THE PRISON LITIGATION REFORM ACT AND THE PHYSICAL INJURY REQUIREMENT IN THE CONTEXT OF TRANSGENDER INMATES

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I. INTRODUCTION

The Prison Litigation Reform Act (hereinafter "PLRA") was first enacted by Congress in 1995 in an effort to decrease the amount of meritless litigation that flowed through federal courts in the United

States.[1] The PLRA is codified at 42 U.S.C. § 1997e.[2] The PLRA has numerous components that place a multitude of burdens on prisoners who try to commence lawsuits for injuries which have occurred during incarceration, especially those that are characterized as mental or emotional injuries.[3] In addition to the numerous burdens[4] and requirements placed onto inmates who wish to file suit, the PLRA has a "physical injury" requirement which has caused much debate and controversy within both the legal and ethical spheres of academia.[5] While the PLRA contains many components and requirements, much controversy stems from what constitutes as a "physical injury" within the meaning of the statute.[6]

Courts have perceived the PLRA to mean that inmates cannot file lawsuits without the demonstration of a physical injury as defined under the PLRA.[7] Thus, prisoners who have suffered both mental and emotional injuries without additionally suffering from a physical injury during their incarceration—are barred from filing suit.[8] This Note will focus on the physical injury requirement with a consideration and focus on how such a requirement affects transgender inmates. Specifically, this Note will delve into the numerous mental and emotional injuries that transgender prisoners suffer from and why they do not qualify under the PLRA. Further, this Note will explore the ramifications that the PLRA's physical injury requirement has on inmates with meritorious claims. I will first propose that Congress should remove the physical injury requirement from the PLRA and use another measure when deciding whether prisoner claims have merit. I will also argue that even if the physical injury requirement is left unchanged, that

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1 Hilary Detmold, '*Tis Enough, 'Twill Swerve: Defining Physical Injury Under the Prison Litigation Reform Act*, 46 SUFFOLK L. REV. 1111 (2013).

2 42 U.S.C. § 1997(e) (2013).

3 Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1656, 1660 (2002).

4 Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1560 (2003).

5 *Id.*

6 Jaclyn Kurin, *No Resource for Inmate Litigants: The Unlikely Success of Prison Litigation Reform Act Complaints After Coleman v. Tollefson*, 18 WESTERN MICHIGAN UNIVERSITY COOLEY J. OF PRACTICAL AND CLINICAL L. 3, 15 (2016).

7 *Id.*

8 *Id.*

some mental injuries, while internal and subjective, manifest themselves in ways that are so detrimental to human health and suffering that they should be considered "physical" under the Act. I will then argue that emotional suffering manifests itself physically as well as physiologically, and thus should not be barred by the physical injury requirement. Further, this Note will explore the ethics behind the PLRA and the numerous constitutional ramifications and potential claims that underlie the Act.

Part I of this Note will discuss the requirements set forth in 42 U.S.C. § 1997e(e), the legislative history and congressional justifications given for the PLRA's enactment, as well as the American view toward the criminal justice system. Part II of this Note will discuss the specific requirements that surround the PLRA's physical injury requirement, while focusing on how different courts have interpreted this provision. Subsection A of Part II will include a psychological analysis of mental and emotional injuries, while subsection B will discuss the Violence Against Women Amendment ("VAWA") to the PLRA. Lastly, subsection C will focus on sexual assault. Section III will focus on transgender inmates, the heightened amount of abuse that transgender inmates face, and the forms of injuries that they suffer. The section will also consider how mental injuries do not meet the PLRA's physical injury requirement. Lastly, Part IV of this Note will contain my proposed resolution for the issues surrounding the PLRA, as well as a discussion on the constitutionality and ethics behind the PLRA.

II. 42 U.S.C. § 1997E(E) AND THE LACK OF CONGRESSIONAL JUSTIFICATION UNDERLYING ITS ENACTMENT

According to the current codified PLRA statute, "[N]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in 18 U.S.C. § 2246)."[9] At its original enactment, the PLRA dictated: "[N]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[10] While this statute was

9 42 U.S.C. § 1997(e) (2013).

10 John Boston, *Congress Amends PLRA Physical Injury Requirement For Sexual Abuse Cases*, PRISON LEGAL NEWS (July 15, 2013),

amended from its original terminology in that it now includes the phrase "or a sexual act," it still provides significant obstacles to prisoners, specifically, transgender inmates who face extremely high rates of abuse and maltreatment that fall short of reaching the requirements mandated under the PLRA.[11]

The PLRA statute contains numerous sections, each dealing with different substantive and procedural requirements regarding prisoner lawsuits.[12] Section A, as well as section B are the two sections, which are most relevant to this Note, as the other provisions focus more heavily on the procedural requirements of the PLRA. As noted, while section E of the PLRA deals with emotional injuries, in addition to the physical injury requirement, section A, titled "applicability of administrative remedies," is known as the grievance exhaustion provision.[13] This provision states that no action by a prisoner can be brought pursuant to any federal law or a § 1983 action unless all administrative remedies are exhausted.[14] This provision exemplifies another burden placed on prisoners who wish to file suit.

In addition to the PLRA as codified in 42 U.S.C. § 1997e, there are other limitations codified in 18 U.S.C. § 3626 that are important within the context of prisoner lawsuits. 18 U.S.C. § 3626(a)(1)(A) states:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.[15]

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https://www.prisonlegalnews.org/news/2013/jul/15/congress-amends-plra-physical-injury-requirement-for-sexual-abuse-cases/.

11 *Id.*

12 42 U.S.C. § 1997 (2013).

13 42 U.S.C. § 1997(a) (2013).

14 *Id.*

15 18 U.S.C. § 3626(a)(1)(A).

This provision is important for example in the context of injunctions in which prisoners might request treatment. Regarding the PLRA in its entirety, Margo Schlanger stated in an article published by the Harvard Law Review that the PLRA imposes a multitude of burdens on prisoners as its enactment has lessened the amount of prisoner litigation drastically.[16] In her article, Schlanger notes:

> The statute drastically altered the corrections litigation environment, imposing filing fees on even indigent inmates, requiring them to exhaust administrative remedies prior to filing lawsuits, and limiting their damages and attorney's fees. The PLRA's passage was aided by its connection to several longstanding political trends. In particular, it marked the overlap of conservative's discontent with so-called "imperial" judging, tort reformer's concern with the problem of frivolous lawsuits, and new congressional willingness to legislate federal court procedure. The PLRA has had an impact on inmate litigation that is hard to exaggerate; to set out just the most obvious effect, 2001 filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide.[17]

While Congress passed the PLRA because of "an abuse of judicial process by inmates"—in the hopes that it would lessen the amount of meritless prisoner lawsuits—arguments have been made that the PLRA's physical injury requirement does not further Congress' goal, as a workable method of eliminating frivolous claims that are already in place.[18] These arguments acknowledge the fact that federal courts follow workable methods that aid them in eliminating frivolous lawsuits such as Federal Rule of Civil Procedure ("FRCP") 12(b)(6).[19] There are numerous procedural rules encompassed in the FRCP that safeguard against frivolous claims.[20] For example, FRCP 12(b)(6)

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16 Schlanger, *supra* note 4. In addition to the burdens that surround the physical injury requirement, the PLRA applies to juvenile inmates, requires inmates to exhaust all administrative remedies before filing a lawsuit, and has a limit on attorney's fees. *See* 42 U.S.C. § 1997(e) (2013).

17 Schlanger, *supra* note 4, at 1559.

18 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS (5th ed., 2018).

19 Winslow, *supra* note 3; Elizabeth A. Etchells, *Please Pass the Dictionary: Defining De Minimis Physical Injury Under The Prison Litigation Reform Act § 1997E(e),* 100 IOWA L. REV. 819 (2015); FED. R. CIV. P. 12(b)(6).

20 *Id*.

contains pleading requirements that mandate a plaintiff to show a plausible claim and to show that the claim is one for which relief can be granted.[21] As applied to the PLRA, if the state or government believes the prisoner's claim lacks merit, the state or government can file a 12(b)(6) motion rather than entirely displacing a prisoner's opportunity from filing in the first place.[22] In addition to filing a motion to dismiss pursuant to FRCP 12(b)(6), FRCP 8(a)(2) requires that the court ignore inmates' conclusions of law and focus on their alleged facts.[23] Thus, when focusing on the alleged facts to determine whether they support a plausible claim, the judge uses his or her discretion and experience.[24] Moreover, it is clear that there are numerous procedural safeguards already in place that guard against frivolous claims through proper judicial means that should operate within the prison system.[25]

As scholars have identified, the PLRA has brought "unprecedented" changes in a prisoner's ability to seek relief in federal court from conditions that threaten their health and safety, as well as those that violate their legal and civil rights.[26] These changes refer to real psychological, emotional injuries that threaten the health of numerous inmates and do not qualify as "physical" injuries under the meaning of the PLRA.[27] In regard to congressional intent, it is important to recognize that Congress has not explained, nor justified, the association or correlation between frivolous lawsuits and the ban on mental and emotional injuries.[28] For example, the court in *Zehner v. Trigg* noted, "[t]he legislative history contains virtually no discussion specifically concerning § 1997e(e)."[29] Moreover, there has been no explanation regarding how banning prisoners from filing suit for mental and emotional injuries will lessen the number of meritless claims.[30]

The lack of congressional explanation regarding any correlation has led scholars to presume that Congress likely views all prisoner

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21 *Id*.

22 *Id*.

23 *Id.*; FED. R. CIV. P. 8(a)(2).

24 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

25 *Id.*

26 DAVID FATHI, HUMAN RIGHTS WATCH 4 (Benjamin Ward ed., 2009).

27 *Id.*

28 Winslow, *supra* note 3, at 1657.

29 Zehner v. Trigg, 952 F.Supp. 1318, 1325 (SD. Ind Dist. Ct. 1997).; James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis,* 37 HARV. J. ON LEGIS. 105, 114 (2000).

30 Winslow, *supra* note 3, at 1657.

lawsuits as "inherently frivolous or meritless."[31] If that is not the case, one can assume that Congress might view all prisoner suits for mental injury as unworthy of compensation. Additionally, there were only five days of discussion before Senators voted to approve the PLRA.[32] Senators Robert Dole and John Kyl described the PLRA as a "bill to provide for the appropriate remedies for prison condition lawsuits, to discourage frivolous and abusive prison lawsuits, and for other purposes . . . ."[33] The fact that this piece of legislation received such *little scrutiny* and passed through Congress so quickly, suggests that there was not much opposition, nor lengthy discussion regarding the potential ramifications that the PLRA would have on American inmates, specifically transgender inmates who are known to suffer abuse at higher rates than their counterparts.[34]

A. The American View Toward the Criminal Justice System

Interestingly, an argument can be made that the underlying reason behind the disparity in treatment between prisoners and those outside of the prison system is due to the American view[35] toward the criminal justice system. Moreover, there seems to be a disparity that is solely based on one's status in society, prisoner or non-prisoner, which is representative of the American view of criminals within such a system. According to Koppelman,[36] there is a prevalent American idea that criminals are irredeemable and should be separated from the rest of society.[37] Because of one such American view and Congress' enactment of the PLRA, prisoners who suffer from real injuries are unable to vindicate their fundamental rights. Koppelman refers to Kleinfeld[38] in his discussion of the American criminal justice system and notes, "[K]leinfeld observes that the system attributes either radical evil or permanent dangerousness to a large portion of the individuals

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31 *Id*.

32 *Id*. at 1659.

33 *Id*.; 42 U.S.C. § 1997(e).

34 *Id*.; FATHI, *supra* note 26, at 9; *Police, Jails & Prisons*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, https://transequality.org/issues/police-jails-prisons (last visited Oct. 8, 2019).

35 Andrew Koppelman, *American Evil: A Response to Kleinfeld on Punishment*, 50 ARIZ. ST. L. J., 179, 179-180 (2018).

36 American Law Professor at Northwestern University whose main research focus involves the intersection between philosophy and the law.

37 Koppelman, *supra* note 35.

38 American Law Professor who has written on American criminal punishment.

who have been convicted of a crime."[39] Moreover, the American view of prisoners in connection with the PLRA condones maltreatment in prison because there is no incentive to stop it, as prisoners must meet numerous hurdles if they are to file lawsuits. Furthermore, there seem to exist the perspective that prisoners will keep filing suits for whatever is possible while in prison because they have nothing to lose but time. As a result, it seems as though public sentiment has either shaped public policy in this sphere or has permitted the perpetuation of unethical acts, such as the PLRA, without much public resistance.

III. THE PHYSICAL INJURY REQUIREMENT, GENERALLY

Many courts have had difficulty in trying to establish what constitutes a "physical injury" under the PLRA as this question has remained open and has been perceived differently by various courts throughout the United States.[40] For example, the court in *Amaker v. Haponik,* discussed the meaning of mental and emotional injury and noted: "[t]he term 'mental or emotional injury' has a well-understood meaning as referring to such things as stress, fear, and oppression, and other psychological impacts."[41] However, in *Oliver v. Keller*, the court noted, "[t]he phrase 'physical injury' does not wear its meaning on its face" and that, "[i]n drafting 1997e(e), Congress failed to specify the type, duration, extent or cause of 'physical injury that it intended to serve as a threshold qualification for mental and emotional injury claims."[42] Because the language of the statute is quite ambiguous and due to the lack of legislative history surrounding the PLRAs enactment, courts have had a difficult time understanding the PLRA and its components.[43] While courts have held that the physical injury must be more than de minimis (but need not be significant), courts have ruled differently in their perception of what constitutes "de minimis."[44] Moreover, courts perceive "de minimis" differently. As there is no explicit congressional definition of the term—in conjunction with the

39 Koppelman *supra* note 35, at 182.

40 Boston, *supra* note 10.

41 Robertson, *supra* note 29, at 117.

42 *Id.*

43 Corbett H. Williams, *Evisceration of the First Amendment: The Prison Litigation Reform Act and Interpretation of 42 U.S.C. §1997E€, in Prisoner First Amendment Claims*, 39 LOY. L.A. L. REV. 859, 866 (2006).

44 Kurin, *supra* note 6.

PLRA—there is a lack of uniformity. This lack of uniformity has led to a series of troubling situations for inmates who wish to file suit.[45]

While Congress did not explicitly define "physical injury" within the statute, the Fifth Circuit's definitions of "physical injury" and "de minimis" are narrower than the Ninth Circuit's definitions.[46] The Fifth Circuit in *Luong v. Hatt* struggled to define "physical injury," though eventually defining it as '"an observable or diagnosable medical condition requiring treatment by a medical care professional . . . not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks."'[47] The Fifth Circuit maintains this definition of "physical injury," and the First, Third, and Eleventh Circuits additionally follow this view.[48]

While the Fifth Circuit currently maintains the majority position, the Ninth Circuit maintains a more expansive view of what constitutes "de minimis." Unlike the Fifth Circuit, the Ninth Circuit does equate "de minimis force" with "de minimus injury."[49] Moreover, the Ninth Circuit believes that the *Luong* definition used in the Fifth Circuit is too restrictive and narrow.[50] Further, it is important to note that because of this circuit split, prisoner claims could be actionable in one circuit, while dismissible in another.[51]

It should also be noted that physical injuries that arise out of prior psychological harm do not meet the requirements of the PLRA.[52] For example, in a case where a prison official found out that an inmate was HIV positive—the inmate lost his appetite, lost weight, and experienced insomnia—the court dismissed the claim because it found that there was no prior showing of a physical injury.[53] In the same case, the plaintiff alleged that the prison official "broke the seal on the plaintiff's medical files and disclosed their contents to others."[54] The court held the phrase "prior showing" to mean prior to and independent of psychological injuries.[55]

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45 *See generally id.* at 15.
46 Etchells, *supra* note 19, at 816.
47 *Id*.
48 *Id*.
49 *Id*. at 817.
50 *Id*. at 818.
51 *Id*. at 816.
52 Robertson, *supra* note 29, at 119.
53 Davis v. Dist. of Columbia, 158 F.3d 1342, 1345 (Ct. App. 1998).
54 *Id.*
55 *Id.*; Robertson, *supra* note 29, at 119.

When thinking about physical injuries more generally, it is essential to note that transgender inmates face a higher percentage of abuse, both physical, as well as verbal, which can be so extreme and traumatic, so as to cause emotional injury.[56] Moreover, because of the very real and severe injuries that transgender inmates face while in prison, they, in addition to all prisoners, should be able to file suit and seek proper redress just as people outside of the prison system are able to do.[57] For example, according to the statistics of the Federal Bureau of Justice Statistics ("BJS"), forty percent of transgender inmates have reported sexual abuse in the past year, as federal statistics show that transgender inmates are ten times more likely to be sexually assaulted than the general prison population.[58] Furthermore, the National Inmate Survey noted that thirty-four percent of transgender prisoners in jails and thirty-five percent of transgender prisoners in prisons, reported one or more sexual assaults perpetrated by other inmates, as well as staff in a period of one year.[59] In the same national survey, seventy-four percent of transgender inmates reported that the sexual assaults involved "oral, anal, vaginal penetration, hand jobs, or nonconsensual sexual acts."[60] According to the American Civil Liberties Union ("ACLU"), transgender inmates face incidents of sexual violence and abuse because they are forced to live with other inmates in gendered facilities that "do not correspond with their gender."[61] These inmates are either forcibly housed with a gender that does not align with their self-identified gender or are held in solitary confinement and subject to abuse by members of the prison or jail staff.[62]

For example, in *Cameron v. Menard*, an inmate brought an action pursuant to 42 U.S.C. § 1983, alleging that she was a transgender inmate who had been subjected to harassment and unequal treatment

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56 *Police, Jails & Prisons*, *supra* note 34.

57 *Id.*

58 *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and their Legal Rights,* NATIONAL CENTER FOR TRANSGENDER EQUALITY, https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf (last visited Mar. 8, 2021); *Race, Gender & Incarceration*, SURVIVED AND PUNISHED, https://survivedandpunished.org/quick-statistics/ (last visited Mar. 8, 2021).

59 Jordan Kinsey, *Survey: Transgender inmates more likely to be victims of sexual assault,* CBS NEWS, https://www.cbsnews.com/news/federal-survey-transgender-inmates-more-likely-to-be-victims-of-sexual-assault/ (last visited Jan. 13, 2020).

60 *Id.*

61 *Id.*

62 *Id.*

because of her transgender identity while incarcerated.[63] In *Cameron*, the plaintiff, alleged that Defendants permitted other inmates to harass Cameron by ripping open the shower curtain while Cameron was showering.[64] Further, Cameron was not allowed to participate in "work camp" because of her transgender identity.[65] The court held that this claim was barred by the PLRA's exhaustion requirement, as well as the physical injury requirement, noting that ripping open the shower curtain did not satisfy the "sexual act" component of the PLRA.[66] In *Diamond v. Owens*, a transgender inmate who suffered from gender dysphoria and was placed into solitary confinement for "pretending to be a woman" and for telling another inmate that she would receive no treatment despite the fact that she was suicidal.[67]

While transgender prisoners face assault at much higher rates than non-transgender prisoners, they are ten times more likely to be sexually assaulted by other inmates and five times more likely to be sexually assaulted by staff, as demonstrated in the BJS federal data and statistics noted above.[68] In addition to the horrific rates of sexual abuse that transgender prisoners face, other forms of maltreatment such as solitary confinement, which has been used on transgender inmates, is known to increase the prevalence of psychological conditions and disorders.[69] David Fathi of Human Rights Watch has explained: "As a result of these restrictions, prisoners seeking the protection of the courts against unhealthy or dangerous conditions of confinement, or those seeking a remedy for injuries inflicted by prison staff and others, have had their cases thrown out of court."[70] For example, in a case where an inmate alleged that a guard reached between his legs and grabbed his genitals, the court held that the alleged act did not meet the physical injury requirement.[71]

A stark contrast exists between a simple tort claim outside of the prison system and how un-incarcerated individuals routinely sue for, and are able to re-coup, compensatory damages that stem from mental and emotional distress, while those in prison are unable to do so for

63 Cameron v. Menard, 2016 WL 5017390 (2016).

64 *Id.* at 7.

65 *Id.* at 9.

66 *Id.* at 5.

67 Diamond v. Owens, 131 F.Supp.3d 1346, 1356 (2014).

68 *Id.*

69 MICHAEL A. GRODIN ET. AL., HEALTH AND HUMAN RIGHTS IN A CHANGING WORLD (2013).

70 FATHI, *supra* note 26, at 35.

71 *Id.*; Cobb v. Kelly, 2007 WL 2159315 (N.D. Miss. 2007).

incidents that are objectively as, and more severe than injuries suffered by non-prisoners.[72] Outside of the United States prison system, non-prisoners can sue whoever they want pursuant to either state rules and laws or federal laws pursuant to the FRCP. Typically, non-prisoners hire a lawyer to represent themselves and are limited only by the statute of limitations surrounding their claim, as well as any applicable state or federal laws. Once a lawyer is hired, the lawyer will assess the claim and determine the likelihood of success and will then serve the opposing party, commencing the lawsuit. On the other hand, prisoner suits pursuant to the PLRA are restricted by numerous additional procedural and legal hurdles, such as the grievance provision set forth in section A of the Act.[73] While it is true that Congress has the power to treat prisoner claims differently than Congress treats claims outside of the prison system, the physical injury requirement should not be the deciding factor regarding whether prisoner claims lack merit. Because there is such a disparity in treatment under the Act, Congress is sending the message that prisoner emotional suffering lacks merit or is unworthy of filing for suit.

A. The Underlying Psychology Behind Emotional Injury

When exploring mental and emotional injury in the context of transgender inmates, is it important to note that there are numerous actions that can give rise to severe emotional injuries, that while subjective, do manifest in ways that comprise an individual's health.[74]

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72 As an aside, numerous similarities are prevalent between the ways in which transgender inmate's claims and prisoner of war claims are treated. While transgender inmate's claims are hindered by many hurdles and requirements of the PLRA, prisoner of war claims are treated differently dependent on whether the enemy combatant is a US citizen or alien and whether the combatant is captured abroad or on US territory. *See* Johnson v. Eisentrager, 339 U.S. 763, 771 (1950). Similarly, prisoner of war claims are treated differently dependent on whether the prisoner is a lawful or unlawful enemy combatant. *See* Ex Parte Quirin, 317 U.S. 1, 31 (1942). Importantly, while the US government has the authority to detain enemy combatants, detainees who are US citizens must be given due process of the law to challenge their enemy combatant status and contest the factual basis for detention before a neutral decision maker. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004). In addition to procedural due process rights that the government must follow before it deprives a person of life, liberty or property, US citizen enemy combatants are further protected by numerous procedural safeguards. *See* Matthews v. Eldridge, 424 U.S. 319, 321 (1976). Moreover, while "process" is more limited than that given to civilians, even prisoners of war are protected by taking account of procedural safeguards.

73 42 U.S.C. § 1997(a) (2013).

74 *See generally LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and their Legal Rights*, NATIONAL CENTER

While sexual assault is one of the most common forms of abuse that transgender inmates face, which cause mental suffering, other actions such as humiliation, coercion, and harassment, are capable of manifesting in the form of a psychological injury or illness.[75] It is likely that, because of the fact that mental suffering is felt individually and internally, and because there is a subjective component to internal feelings, Congress was unwilling to allow inmates to sue based on their subjective emotions, as people react differently to certain events.[76] It follows, that while one individual might suffer from an anxiety disorder that stems from verbal abuse by prison guards, another individual might not suffer anything from the same or even harsher verbal abuse or stimulus.[77]

Further, many forms of psychological and emotional injuries are as severe, or even more severe than non-emotional, physical injuries. To further exemplify the issues surrounding the physical injury requirement, Fathi explains:

> [I]magine a sadistic prison guard who tortures inmates by carrying out fake executions—holding an unloaded gun to a prisoner's head and pulling the trigger, or staging a mock execution in a nearby cell, with shots and screams, and a body bag being taken out (within earshot and sight of the target prisoner). The emotional harm could be catastrophic but would be non-compensable [under the PRLA].[78]

Additionally, a Yugoslavian study of 279 survivors of torture found that psychological stressors could not be easily distinguished from physical torture with regard to their psychological impact, which corroborates the fact that mental injury can be as severe as "physical injuries."[79] As Fathi notes:

> [t]he study's authors identified "sham executions, threats of rape, sexual advances, threats against self or family,

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FOR TRANSGENDER EQUALITY (Oct. 2018), https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf.

75 *Id*.

76 Franz Müller-Spahn, *Individualized preventative psychiatry syndrome and vulnerability diagnostics*, 258 EUROPEAN ARCHIVES OF PSYCHIATRY AND CLINICAL NEUROSCIENCE (2008).

77 *Id.*

78 FATHI, *supra* note 26, at 23.

79 *Id.* at 24.

> witnessing the torture of others, humiliating treatment, isolation, deprivation of urination/defecation, blindfolding, sleep deprivation, and certain forced stress positions" as forms of abuse that "seemed to be as distressing as most physical torture stressors."[80]

In further exploring emotional injuries, a psychological journal study found that treatment of mental health disorders will depend on the interplay between gene-environment interactions, noting that a person's vulnerability and resilience—factors into this relationship tremendously.[81] The study noted that numerous factors, both genetic and environmental, contribute to individual differences in clinical manifestations or certain personality traits, as well as mental disorders.[82] Importantly, having a genetic susceptibility or vulnerability is associated with reactivity to stressors that lead to an increase in "allostasis," which describes the psychological "pathology following stressful events."[83] Furthermore, the same research study found that while certain factors are associated with positive effects on individuals' stress perceptions, other factors such as biological factors, those which are more genetically based, are involved in resilience functioning.[84] Moreover, it is clear that while stressful events and daily stressors do lead to increased reactivity and heightened emotional arousal, there are individuals who are more susceptible to these traits, and thus, feel the emotions on a more extreme, or heightened level.[85]

Another salient point is the general characteristics and makeup of prison populations in the United States. While psychologists and psychiatrists, as well as commonplace stereotypes, have acknowledged that many inmates are typically individuals who can be characterized as reckless, impulsive, and likely do not have the same physiological and psychological reactivity as a typical non-prisoner, these generalizations are not true of each and every inmate.[86] For example, in a psychological study, researchers found that exposure to stressful events during developmental periods is associated with mood and anxiety

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80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 Richard A. Wright, *The Characteristics of U.S. Inmate Populations, Inmates and the Formal Organization of Prisons*, JRANK. https://law.jrank.org/pages/1798/Prisons-Prisoners.html (last visited Mar. 6, 2021).

disorders, as well as vulnerability to disease.[87] The same study noted that gene-environment interactions mediate the effects of environmental stressors as the study discusses, the fact that these interactions can mediate risk and resilience in adults.[88] There are numerous factors, both genetic and environmental, that can lead to individuals having a greater susceptibility to stress, emotional reactivity, and emotional regulation which can play a major role in the individualized experience of prisoners. As such, Congress should have been more aware of the differences in the physiological factors between different individuals when enacting both the PLRA and the VAWA, which will be explained below.[89] Had Congress been more aware, the PLRA would likely not be as categorical as it currently is, allowing more prisoners to file suit for mental and emotional injuries.[90]

B. The Violence Against Women Act Amendment to the PLRA

The VAWA adds the following phrase to the statute, "or the commission of a sexual act (as defined as 18 U.S.C. § 2246)."[91] While the phrase "sexual act" has been defined under 18 U.S.C. § 2246, the definition does not include all types of sexual acts that transgender prisoners and prisoners at large suffer from.[92] Thus, those who do not meet the exact statutory definition of what constitutes a "sexual act," are barred by the PLRA from filing suit under a strict reading of the statute. Per the statutory definition, a "sexual act" includes "manual or other non-penetrative sexual touching of another person, compelled or otherwise, is not included except for intentional, unclothed touching of persons under sixteen years old; nor are acts involving the touching of women's breasts."[93] Additionally, the amended statute does not reference situations in which inmates are forced to perform sexual acts for the enjoyment of others, as a strict reading of the statute still leaves out numerous acts that are capable of causing mental suffering to inmates.[94] While the VAWA amendment relates to all prisoner claims,

87 Charles F. Gillespie M.D. Ph.D., et. al., *Risk and Resilience: Genetic and Environmental Influences on Development of the Stress Response*, DEPRESSION & ANXIETY (Nov. 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2852579/pdf/nihms187817.pdf.

88 *Id.*

89 Boston, *supra* note 10.

90 *See infra* Section II.

91 Boston, *supra* note 10.

92 *Id.*; 18 U.S.C. § 2246 (1998).

93 Boston, *supra* note 10.

94 *Id*.

it can be understood as relevant to transgender prisoner's claims as well because of the fact that transgender prisoners are sexually assaulted at exceptionally high rates. Thus, if the transgender inmate's claim of sexual assault or injury does not meet the statutory definition under the amendment, the inmate cannot file suit under the PLRA.

In addition to emotional injuries being excluded from the statute, some forms of physical injuries, specifically, forms of sexual assault that do not meet the requisite definition of "sexual act" under the statute. For example, in a case where two female inmates alleged that they were strip searched, resulting in one inmate suffering from migraines and the other inmate attempting suicide, the court ruled that the women did not satisfy the physical injury requirement.[95] In this case, the court noted, "a few hours of lassitude and nausea and the discomfort of having her stomach pumped is no more than a de minimis physical injury."[96] This case illustrates the fact that even where an inmate attempts suicide after having been strip searched, the PLRA's physical injury requirement still bars the prisoner from filing suit. Even after the VAWA was enacted, the question as to what constitutes a "physical injury" has remained open and has been decided and construed differently by various courts, as well as different jurisdictions (see the following section for an in-depth analysis on sexual assault).[97] To exemplify this, Boston[98] notes: "The courts have not been much help, agreeing that physical injury must be more than de minimis but not otherwise defining the term."[99] Going forward, Congress should clarify what the requisite standards are when using vague terms such as "physical injury" when enacting legislation.

C. Sexual Assault and the Physical Injury Requirement

Many court decisions hold that certain forms of sexual assault do constitute physical injury.[100] For example, the Second Circuit found that "alleged sexual assaults" by staff "qualify as physical injuries as a matter of common sense" and "would constitute more than de

95 FATHI, *supra* note 26, at 26; Moya v. City of Albuquerque, Civil No. 96-1257 DJS/RLP, 3-4, (D.N.M., Memorandum Opinion and Order, Nov. 17, 1997).

96 FATHI, *supra* note 15, at 26; Moya, Civil No. 96-1257 DJS/RLP at 3-4.

97 Boston, *supra* note 10.

98 Boston directs the Prisoners' Rights Project with the Legal Aid Society in New York City. *See* Boston, *supra* note 10.

99 *Id.*

100 *Id*.

minimis injury."[101] Similarly, another court, when describing sexual assault in prisons, stated, "even if considered to be de minimis from a purely physical perspective, is plainly 'repugnant to the conscience of mankind.'"[102] Contrastingly, the court in *Hancock v. Payne* held that sexual assault does not constitute physical injury, and therefore is not to be compensable in federal civil actions.[103] In his article, Boston notes: "Since sexual assault may or may not result in actual damage to tissue, which is arguably the everyday understanding of what physical injury means, the question has remained open."[104] The court in *Hancock* held that prisoners who alleged that they were sexually battered by sodomy did not satisfy the physical injury requirement because they failed to meet the exhaustion requirement under the PLRA and because they did not show requisite physical injury.[105] In *Hancock*, numerous prisoners alleged that they had been sexually assaulted by corrections officers who threatened them with physical harm and a prison lockdown if the prisoners reported their actions.[106] Despite the egregious allegations made by the plaintiffs, the court granted summary judgement to the Defendants, holding that the prisoners made a "bare allegation of sexual assault without a physical injury," which was insufficient under the PLRA.[107]

Pursuant to 18 U.S.C. § 2246, a "sexual act" has four different definitions set forth in subsections A through D of the code.[108] Section 2(A) states that a "sexual act" means "contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight."[109] Subsection B states "sexual act" means "contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus."[110] Lastly, while subsection C defines "sexual act" as "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate,

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101 *Id.*; Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999).

102 *See* Boston, *supra* note 10; *see also* Kemner v. Hempill, 199 F.Supp.2d 1264, 1270 (N.D.Fla. 2002).

103 Hancock v. Payne, 2006 WL 21751, *1, 3 (S.D. Miss., 2006).

104 Boston, *supra* note 10.

105 *Id.*; *Hancock,* 2006 WL 21751 at 96.

106 Hancock, 2006 WL 21751 at 96.

107 Margo Schlanger, Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisoners: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L 139 (2008).

108 18 U.S.C.§2246(2) (1998).

109 18 U.S.C. §2246(2)(A) (1998).

110 18 U.S.C. §2246(2)(B) (1998).

harass, degrade, or arouse or gratify the sexual desire of any person[111]," subsection D defines the same phrase as "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of sixteen years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[112] Because the statute now contains a definition of "sexual act," anything that does not meet this definition does not meet the PLRA requirements.[113] For example, Boston notes "questions about anal, vaginal and oral sex are resolved," however, this leaves other sexual assault situations unresolved as they are not codified within the statute.[114]

In the past, because, "sexual act" was not codified in the PLRA, the courts had more leeway in deciding what met the definition of the broader term "physical injury." For example, a court held that where an officer "played" with himself in front of a prisoner, that "unwanted sexual contact, alone, is a physical injury for which there may be compensation."[115] This case would now come out differently because of the now explicit subsections defining "sexual act." While it is true that courts could read "physical injury" more broadly than "sexual act," the fact that an explicit statutory definition of "sexual act" exists, means that some courts will likely abide by the statutory definition, while others theoretically could choose to read "physical injury" more broadly.

While the VAWA amendment was an attempt to give more rights to inmates, the amendment has produced incidental negative effects onto prisoners in many cases. Boston notes, "Does the VAWA amendment mean that a sexual act that does not fall under the provisions of 18 U.S.C. § 2246 cannot be the basis for a damages award in federal litigation brought by a prisoner?"[116] In most cases, probably yes.[117] Arguments have been made that VAWA simply clarifies existing law and does not really give prisoners more rights, which was the central point of enacting VAWA.[118] Moreover, the addition of the phrase "sexual act" to the PLRA statute does not go far enough and is not inclusive enough of real sexual acts and assaults that occur within the

111 18 U.S.C. §2246(2)(C) (1998).
112 18 U.S.C. §2246(2)(C) (1998); 18 U.S.C. §2246(2)(D) (1998).
113 Boston, *supra* note 10.
114 *Id.*
115 Duncan v. Magelessen, 2008 WL 2783487, *2, *4 (D. Colo., July 15, 2008).
116 Boston, *supra* note 10.
117 *Id.*
118 *Id.*

transgender prison population, as well as within the general prison population.[119]

IV. A SPECIFIC FOCUS ON TRANSGENDER INMATES' MENTAL AND EMOTIONAL SUFFERING THAT DOES NOT QUALIFY UNDER THE PLRA'S PHYSICAL INJURY REQUIREMENT

Because of the mental anguish and societal judgement that has been associated with being transgender in modern day society, transgender individuals' initial mental capacity is likely more susceptible and vulnerable to environmental effects.[120] For example, in *Edmo v. Corizon*, a transgender inmate testified that her gender dysphoria caused her to feel "depressed, disgusting, tormented, and hopeless while also disclosing her past efforts and active thoughts of self-castration."[121] The court noted that gender dysphoria is a serious medical condition that causes much distress and is associated with severely limiting an individual's ability to function.[122] Further, a psychological research study about transgender individuals noted, "when individuals who can no longer compensate are not only exposed to the full impact of trauma due to social norm stressors, but also rendered susceptible to further generalized stressors as a result of their compromised defenses."[123] Thus, transgender inmates face both the societal stressors that exist inside and outside of prisons, in addition to the stressors and maltreatment inside the prisons. Taking these facts into consideration, any form of abuse, no matter how extreme, is likely to be felt on a much larger scale and is likely to cause more mental suffering for those who are transgender.[124]

While individuals differ in regard to their baseline levels of emotional arousal and reactivity, and while it may appear as a generalization, it can only be understood that initial maltreatment and societal stigma of being transgender compounded by the stressors of prison leads to transgender prisoners suffering emotionally at exceptionally high levels.[125] Additionally, while many mental disorders and

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119 *See supra* Section III B.

120 Damien W. Riggs et al., *An evidence-based model for understanding the mental health experiences of transgender Australians*, AUSTRALIAN PSYCHOLOGIST (Jan. 12, 2015), https://aps.onlinelibrary.wiley.com/doi/abs/10.1111/ap.12088*; see supra* Section III A.

121 Edmo v. Corizon, 935 F.3d 757, 772 (9th Cir. 2017).

122 *Id.* at 785.

123 Riggs, *supra* note 120.

124 *See supra* Section III A.

125 *See supra* Section III A.

conditions form as a result of abuse within prisons, many transgender individuals suffer from anxiety disorders that are worsened by their incorporation into the prison system and can also be worsened by the denial of proper medical treatment, which can lead to mental and emotional distress.[126]

Other examples of situations that transgender prisoners face at a higher proportion than non-transgender inmates that would not meet the physical injury requirement, include mental suffering that stems from solitary confinement, sexual acts that do not meet the statute's definition of "sexual act," pre-existing mental illnesses that get exacerbated while in prison, humiliation and verbal abuse by prison staff, sexual gestures, and sexual language.[127] In regard to solitary confinement, there have been numerous cases that have found that the act can result in mental suffering.[128] Thus, while solitary confinement might result in a mental injury, this would not meet the physical injury standard of the PLRA.[129] Specifically, solitary confinement is known to cause extreme long-term damage such as cognitive impairment, memory issues, and other functioning issues.[130] Additionally many forms of trauma are known to cause nightmares, flashbacks, anxiety disorders, and Post Traumatic Stress Disorder—all forms of emotional suffering. While these conditions may not be physical, in that they are not apparent to the eye or another visible measure, they do affect one's physical functioning and health, which should qualify as "physical" under the PLRA for all types of prisoners. Moreover, while I do argue that the physical injury requirement should be eliminated from the PLRA, I also propose that even if the statute is left as is, that mental and emotional injuries should qualify as "physical injuries" because they manifest in physical and physiological ways.

V. PROPOSED RESOLUTION

Simply put, either the interpretation of the statute should be revised, such that mental injuries are also understood as physical because they manifest and present themselves in physical ways, or the physical injury requirement should be eliminated from the PLRA. Because of the numerous issues that result from the PLRA's physical injury requirement, the Act should be modified to allow inmates to sue

126 *See, e.g., LGBTQ People Behind Bars, supra* note 74.
127 FATHI, *supra* note 26, at 26.
128 *Id.*
129 *Id.*
130 *Id.*

and recover from mental and emotional injuries, similarly to individuals outside of the prison system. While those outside the prison system will likely have difficulty in finding a lawyer to represent themselves if the lawyer believes their claim is meritless, or will likely not result in a successful verdict, individuals can still sue *pro se* without having to meet the numerous requirements of the PLRA. As mentioned above, individuals typically suffer some type of "wrong" and consequently hire a lawyer to file a summons and commence a lawsuit against an opposing party and recover compensatory, punitive, or nominal damages. If the individual does not decide to go to court, he or she can also recover in the form of a settlement agreement with the opposing party. On the contrary, prisoners do not get all of these options regarding pursuing a lawsuit as they must first meet all of the PLRA requirements.[131]

The current iteration of 42 U.S.C. § 1997e states: "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."[132] Congress should consider removing this subsection from the statute and recognize the importance of allowing prisoners to sue for mental and emotional injuries. While Congress was correct in being concerned about meritless claims in the prison system, Congress should find a better way to distinguish between meritorious and meritless claims without using the physical injury requirement as the sole determining factor.[133] Moreover, the barometer for determining merit should not be solely dependent on a showing of a physical injury because injuries manifest in numerous forms and are felt and experienced on different levels by varying persons, especially because of individual genetic and environmental differences.[134]

In addition to potentially removing subsection E[135] from the PLRA, other ways to ensure that prisoner's claims have merit, would be to mandate forms individualized preliminary screenings. Individualized screenings can be done either through having psychologists, psychiatrists, or mental health counselors meet with individual inmates and evaluate them and their injuries through psychological

131 42 U.S.C. § 1997(e) (2013).

132 42 U.S.C. § 1997(e) (2013).

133 *See supra* Section II.

134 Gillespie, *supra* note 87.

135 The section of the Prison Litigation Reform Act that requires a physical injury in order for an inmate to sue.

examinations. While individualized therapists might be expensive, hard to effectuate, and resource intensive, preliminary questionnaires and standardized psychological testing batteries could be administered as one measure in determining whether a prisoner's claim is meritorious. However, some potential risks associated with this approach might be the subjectiveness regarding each prisoner's internal feelings. Despite potential risks, standardized testing in addition to in person psychological evaluations would be a good alternative to PLRA section E, which outright bans any mental injuries without a showing of a physical injury.

In addition to psychological testing and screening measures, prisons need to hire more qualified psychologists and psychiatrists in order to properly treat their inmates especially with the current iteration of the statute. Currently, not only are inmates unable to get compensation for their injuries without a showing of a physical injury, but they are also unable to get the proper care that would likely be able to ameliorate some of the psychological suffering that inmates endure. Had inmates been treated properly and received proper medical attention, they might not suffer the emotional injury or might be better able to cope with the injuries. As a result, the number of inmate suits might decrease. Prisons need to ensure that those giving medicines to inmates are medically trained and are monitoring the inmates' mental health more frequently. In addition to making sure inmates are properly treated with the correct medicines and dosages, prisons, both state and federal, should have available and accessible mental health counselors and support groups focused on different mental health conditions that would help prisoners during their incarcerations.[136]

Regarding the practicality of revising the PLRA, there are numerous political and social factors to consider. First, there may not be legislators that support this revision, which would cause issues in removing the physical injury requirement. Similarly, because of the American view toward prisoners that has been noted above, the social attitude surrounding the revision might not be strong enough to enact such change. If the statute is in fact revised, legislators would be making it easier for prisoner claims to be brought.[137] At the same time,

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136 *See generally, Jennifer M. Reingle Gonzalez et. al., Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUBLIC HEALTH 2328 (2014); Heather Stringer, *Improving Mental Health for Inmates*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Mar. 2019), https://www.apa.org/monitor/2019/03/mental-heath-inmates.

137 *See supra* Section I.

however, prisoners who have suffered and continue to suffer mental and emotional injury, would be able to obtain redress for their injuries. Another option to consider would be to simply allow all prisoners to sue because the current screening measure (the physical injury requirement) is arbitrary. Moreover, it is likely that it will be obvious if the claim is meritless in many cases.[138]

As an aside, even if Congress is reluctant to remove subsection E from the PLRA, Congress should be aware of the very real fact that mental and emotional injuries do have the capability of manifesting physically through physiological symptoms that compromise overall human health and wellbeing.[139] Congress should be open to the fact that a mental injury manifests itself physically despite the fact that it cannot be seen by the eye, and thus, technically constitutes a physical injury. If Congress maintained this new perspective, prisoners at large would be able to file suit for mental and emotional injuries without having to meet the hurdle of also demonstrating a requisite, visible physical injury.[140]

Moreover, there are players at both the federal and state level that need to work together to facilitate these much-needed changes within the prison system. At the state level, state legislatures should become more active in prison policy, reform, and lawmaking. While state law is preempted by the federal PLRA, states should still ensure that prisons are equip with qualified medical staff and qualified psychologists who can aid prisoners who are suffering from emotional injuries.[141] Federal, as well as state governments, could offer funding for improving treatment and for screening measures which, would incentivize states to screen prisoner claims more efficiently without having to require a physical injury. Further, the federal government might consider passing spending clause legislation, and condition federal funding on improving treatment and hiring more qualified medical personnel to treat inmates. At the federal level, Congress should consider removing subsection E from the PLRA because of the numerous negative ramifications discussed above. Congress should also become aware of the fact that emotional injuries, in many cases, manifest physically, which should be considered a requisite physical injury under the statute.[142]

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138 *See supra* Section II.
139 *See supra* Section II.
140 *See supra* Section II.
141 Stringer, *supra* note, 136.
142 *See supra* Section II.

A. Ethical and Constitutional Violations: An Equal Protection Analysis

It has been argued that the numerous obstacles that accompany the PLRA undermine the law in its entirety, as it grants the government "near-impunity" to violate prisoner's rights without any future consequence.[143] As a result, there have been numerous arguments set forth arguing that an amendment to the PLRA is needed because the current physical injury requirement has "obstructed judicial remediation of religious discrimination, coerced sex, and other constitutional violations typically unaccompanied by physical injury, undermining the regulatory regime that is supposed to prevent such abuses."[144] As briefly noted above, the PLRA obstructs the possibility of any tort actions in which prisoners claim mental injuries which likely would have been available to prisoners under the Federal Tort Claims Act.[145] While Congress likely did not intend to disfavor mentally ill prisoners, the PLRA disproportionately affects those who experience mental suffering at the highest rates, such as transgender inmates.[146]

While the PLRA does bar claims without a showing of a physical injury, a minority of courts hold that the PLRA does not bar claims of constitutional violations by prisoners even if there is no physical injury demonstrated. [147] Courts that maintain this view hold that deprivations of important constitutional rights, such as due process or the right to be free of cruel and unusual punishment, are not barred by the PLRA, as these constitutional rights are typically not measured in terms of an emotional injury.[148] However, other courts have perceived the PLRA to bar constitutional claims by prisoners if they also do not suffer from a physical injury.[149] Because the PLRA statute itself does not address constitutional claims, courts differ in their perception of whether constitutional violations are barred.[150]

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143 Margo Schlanger, Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisoners: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L 139 (2008).

144 *Id.* at 141.

145 *Id.*

146 Harvard Law Review Association, *The Impact of The Prison Litigation Reform Act on Correctional Mental Health Litigation,* 121 HARV. L. REV. 1145, 1155 (2008).

147 MICHAEL B. MUSHLIN, PRISON LITIGATION REFORM ACT AND IN FORMA PAUPERIS PROCEEDINGS, (5th ed., 2019).

148 *Id.*

149 *Id*. at 148.

150 *Id.*

Further, it is harder to argue an equal protection violation for transgender inmates under the Fifth or Fourteenth Amendments because dissimilar groups of people, prisoners and non-prisoners, are permitted to be treated differently.[151] Despite this, there have been arguments that prisoners as a class of people should be treated as a "discrete and insular minority," warranting heightened judicial scrutiny.[152] Furthermore, there is also an argument that prisoners generally are treated differently than transgender prisoners because transgender prisoners suffer abuse in prisons at higher levels, and as a result are more frequently barred by the PLRA's physical injury requirement.

However, transgender status is not considered a suspect class and thus only rational basis or possibly intermediate scrutiny would be used when analyzing the PLRA for discriminating against transgender inmates.[153] As such, because the PLRA is facially neutral and does not discriminate against transgender individuals, as the Act applies to all prisoners, discriminatory effects alone (without a discriminatory purpose) are not unconstitutional.[154] In *Personnel Administrator of Massachusetts v. Feeney,* the court upheld a law that gave veterans preference for consideration of state civil service positions despite the fact that ninety-eight percent of veterans were male.[155] Because the classification was facially neutral and did not reflect invidious discrimination against a specific group, the distinction was really between veterans and non-veterans as the effects of the law were not sufficient to deem the law unconstitutional.[156] As the court noted, a discriminatory purpose implies action taken '"because of' not merely 'in spite of,' it's adverse effects upon an identifiable group," and this is not the case here.[157] Congress did not enact the PLRA to discriminate between transgender and non-transgender prisoners, as the effects of the Act are simply byproducts of its enactment.[158]

Moreover, because the PLRA is facially neutral and because there is no fundamental right for transgender prisoners to sue for emotional injuries while in prison, the equal protection argument is seemingly weak within this context. Because rational basis review would likely

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151 *See* Michael M. v. Sonoma Cty. Sup. Ct., 450 U.S. 464 (1981).

152 Robertson, *supra* note 29, at 105.

153 Romer v. Evans, 517 U.S. 620, 621 (1996).

154 Washington v. Davis*,* 426 U.S. 229, 242 (1976); Personnel Administrator of Mass. v. Feeney*,* 442 U.S. 256, 279 (1979).

155 *Id.*

156 *Id.*

157 *Id.*

158 *See supra* Section IV.

be used to argue such matters, the claim that the PLRA violates equal protection would likely fail because there is a legitimate government interest in lowering the number of meritless claims, and because the PLRA is a rational method for Congress to effectuate this goal. However, Professor Robertson argues that prisoners in general should be treated as a discrete and insular minority, warranting a higher level of judicial scrutiny as set forth in footnote four in *United States v. Carolene Products*.[159] In his analysis, Robertson comments on the powerlessness of prisoners and analogizes prisoners as a whole to "the paradigmatic *Carolene* minority group – black Americans circa 1938."[160] Further, Robertson notes: "[t]he points of comparison speak to segregation; prejudice or animus; disenfranchisement; and impoverishment."[161] While Robertson concedes that there are numerous differences in terms of race and history between the Black population in America and prison inmates, he explains, "these distinctions are of limited significance for equal protection purposes."[162] Robertson goes on to note that the prison experience of being behind bars is representative of the oppression that blacks suffered in the South, referring to prison cells as the "modern equivalent of plantation slavery."[163] To further his argument, Robertson discusses the vulnerability of the prison population generally and notes that while prisoner status is unlike race because race is immutable, mutability is not a requirement for a class to be considered suspect, warranting strict judicial scrutiny.[164] To conclude his argument, Robertson quotes Justice Stevens in *Hudson v. Palmer* noting: "[p]risoners are truly outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a 'discrete and insular minority.'"[165]

Moreover, while transgender inmates in comparison to inmates at large might only warrant rational basis review in the context of the PLRA, inmates as a class, in comparison to non-prisoners as a class, might warrant stricter judicial scrutiny. To further this argument, a note from Duke Law Journal reads:

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159 Robertson, *supra* note 29, at 107; U.S. v. Carolene Products, 304 U.S. 144 (1938).

160 Robertson, *supra* note 29, at 124.

161 *Id*. at 124.

162 *Id*. at 134.

163 *Id*. at 135.

164 *Id*. at 139.

165 *Id*. at 157; Hudson v. Palmer, 468 U.S. 517, 557 (1984).

> [t]he Constitution cannot be suspended in the name of judicial and administrative efficiency. The United States has a black history of denying equal protection under its laws to discrete and insular minorities in times of crisis. It is, therefore in times of crisis that the civil rights of groups predisposed to legislative discrimination must be especially protected by the courts. The PLRA should be strictly scrutinized by the courts for constitutionality.[166]

VI. CONCLUSION

While prisoners who are serving life sentences, for example, may be seen as having nothing to lose and everything to gain, there should not be a categorical, absolute ban on real psychological injuries without sufficient proof that the injury is frivolous based on valid, efficient evaluations and screening devices.[167] Moreover, while I do propose that the physical injury requirement should not be the factor that is used as the sole deciding factor regarding whether a claim lacks merit, even if the physical injury requirement stays in place, Congress, as well as the courts, should acknowledge that mental and emotional injuries manifest in physical ways, thus, constituting real physical injuries. By having a physical injury requirement, all mental and emotional injuries are categorized together and treated identically, no matter how severe the injury. Moreover, while Congress initially intended to limit the number of meritless lawsuits, Congress should not outright deny lawsuits solely because there is no present "physical injury." While emotional injuries are internal, subjective, and individualized, many times they affect people on a much larger scale than physical injuries do as they are capable of manifesting themselves through physical means, thus, qualifying as physical injuries.

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166 Julia M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prisoner Litigation Reform Act of 1995*, 47 DUKE L. J. 117, 159-60 (1997).

167 *See supra* Sections III and IV.