majority of the circuit).

55 42 U.S.C. § 1997e(e).

56 Hoever v. Marks, 993 F.3d 1353, 1358 (11th Cir. 2021).

57 *See* Uzuegbunam v. Preczewski, 141 U.S. 792, 800 (2021) ("Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages.").

58 Carey v. Piphus, 435 U.S. 247 (1978) (concluding that without proof of actual injury, plaintiffs can only recover nominal damages).

59 Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986) (holding that damages of the value or importance of constitutional rights were not authorized by the statute as they were not compensatory).

60 *See, e.g.*, Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000) ("[T]he Supreme Court recognized in both *Carey* and *Stachura* that certain absolute constitutional rights may be vindicated by an award of nominal damages in the absence of any showing of injury warranting compensatory damages."); Searles v. Van Bebber, 251 F.3d 869, 879 (10th Cir. 2001) ("[S]ection 1997e(e) does not bar recovery of nominal damages for violations of prisoners' rights . . . the rule seems to be that an award or nominal damages is mandatory upon a finding of a constitutional violation.").

compensate for specific injuries; they are awarded to punish wrongdoing and deter similar actions in the future.[61] They are also available in the absence of compensatory damages,[62] so there is no actual or effective bar on punitive damages in the absence of physical injury.

Finally, courts have found that the physical injury requirement does not apply to injunctive or equitable relief.[63] In one of the early decisions addressing this, *Davis v. District of Columbia*, the court uses a plain meaning analysis of § 1997e(e)'s text to conclude that injunctive and declaratory relief are not limited by the statute.[64] The court explained that the text refers to injuries that have been "suffered," which indicates that it only applies to retrospective relief for past harms.[65] The court also explained that declaratory and injunctive relief do not require proof of an injury suffered; they require the plaintiff to show a threat of a future constitutional deprivation.[66] This is independent of actual injury and is not tied to the availability of damages.[67] Other courts have adopted this reasoning and cited *Davis*;[68] no circuit court currently bars injunctive or declaratory relief under §1997e(e).

B. THE SPLIT

Circuit courts are in agreement about the availability of nominal damages, punitive damages, and all forms of equitable relief. There is also uniform agreement that plaintiffs cannot receive compensatory damages for emotional or mental harms under the PLRA without a prior showing of a physical injury.[69] The split between the less restrictive and more restrictive courts comes from disagreement about the availability of compensatory damages for pure constitutional harms. Pure constitutional harms are violations of constitutional

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61 *Stachura*, 477 U.S. at 306 n.9 ("The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior.").

62 *See Allah*, 226 F.3d at 251 (holding that plaintiff could be entitled to an award of nominal and punitive damages).

63 *See, e.g.*, Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) ("Royal was free to seek . . . injunctive relief and a declaratory judgment."); Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002) ("By its terms, [§ 1997e(e)] does not limit the prisoner's right to request injunctive or declaratory relief.").

64 *See* 158 F.3d 1342, 1346 (D.C. Cir. 1998) (holding that § 1997e(e) is only a limitation on damages).

65 *See id.* at 1346 (explaining that the tense of the statute reflects its applicability to past injuries).

66 *See id.* (noting that to obtain relief a plaintiff must prove threat of loss of constitutional rights).

67 *See id.* (clarifying that plaintiff's right to obtain relief is independent from sustaining actual injury).

68 Mitchell v. Horn, 318 F.3d 523, 534 (9th Cir. 2003) (citing *Davis*, 158 F.3d (D.C. Cir)).

69 *See* 226 F.3d 247, 250 (3d Cir. 2000) ("Under § 1997e(e), however, in order to bring a claim for mental or emotional injury suffered while in custody, a prisoner must allege physical injury.").

rights that are independent from physical or mental injury.[70] In *Aref v. Lynch*,[71] the court lists a number of examples of pure constitutional harms, including loss of access to prison programming,[72] unconstitutional placement in solitary confinement,[73] and a lack of access to books.[74] These are the types of harms that qualify for compensatory damages in some circuits but not in others. Some circuits take a restrictive approach to the interpretation of the physical injury requirement: they do not allow for the award of compensatory damages without a prior showing of physical injuries. Other circuits take a less restrictive approach and only apply § 1997e(e) to claims of mental or emotional harm, allowing compensatory damage awards in the case of other harms, including intangible constitutional harms.[75]

1. Most Restrictive

The Second, Third, Eighth, Tenth, and Eleventh Circuits have the most restrictive approach to interpreting § 1997e(e): they do not allow compensatory damages if the claim does not involve a physical injury. One way these circuits argue for this position is through a plain meaning analysis; in *Royal v. Kautzky*, the Eighth Circuit denied compensatory damages for a First Amendment claim and used a plain meaning analysis to find a complete bar on compensatory damages in the absence of physical injury.[76] The court characterized the statute's language as "unmistakably clear."[77] Specifically pointing to the word "No" at the beginning of § 1997e(e), the court explained that "[t]o read this statute to exempt First Amendment claims would require us to interpret '[n]o Federal civil action' to mean '[n]o Federal civil action [except for First Amendment violations].'"[78] The court declined to do so: "If

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70 *See supra* page 11.

71 *See* 833 F.3d 242, 264 (D.C. Cir. 2016) (clarifying that constitutional harms are different from actual physical or emotional injuries).

72 *See* Cassidy v. Indiana Dep't. of Corr., 199 F.3d 374, 375–77 (7th Cir. 2000) (permitting plaintiffs to claim loss of prison programming as an injury).

73 Brooks v. Andolina, 826 F.2d 1266, 1269–70 (3d Cir. 1987) (concluding that a prisoner should have received compensatory damages for their unconstitutional segregation).

74 Hobson v. Wilson, 737 F.2d 1, 62 (D.C. Cir. 1984) (noting that the denial of an opportunity to participate in a meeting or presentation constitutes a loss).

75 Eleanor M. Levine, *Compensatory Damages Are Not for Everyone: Section 1997e(e) of the Prison Litigation Reform Act and the Overlooked Amendment*, 92 NOTRE DAME L. REV. 2203, 2205, 2211 (2017).

76 Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (limiting § 1997e(e) to recovery for mental or emotional injuries to plaintiffs who demonstrate physical injury).

77 *Id.*

78 *Id.*

Congress desires such a reading of section 1997e(e), Congress can certainly say so. We cannot."[79]

The circuits in this most restrictive category also use the history of tort law to argue against the availability of compensatory damages for pure constitutional harm. In *Allah v. Al-Hafeez*, the plaintiff brought a § 1983 claim against the prison chaplain on behalf of followers of the Nation of Islam alleging First Amendment violations.[80] The court found that § 1997e(e) barred Allah's claims for compensatory damages.[81] The court based its reasoning for this conclusion on tort law, explaining that it is "well-settled" that compensatory damage awards under § 1983 are governed by tort law compensation theories.[82] Ultimately the court decided that tort law permits compensatory damages for injuries suffered as a *result* of constitutional violations, but not for the constitutional violation itself.[83]

Finally, circuits in this most restrictive category cite legislative history as another reason to bar compensatory damages for pure constitutional harms. In *Harris v. Garner*, the Eleventh Circuit dismissed the claims of six plaintiffs who filed § 1983 claims against the Georgia Department of Corrections.[84] As one of many justifications for their decision to dismiss these suits, the court pointed to the legislative history of the PLRA.[85] The court characterized the goal of the PLRA as the substantial reduction of the number of lawsuits brought by incarcerated people in federal court.[86] This goal, the court reasoned, could never be attained if damages for pure constitutional harms were not limited by § 1997e(e). The court concluded that "[c]onstruing section 1997e(e) to be inapplicable to constitutional claims would render it virtually meaningless."[87]

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79 *Id.*; *see also* Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) ("The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted."); Thompson v. Carter, 284 F.3d 411, 417 (2d Cir. 2002) ("Because the words '[f]ederal civil action' are not qualified, they include federal civil actions brought to vindicate constitutional rights.").

80 226 F.3d 247, 248 (3d Cir. 2000).

81 *Id.* at 250.

82 *Id.*

83 *Id.*

84 216 F.3d 970, 985 (11th Cir. 2000).

85 *Id.* at 982.

86 *Id.*

87 *Id.* at 985. This decision was made before the Eleventh Circuit permitted the award of nominal and punitive damages for pure constitutional harms. This reasoning was, therefore, more logical in 1999 than it is in 2023.

2. Less Restrictive

Circuits in the less restrictive category recognize the existence of intangible constitutional harms that are distinct from mental, emotional, or physical injury. The Sixth, Seventh, Ninth, and DC Circuits all fall into this category. These circuits use the same interpretive strategies as the more restrictive circuits do—plain meaning, analysis of tort law, and legislative history—but come to the opposite conclusion: they have allowed compensatory damages to be awarded to compensate for pure constitutional harms without a prior showing of physical injury.

Circuits that follow this less restrictive approach read the language of § 1997e(e) as allowing compensatory damages to compensate for harms that are not mental, emotional, or physical. In *King v. Zamiara*, the court explained this view succinctly: "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."[88] By emphasizing a different set of words in the text, this group of circuits reached a different conclusion than their sister circuits.

This group of courts does not emphasize tort law as much as those on the other side of the split do. In *King*, the court mentioned common-law tort principles once, explaining that these principles allow for compensatory damages for First Amendment violations in the absence of physical, mental, or emotional injury.[89] Some cases do not mention tort law at all. The next two sections of this article will address why this is a missed opportunity.

While the legislative history of the PLRA, and § 1997e(e) in particular, is sparse, courts have cited it to support their allowance of compensatory damages. In *Aref v. Lynch*, the DC Circuit references the stated goal of the PLRA, which was to cut down on "frivolous" prison litigation.[90] The goal was not, they explained, to bar meritorious claims.[91] As a result, the court explained, "[w]e find it hard to believe that Congress intended to afford virtual immunity to prison officials even when they commit blatant constitutional

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[88] 788 F.3d 207, 213 (6th Cir. 2015) (citation omitted); *see also* Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999) ("Section 1997e(e), as its wording makes clear, is applicable only to claims for mental or emotional injury. It has no application to a claim involving another type of injury.").

[89] *See* 788 F.3d at 212 (clarifying that courts adhere to common-law tort principles with respect to First Amendment claims without a physical injury).

[90] *See* 833 F.3d 242, 265 (D.C. Cir. 2016) (explaining that PLRA was passed in anticipation of an increase in prison litigation).

[91] *Id.*

violations, as long as no physical blow is dealt."[92] In addition, the court noted that the PLRA contains numerous limitations on lawsuits, all of which limit the number of claims that end up in court. As a result, they surmised, it is unlikely that Congress decided to extend the physical injury requirement to all cases without physical injury instead of limiting it to claims of mental and emotional distress.[93]

III. DAMAGES FOR PURE CONSTITUTIONAL HARMS

The circuits in the less restrictive category have used a variety of arguments to support their awards of compensatory damages. This is crucial to the vindication of civil rights because other forms of relief are insufficient; it is also aligned with a legally sound interpretation of the statute. This section will begin by contextualizing what is at stake in this split between the more and less restrictive circuits by examining the limitations of equitable relief and punitive and nominal damages. Next, this section will return to the forms of statutory interpretation used by the circuits in their reading of the PLRA and argue that the less restrictive interpretation is correct according to a plain reading, the legislative history, and the history of tort law.

A. LIMITATIONS OF AVAILABLE RELIEF

Some courts that fall into the most restrictive category cite the availability of nominal, punitive, and injunctive relief as a fact that makes compensatory damages less important.[94] However, all three of these forms of relief have limitations that make them insufficient mechanisms for the vindication of constitutional rights. Additionally, without the availability of compensatory damages, litigation under the PLRA is an unsustainable practice for most civil rights lawyers, particularly because of the limitations on attorney's fees created by the statute.

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92 *Id.*

93 *Id.*

94 *See* Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997) ("Prisoners still possess what the Supreme Court has said the Constitution requires: 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'") (quoting Lewis v. Casey, 518 U.S. 343, 351 (1996)).

1. Equitable Relief

While courts do not apply § 1997e(e) to equitable relief, it is often unavailable for other reasons. Sometimes a plaintiff seeks relief for a harm that occurred in the past without fear that it will happen again, in which case prospective relief is not applicable.[95] Other times, the plaintiff's claim is moot by the time the complaint is filed. Plaintiffs only have standing for prospective relief when they can show they will be subjected to the same problem or harm again.[96] Often, by the time a claim is heard in federal court, the plaintiff has been transferred, the prison official has been fired or transferred, or the plaintiff has been released. Therefore, their claim is moot and they do not have standing for equitable relief.[97]

2. Nominal and Punitive Damages

Nominal damages are available under the PLRA even in the absence of a physical injury.[98] However, they are only awarded in the amount of one dollar.[99] They are used to recognize the violation of constitutional rights[100] and allow the prevailing party to collect attorney's fees,[101] but are still insufficient to compensate for constitutional harms.[102]

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95 *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) ("The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again.").

96 *See* Camreta v. Greene, 563 U.S. 692 (2011) (denying standing to the plaintiff, a student suing school officials for civil rights violations, because he had moved out of state and, therefore, would not be subject to the same harm again).

97 Cohn, *supra* note 10, at 323 n.135.

98 *See Allah*, 226 F.3d at 251 (holding that plaintiff could be entitled to an award of nominal damages without a prior showing of physical injury).

99 While this is not an explicit rule, it is almost universally followed. *See* Farrar v. Hobby, 506 U.S. 103, 105 (1992) (holding that a plaintiff who gets one dollar in punitive damages is the prevailing party).

100 *See* Uzuegbuman v. Preczewski, 141 S.Ct. 792, 802 ("[N]ominal damages can redress [plaintiff's constitutional] injury even if he cannot or chooses not to quantify the harm in economic terms.").

101 Farrar v. Hobby, 506 U.S. 103, 112, 115 (1992) (holding that a civil rights plaintiff who received an award of nominal damages is the prevailing party and is, therefore, eligible to receive attorney's fees). Note that punitive damages can be awarded against individual defendants but not against municipal entities. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). If a bureau of prisons is a state actor, this would apply. This does not apply to companies that run private prisons. *See* Sanders v. Glanz, 138 F. Supp. 3d 1248, 1259 (N.D.O.K. 2015).

102 *See supra* Section III(A)(3).

Punitive damages can be awarded on top of nominal damages, even in the absence of compensatory damages.[103] However, a number of factors significantly limit the amount of relief available. Punitive damages are never awarded as a right, regardless of how egregious a defendant's behavior is.[104] They may be awarded by a jury when they decide that a defendant's conduct was "motivated by evil motive or intent, or when it involves reckless or callous indifference" to the rights of others.[105] In order to get an award of punitive damages, a plaintiff must overcome the obstacles of both jury discretion and a high standard of intent.[106]

Even if a plaintiff does succeed in getting punitive damages, there are limits to the amount of money that can be awarded. Courts have long held that punitive damages must not be excessive; they must be proportional to the other damages awarded.[107] While courts have been hesitant to specify a specific permitted ratio,[108] in *BMW v. Gore*, the court held that a punitive damages ratio of 500:1 "transcend[ed] the constitutional limit."[109] Since nominal damage awards are only $1,[110] ratios enforced by courts make it hard to imagine a total damages award of more than $500. Not only does this under-compensate people whose rights have been violated, but it also creates structural barriers to future litigation, particularly given the attorney's fees provisions of the PLRA.

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[103] While the Supreme Court has never explicitly ruled on this, circuit courts have granted punitive damages in the absence of compensatory damages without protest from the Court. *See, e.g.*, *Allah*, F.3d at 251 (explaining, when granting nominal and punitive damages, that "[p]unitive damages may also be awarded based solely on a constitutional violation, provided the proper showing is made."); Searles v. Van Bebber, 251 F.3d 869, 881 (10th Cir. 2001) (mandating the award of nominal damages and remanding the case for a trial to determine a punitive damage amount).

[104] Smith v. Wade, 461 U.S. 30, 52 (1983).

[105] *Id.* at 56.

[106] *Id.* at 52-56.

[107] *See, e.g.*, TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993) (discussing the due process implications of large punitive damage awards); BMW v. Gore, 517 U.S. 559, 582, 585-86 (1996) (striking down punitive damages with a 500:1 ratio to compensatory damages).

[108] The exception to this is in maritime law: punitive damage awards are limited to a 1:1 ratio with compensatory damages. Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

[109] *BMW*, 517 U.S. at 586.

[110] This is not a hard and fast rule. However, nominal damage awards are almost always $1. *See* Farrar v. Hobby, 506 U.S. 103 (1992) (holding that a plaintiff who gets one dollar in punitive damages is the prevailing party).

3. Attorney's Fees Under the PLRA

When plaintiffs prevail in a § 1983 lawsuit, they can collect attorney's fees under § 1988.[111] To be the prevailing party in a lawsuit, the plaintiff must get some form of relief on the merits of the claim that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[112] This includes plaintiffs who win an award of nominal damages.[113]

The PLRA modifies the application of § 1988(b) to lawsuits brought by incarcerated people in numerous ways.[114] Notably, § 1997e(d) caps the amount of attorney's fees available both in total quantity and in percentage.[115] The enforcement of this provision creates a barrier for civil rights litigation, for lawyers cannot financially sustain themselves by taking on prison conditions cases.[116] Thus, the availability of nominal and punitive damages alone is insufficient for vindicating the rights of individuals and ensuring the long-term sustainability of prison conditions litigation.

B. SECTION § 1997E(E) PERMITS COMPENSATORY DAMAGES

The previous sections have explained why the availability of compensatory damages for pure constitutional harms is crucial. Alternative remedies—nominal, punitive, and equitable relief—are financially insufficient, often unavailable, and do not allow for sustainable prison conditions litigation. Additionally, recognizing that incarcerated people can be and frequently are harmed in ways that do not involve solely bodily harm is part of recognizing their humanity. Compensating those harms is not only financially necessary, it is also symbolically necessary. Furthermore, permitting awards of

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111 "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction." 42 U.S.C. § 1988(b).

112 506 U.S. at 111–12.

113 *Id.* at 112.

114 For more information about attorney's fees under the PLRA, *see* Lynn S. Branham, *Toothless in Truth—The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CALIF. L. REV. 999, 1008 (2001).

115 "Whenever a monetary judgment is awarded in an action described in paragraph a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2).

116 Cohn, *supra* note 10, at 326–27.

compensatory damages is aligned with the history of tort law, the plain text, and the legislative history of § 1997e(e).

1. Plain Text

The plain text of § 1997e(e) suggests that compensatory damages should be available to compensate for pure constitutional harms. Since the circuit courts are split in their statutory interpretation, this article will conduct an independent analysis. Section 1997e(e) states that "No Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act."[117] One principle of statutory interpretation is the rule against surplusage, which presumes that Congress would not have intended an interpretation of a statute that would render certain words meaningless.[118] An analysis using this tool supports the Sixth Circuit's conclusion that compensatory damages should be available for pure constitutional harms.[119] If compensatory damages were never available in the absence of physical injury, the phrase *for mental or emotional injury* would be rendered superfluous. An interpretation barring compensatory damages to compensate specifically for mental or emotional injury would be more aligned with the text of the statute.

2. Legislative History

The legislative history of the PLRA further supports the less restrictive interpretation of the physical injury requirement. The goal of the PLRA was to prevent incarcerated people from bringing "nonmeritorious" claims in federal court.[120] Examples of these claims were provided during the debate on the senate floor. Senator Spencer Abraham said that people had brought claims because their ice cream had melted, they didn't like the country music played by their unit manager, they received chunky instead of smooth peanut butter, and their slice of cake at dinner was broken up.[121] He told his colleagues that these claims were wasting taxpayer dollars and making it more difficult for

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117 42 U.S.C. § 1997e(e).

118 *See* Nat'l. Credit Union Admin. v. First Nat'l. Bank & Trust Co., 522 U.S. 479, 501 (1998) (using this method to interpret the Federal Credit Union Act).

119 788 F.3d at 212–13.

120 142 Cong. Rec. S3703 (1996) (Statement of Spencer Abraham).

121 *Id.* The presentation of these examples was dripping with condescension. Regarding the ice cream claim, Mr. Abraham said, "an inmate claimed $1 million in damages for civil rights violations because his ice cream had melted. The judge ruled that the right to eat ice cream was clearly not within the contemplation of our Nation's forefathers."

states to dedicate resources towards incarcerating "dangerous offenders."[122] The examples of nonmeritorious claims provided in the congressional debates are not comparable to the kinds of claims that are now limited by § 1997e(e): psychological torture,[123] gender-based discrimination,[124] baseless solitary confinement,[125] and the prohibition of religious exercise[126] are just a few.

Later in the congressional debates, senators favoring the PLRA reassured those who had concerns about access to courts. Senator Hatch, for example, explained that he did not "want to prevent inmates from raising legitimate claims . . . . [T]here are cases in which prisoners' basic civil rights are denied . . . . [T]his legislation will not prevent those claims from being raised."[127] Senator Jon Kyl, one of the architects of the bill, shared a similar sentiment: "[P]risoners still have the right to seek legal redress for meritorious claims."[128] Given these reassurances, it is unlikely that the senators who voted for the PLRA intended to prohibit all lawsuits that weren't based on physical injury.

The limited mention of the physical injury requirement in these debates reinforces the plain text reading of the statute. Section 1997e(e) was not discussed at length in the congressional debates—indeed, it was barely mentioned. However, Senator Kyl mentioned the provision as he was explaining his proposal. He explained: "Sections 4 and 5 of the bill will bar inmate lawsuits for mental or emotional injury suffered while in custody unless they can show physical injury."[129] This statement closely mirrors the final phrasing of § 1997e(e) in a crucial way: it shows that the relevant sections of the bill applied to lawsuits *for mental or emotional injury*, not all lawsuits. This reinforces the plain text reading of the less restrictive group of circuits; section 1997e(e) was never meant to apply to intangible constitutional harms.

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122 *Id.*

123 Hutto v. Finney, 437 U.S. 678, 687–88 (1978).

124 *See* Hunter Kravitz, *The Prison Litigation Reform Act and the Physical Injury Requirement in the Context of Transgender Inmates*, 4 CARDOZO INT'L & COMP. L. REV. 1041 (2021) (describing rampant discrimination against transgender prisoners).

125 Royal v. Kautzky, 375 F.3d 720, 731 (8th Cir. 2004).

126 Searles v. Van Bebber, 251 F.3d 869, 872, 874–75, 881 (10th Cir. 2001).

127 141 Cong. Rec. S18136–37 (statement of Senator Hatch).

128 141 Cong. Rec. S14418 (statement of Sen. Jon Kyl) (quoted in *Aref*, 833 F.3d at 265).

129 141 Cong. Rec. S7527 (statement of Senator Kyl).

3. Tort Law

Section 1983 provides a cause of action for constitutional torts, and is, therefore, governed by common law tort rules.[130] Barring compensatory damages for pure constitutional harms is at odds with this history of tort law.[131] Tort law is full of awards of damages to compensate for harms that do not involve physical injuries. One clear example is common law of defamation, which provides compensation to individuals for injuries to their reputation.[132] In instances of defamation, the plaintiff can receive compensatory damages even if there is "no evidence which assigns an actual dollar value to the injury."[133] By limiting damages in the absence of physical injury, the PLRA created a "preferred" set of constitutional injuries: those predicated on physical harm.[134] This is contrary to common law torts: "[w]hereas courts are required in the non-prisoner context to award compensatory damages when an actual injury is proved, the PLRA mandates the opposite: courts must now dismiss compensatory claims where the prisoner alleges certain actual injuries."[135] Even the least restrictive reading of § 1997e(e) is likely inconsistent with common law, so the most restrictive reading is entirely at odds with it.[136]

IV. QUANTIFYING RIGHTS

This article began by presenting the historical context and present state of a split between circuits on how to interpret § 1997e(e). Section three argued that the less restrictive interpretation is not only morally urgent, but also legally correct. However, there is tension between decisions out of the less restrictive circuits and Supreme Court jurisprudence on compensatory damages. This tension is not insurmountable. It must, however, be addressed to ensure the availability of compensatory damages for non-physical injuries under the

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130 *See* Imbler v. Pachtman, 424 U.S. 409, 417 (1976) ("[§ 1983] creates a species of tort liability."); *see also* Careys, 435 U.S. at 257–58 ("[T]he common law of torts has developed a set of rules . . . [these] provide the appropriate starting point for the inquiry under § 1983 as well.").

131 For a criticism of the PLRA's requirement that damages for mental and emotional harm must be predicated on a showing of physical harm, *see* Robertson, *supra* note 11, at 4–6.

132 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348–49 (1974) ("[W]e endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury for reputation.").

133 *Id.* at 350.

134 Cohn, *supra* note 10, at 329.

135 *Id.* at 330.

136 Even if the more restrictive interpretation of § 1997e(e) were aligned with common law torts, the Supreme Court has emphasized that plaintiffs should still be compensated for their injuries in instances where tort law does not exactly align with a constitutional harm. 435 U.S. at 258.

PLRA. This section suggests that borrowing from foundational tort law provides an avenue for reconciling this tension.

A. THE *STACHURA* PROBLEM

Quantifying the value of constitutional rights appears to be a highly subjective process. Moreover, there is a series of Supreme Court decisions that hold that compensatory damages cannot be based on the abstract value of constitutional rights. The circuit courts on the more restrictive side of the split point to existence of these cases—particularly *Carey*[137] and *Stachura*[138]—as one of the reasons compensatory damages should not be awarded to vindicate the violation of intangible rights. The tension between the Supreme Court's holdings in these cases and the less restrictive view of § 1997e(e) is real and notable, but not insurmountable. However, the circuits on the less restrictive side of the split largely have not acknowledged this tension, which might create additional obstacles for practitioners in the future. This article makes the argument that these courts should address the tension head on and rely on the jurisprudence of presumed damages and common law torts to square their holdings with those in *Carey* and *Stachura*.

Principles of remedies under § 1983 cases are largely drawn from the common law of torts.[139] *Carey v. Piphus* was one of the first cases that created the framework for understanding the goals of compensatory damages under § 1983. It established that compensatory damages must compensate for an "actual" injury.[140] Eight years later, the Court refined its holding in *Carey* in its decision in *Memphis Community School Dist. v. Stachura*. Writing for the majority opinion, Justice Powell characterized *Carey*'s precedent: it was "impermissible" to ask a jury to determine appropriate compensation for a right not based on provable injury, but on "subjective perception of the importance of constitutional rights as an abstract matter."[141] *Carey*, he explained, "makes [it] clear that the abstract value of a constitutional right may not form the basis for § 1983 damages."[142] In *Stachura*, the Court expounded on its reasons for this decision, which included a lack of historical guidance, concerns about arbitrary damage awards, and concerns about the impact this

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137 435 U.S. at 264–65.

138 477 U.S. 299, 308, 310 (1986).

139 435 U.S. at 257.

140 *Id.* at 266.

141 477 U.S. at 308.

142 *Id.*

would have on § 1983 claims.[143] The court cites these reasons for its ultimate conclusion: "We therefore hold that damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in such cases."[144]

These holdings pose a problem for the circuit courts that fall within the less restrictive category. The language they use to describe what they're compensating for—the violation of constitutional rights—is seemingly at odds with the holdings in *Carey*, *Stachura*, and their progeny.[145] Most of the recent cases in which circuit courts have declared themselves to be in the less restrictive category do not acknowledge this tension, which has created inconsistency among district courts.[146]

In *Rios v. Tilton*, the Eastern District of California applied the Ninth Circuit's decision in *Canell* to a First Amendment claim brought by a plaintiff in state prison.[147] In its decision, the court explained that district courts within the circuit had varying interpretations of *Canell*'s holding. In *Rios*, the court determined that they could not square an award of compensatory damages for the violation of the First Amendment with *Stachura*'s holding.[148] As a result, they determined that "the soundest reading of . . . *Canell* is that prisoner plaintiffs may seek compensatory damages for First Amendment violations based on alleged mental and emotional injuries, even if they have not presented evidence of accompanying physical injury."[149] This holding is explicitly at odds with even the least restrictive interpretation of § 1997e(e). However, by not acknowledging the tension with *Stachura* in *Canell*, the Ninth

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143 "Moreover, damages based on the "value" of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution. History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections. Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants . . . . Such damages would be too uncertain to be of any great value to plaintiffs, and would inject caprice into determinations of damages in § 1983 cases." *Id.* at 310.

144 *Id.*

145 *See* Canell, 143 F.3d at 1213 ("[Plaintiff] is asserting a claim for a violation of his First Amendment rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought.").

146 *See* Robinson, 170 F.3d at 749 (holding that claims for an injury that is not emotional or mental are not barred by § 1997e(e) without citing *Stachura* in the entire opinion).

147 2016 WL 29567, at *4, *13, *14 (E.D. Cal.).

148 "For the court to adopt defendant's position would be, in essence, to hold that a constitutional violation can, in and of itself, give rise to compensatory damages . . . . such a holding would run afoul of [*Carey* and *Stachura*]." *Id.* at *14.

149 *Id.*

Circuit did not provide sufficient guidance to lower courts about how to think about compensatory damages for non-physical injuries.

Practitioners and advocates should be on notice that this is an obstacle they might encounter in future litigation – certainly in the more restrictive circuits and also quite possibly in the less restrictive circuits. This is particularly urgent given that courts in the more restrictive category have recognized this tension and use it in their determinations about § 1997e(e).[150] The next section of this article will propose two avenues for navigating this obstacle.

B. PRESUMED DAMAGES

Courts in the less restrictive category can award compensatory damages to plaintiffs without a prior showing of physical injury by awarding them presumed damages. These damages would be compatible with both § 1997e(e) and *Stachura* and accomplish the goal of vindicating violations of constitutional rights.

Presumed damages have their roots in common law; judges would allow juries to presume a plaintiff's injury from the facts establishing the defendant's liability.[151] Juries could then award a substantial amount of compensatory damages to compensate the plaintiff for their particular injury.[152] Presumed damages have been commonly recognized in claims about libel[153] and the deprivation of voting rights.[154] In these cases, juries are instructed to assume, *per se*, that an injury must have occurred because of the libelous statement or deprivation of the right to vote. Then, even though those injuries cannot be

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150 *See, e.g.*, Allah, 226 F.3d at 250 ("The abstract value of a constitutional right, the Supreme Court has stated, 'may not form the basis for § 1983 damages.'") (quoting *Stachura*, 447 U.S. at 308); Meade v. Plummer, 344 F.Supp.2d 569, 573 (E.D. Mich. 2004) (explaining that *Stachura* "rejected [the] . . . rationale" of circuit courts that allowed compensatory damages for the violation of constitutional rights without requiring the injury be specific and provable); Rowe, 196 F.3d at 781 ("A deprivation of First Amendment rights standing alone is a cognizable injury."); Canell, 143 F.3d at 1213 (holding that the deprivation of First Amendment rights entitles a plaintiff to judicial relief).

151 Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASHINGTON & LEE L. REV. 67, 68 (1992) (showing common law tradition of granting damages from established liability).

152 *Id.*

153 *See* Gertz v. Welch, 418 U.S. 323, 349 ("Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.").

154 For a full account of presumed damages in voting rights suits, *see* Love, *supra* note 141, at 80–84.

calculated based on something like lost earnings, compensatory damages are awarded to compensate for them.[155]

Similar principles can be used in the award of damages to plaintiffs who bring claims under § 1983. *Stachura* recognized this possibility even though the Court declined to award presumed damages in that particular case.[156] The Court explained that, "[w]hen 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."[157] The Court distinguished such presumed damages from the kind of damages the jury was instructed to consider by the lower court. It explained that the jury was asked to measure damages based on a "subjective evaluation of the importance of particular constitutional values."[158] This is distinct from the task juries are given when awarding presumed damages, which is to determine the plaintiff's specific injury in their specific case.[159]

Stachura specifically contemplated the award of compensatory damages in the First Amendment context. By the time *Stachura* was decided, the Court had already determined that any violation of the First Amendment created an injury.[160] Writing for the concurrence, Marshall recalled some of the history of this jurisprudence and argued that since a First Amendment violation could constitute an injury distinct from any emotional distress, First Amendment violations are compensable for those distinct injuries.[161] If deprivations of

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155 Love, *supra* note 141, at 70.

156 The Court explained that presumed damages are a substitute for compensatory damages, not a supplement. Since the plaintiff did not plead for presumed damages, they were not available. Stachura, 447 U.S. at 310.

157 *Id.* at 310–11.

158 *Id.* at 311.

159 Love provides an example that is illustrative of this point. She cites the class settlement agreement in Vargas v. Calabrese, No. 85-4125, slip op. at 27–29 (D.N.J. Mar. 5, 1990), *aff'd*, 949 F.2d 665 (3d. Cir. 1991). The settlement included 1,000 plaintiffs, each of whom had been denied the right to vote because of their race. The court ruled that the plaintiffs were entitled to presumed general damages. Love explains that, "[h]ad the settlement agreement in *Vargas* awarded damages for the 'inherent value' of a constitutional right, each plaintiff would have received a uniform sum of money. But because the agreement awarded presumed general damages for the 'particular loss' sustained by each plaintiff, the three groups of plaintiffs received varying amounts of money, depending on the circumstances. Those plaintiffs who were prevented from voting received a larger sum than those who were discouraged from voting." Love, *supra* note 145, at 84.

160 *See* Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); Hobson v. Wilson, 737 F.2d 1 (holding that injuries due to First Amendment violations can be compensated with damages in § 1983 cases).

161 Stachura, 477 U.S. at 315 (Marshall J., concurring) (showing First Amendment violations can have their own distinct damages).

constitutional rights never constituted compensable injury, Marshall wrote, that rule would be "inconsistent with the logic of *Carey*, and would defeat the purpose of § 1983 by denying compensation for genuine injuries caused by the deprivation of constitutional rights."[162] Crucially, Marshall's concurrence makes it clear that the compensation would come in the form of presumed damages.

Given this precedent, the application of presumed damages to First Amendment claims brought by incarcerated people is the clearest transition from a broader discussion of presumed damages to a discussion of compensatory damages under § 1997e(e). *King v. Zamiara*, the Sixth Circuit case that placed the Circuit in the less restrictive category with respect to the interpretation of § 1997e(e), is an example of this and a notable outlier in its explicit discussion of *Stachura*.[163] The court addressed the tension between *Stachura* and awarding compensatory damages for constitutional violations head on. It cited *Stachura* and emphasized that compensatory damages must be awarded to compensate for a real, particular injury sustained; not for the abstract importance of the right that was violated.[164] In affirming the lower court's decision about damages, the court emphasized that the district court had "focused on the particular circumstances of King's case and the harms he suffered . . . and was careful to focus on approximating the value of the harm King actually suffered on the facts of this case, not on the abstract value of importance of his First Amendment rights."[165]

The depth of federal jurisprudence on injuries caused by First Amendment violations is robust, which should make the path to compensatory damages for these claims under the PLRA clearer than it would be otherwise. However, other constitutional injuries do not have such presence in federal court decisions.

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162 *Id.* at 316.

163 King v. Zamiara, 788 F.3d at 211–216 (6th Cir. 2015) (affirming the district court's grant of compensatory damages for a violation of plaintiff's First Amendment rights).

164 *Id.* at 214.

165 *Id.* at 215. Here, the specific injury suffered was increased difficulty in obtaining affidavits or declarations concerning prisoner property violations for use in future litigation. This was done in retaliation for King's exercise of First Amendment rights. *Id.*

C. TORTIOUS INJURIES

The Supreme Court has made it clear that the deprivation of First Amendment rights necessarily creates constitutional injury.[166] In the absence of such clarity on other constitutional rights, plaintiffs might face a greater challenge in proving the existence of actual injury, which is a requirement for compensatory damages under *Carey*, *Stachura*, and their progeny.[167] In order to prove the existence of such constitutional injuries, plaintiffs should turn to tort law to guide their arguments and create a familiar foundation for their claims. Cases brought outside of the purview of the PLRA can be instructive in this. In *Kerman v. City of New York*, the Second Circuit relied on the tort of false imprisonment in its holding that a plaintiff could recover compensatory damages for his loss of liberty after being involuntarily held in a hospital.[168] These damages, the court explained, would be wholly separate from damages for injuries such as physical harm or emotional suffering. Specifically addressing *Stachura*, the court explained that the plaintiff was not claiming damages for an abstract harm; instead, what happened in the case was an "anything-but-abstract physical detention."[169] By contextualizing their argument in familiar, well-established tort law, the plaintiffs in this case were able to clearly identify cognizable injuries, which can then be compensated with damages.

The Seventh Circuit's decision in *Stewart v. Lyles* demonstrates how the failure to use such grounding in tort law could be unjust to plaintiffs.[170] The court heard a case brought by a plaintiff, Stewart, who was in the Stateville Correctional Center in Illinois when he was subjected to a public strip search.[171] The court described the facts alleged in the complaint:

> [O]n two consecutive days in October 1999, Lyles and Wright, accompanied by prison security officers, entered the Stateville "tailorshop" where [plaintiff]

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166 *See* Love, *supra* note 149, at Part IV.B (showing Justice Powell's sharp division between the abstract value of constitution rights and the presumed damages from violating such rights).

167 *See* Allah, 226 F.3d at 250 (barring plaintiff from recovering compensatory damages because the court did not recognize any actual injury beyond emotional or mental harm).

168 Kerman v. City of New York, 374 F.3d 93, 125 (2d Cir. 2004) (drawing distinction between damages for loss of liberty and damages for physical injuries). Notably, this lawsuit was not brought by a prisoner. If it had been, the Second Circuit's precedent suggests that compensatory damages would have been barred by § 1997e(e). Thompson v. Carter, 284 F.3d 411-412 (2d Cir. 2002) (affirming a denial of inmates' pro se civil rights actions against corrections officers).

169 Kerman, 374 F.3d at 130.

170 Stewart v. Lyles, 66 F. App'x. 18 (7th Cir. 2003) (holding that plaintiffs may state a claim for purely psychological injury from Eighth Amendment violations but only nominal and punative damages may be awarded).

171 *Id.* at 19.

> worked and ordered the inmates there to strip off their outer clothing and undershorts in front of the approximately 130 inmates working in the shop and several female supervisors. On the first day, Stewart informed Lyles and Wright that the search procedure violated Illinois Department of Corrections rules requiring strip searches to be conducted in private absent an emergency. In response, Lyles and Wright singled out Stewart for a more invasive search, telling him, "Okay, since you got something to say, you strip down all the way, spread your cheeks, or go to Segregation." Stewart complied. The next day when Lyles and Wright returned to conduct a second search, Stewart was armed with a copy of the applicable prison rule. Undeterred, Lyles and Wright informed him that they didn't "care about that paper" and again subjected him to an anal cavity inspection.[172]

Stewart brought a claim under § 1983 for violations of his Eighth and First Amendment rights. Among other decisions, the Seventh Circuit held that, since Stewart did not allege any physical injury, § 1997e(e) barred him from recovering compensatory damages for his Eighth Amendment claim.[173] However, the court also cited its previous decision in *Rowe*, which determined that § 1997e(e) does not retstrict damages in cases alleging First Amendment violations.[174]

The inconsistency exemplified by the contrast between the holdings in *Kerman* and *Stewart* threatens the ability of incarcerated people to vindicate violations of their civil rights even in circuits that fall in the less restrictive category. In *Rowe*, the case cited in *Stewart*, the Seventh Circuit determined that § 1997e(e) did not bar compensatory damages for First Amendment violations because "[a] deprivation of First Amendment rights standing alone is a cognizable injury."[175] While the Seventh Circuit never said this explicitly in *Stewart*, its rationale in *Rowe* suggests that they barred Stewart from being able to recover compensatory damages for his Eighth Amendment right because he did not sufficiently demonstrate a cognizable injury that was caused by the violation. In such a situation, drawing on common law torts could provide plaintiffs with a foundation to identify a specific injury that the court might recognize.

Here, Stewart's experience in prison could amount to an intrusion upon seclusion.[176] The introduction to the chapter on invasions of privacy in the

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172 *Id.* at 20.

173 *Id.* at 21.

174 *Id.* at 22 (citing Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999)).

175 Rowe, 196 F.3d at 781.

176 "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the

Restatement (Second) of Torts makes it clear that anyone who commits one of the intentional torts within the category is liable for the resulting harm to the interests of the other.[177] By grounding his claims in tort law, Stewart might have been able to demonstrate a cognizable and specific injury to the judges, increasing his chances of recovering compensatory damages. This is a strategy that litigators might find successful when bringing lawsuits under the PLRA.

CONCLUSION

As the law now stands, ability to vindicate violations of civil rights in prisons varies greatly depending on the forum. This is not only harmful to individual plaintiffs but also makes the practice of litigating these claims unsustainable for civil rights lawyers in certain states. Section 1997e(e) of the U.S. code does not prohibit the award of compensatory damages for intangible constitutional injuries; this is clear in its plain meaning, the legislative history of the PLRA, and the relevant tort law. The circuits that continue to bar compensatory damages for constitutional injuries are acting contrary to a faithful interpretation of the law and depriving people of the opportunity to access meaningful remedies.

Those circuits that permit compensatory damages in these instances should continue to do so but must proceed with caution in their framing of what they are compensating for. The Supreme Court has made it clear that compensatory damages cannot be awarded for the abstract value of constitutional rights.[178] Instead, plaintiffs must demonstrate the particular, individual harm they have suffered as a result of the constitutional violation. This is something courts should be explicit about in order to confront arguments from the more restrictive circuits about violations of *Stachura*. While injuries caused by First Amendment violations have long been

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intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1981); *see also* Helton v. U.S., 191 F.Supp. 2d 179, 182 (D.D.C. 2002) (finding that a strip search of female prisoners constituted an intrusion upon seclusion tort).

177 (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right of privacy is invaded by
(a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
(b) appropriation of the other's name or likeness, as stated in § 652C; or
(c) unreasonable publicity given to the other's private life, as stated in § 652D; or
(d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E. *Id.* at § 652A.

178 *See* Love, *supra* note 156, at Part III (showing the Supreme Court's rejection of a grand theory for awarding compensatory damages under § 1983 to deter the deprivation of constitutional rights).

recognized, injuries caused by violations of other amendments are not as well-established in Supreme Court jurisprudence. Practitioners and plaintiffs should consider grounding their arguments in tort law so they can present courts with specific, recognized injuries. This might increase the likelihood that courts will identify the types of injuries that can be the basis for compensatory damages.

The idea that people must be able to vindicate violations of their constitutional rights is foundational to our legal system. When establishing modern jurisprudence, Justice Marshall emphasized that "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury a proper redress."[179] When rights are withheld or violated, people must have access to remedies. Punitive, nominal, and equitable remedies are insufficient mechanisms for redress. People must be compensated for their injuries, and a proper construction of § 1997e(e) is a necessary component of increasing access to justice.

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[179] Marbury v. Madison, 5 U.S. 137, 147 (1803).