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IT'S NOT ALL IN MY HEAD: THE HARM OF RAPE AND THE PRISON LITIGATION REFORM ACT

DEBORAH M. GOLDEN¹

I thought everything was fine until he goes into the restroom with me and unshackles my belly chains leaving my right cuff on and my left off and the leg shackles remaining. He hovers over me, I'm 5 ft and he's 6'5" and much bigger than I am—very intimidating. He tells me I'm going to have sex with him—then suddenly he says I'm going to give him oral sex. I call him a pig, but soon am forced on the cold clammy restroom floor after he's forced me to remove my bra and shirt, leaving it to hang off my right arm.²

I was wearing a long black skirt and cowboy boots. I was told to place my feet on the bathroom door so nobody could come in. He stood over me straddling my body leaning against the door as he also stepped on my right hand. I continued to call him a pig. His fingers went for the Velcro on his gunbelt. The gun was a small pistol, black. I realized he was serious, He told me "if you cry out I'll shoot you and say you tried to escape." "Who are they going to believe, me or you!"³

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.⁴

¹ Attorney at the D.C. Prisoners' Legal Services Project. I thank Peter Stone, Phil Fornaci, James Cargas, and Mollie Mulvanity for their invaluable comments during the writing of this article. Most importantly, I also thank the women who have trusted me enough to share their stories over the years as I have represented them.

² Robin Darbyshire, *Survivor Stories*, Stop Prisoner Rape, at <http://www.spr.org/en/survivorstories/robin.html> (last visited Aug. 25, 2004).

³ *Id.*

⁴ 42 U.S.C. § 1997e(e) (2004).

Rape is wrong. From there, it gets complicated.

Rape of prisoners is a problem of great, although hidden, magnitude.⁵ There is widespread agreement both domestically and internationally that rape simply is "not part of the penalty" offenders should pay for their criminal conduct.⁶ Courts in almost every circuit⁷ and the Supreme Court⁸ have condemned rape of the imprisoned. The international human rights community has similarly denounced custodial rape as torture.⁹ The United States Congress passed the Prison Rape Elimination Act of 2003 (PLRA)¹⁰ in an attempt to gain a greater understanding of the problem and to subject this gross violation of human and constitutional rights to greater public scrutiny.

Despite the consensus that rape is wrong, redress for that wrong is complicated by the PLRA. In civil lawsuits, the traditional remedy for harm is pecuniary restitution, and perhaps punitive damages, for the victim.¹¹ However, the PLRA requires that plaintiffs demonstrate a physical injury in order to recover damages. This requirement effectively curtails actions for damages brought by prisoners seeking redress from rape.¹² The special requirement the PLRA created

⁵ "Prison" and "jail" have distinct meanings within the criminal justice system. However, as the particular distinctions do not matter for the analysis presented in this article, the terms will be used interchangeably. If a distinction needs to be made, it will be noted.

⁶ *Farmer*, 511 U.S. at 834, quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

⁷ See *Williams v. Prudden*, 67 Fed. Appx. 976, 977 (8th Cir. 2003); *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 64 (1st Cir. 2002); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 125 (3rd Cir. 2001); *Daskalea v. D.C.*, 227 F.3d 433 (D.C. Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000); *Downey v. Denton Country*, 119 F.3d 381 (5th Cir. 1997); *Boddie v. Schnieder*, 105 F.3d 857, 860-61 (2d Cir. 1997); *Jenkins v. McCoy*, No. 93-6919, 1994 U.S. App. LEXIS 25531 (4th Cir. Sept. 14, 1994); *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993); *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977). See also *Kemner v. Hemphill*, 199 F. Supp. 2d 1264, 1270 (N.D. Fla., 2002); *Paz v. Weir*, 137 F. Supp. 2d 782, 807 (S.D. Tex. 2001); *Nunn v. Michigan Department of Corrections*, No. 96-CV-71416, 1997 U.S. Dist. LEXIS 22970, at *10-11 (E.D. Mich. Feb. 4, 1997).

⁸ See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

⁹ See generally Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 (1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., 93d mtg., U.N. Doc. A/Res/39/46 (1984) (entered into force June 26, 1987) (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person"); Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 297, U.N. Doc. A/43/49 (1988) ("No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."); Basic Principles for the Treatment of Prisoners, G.A. Res. 111, U.N. GAOR, 45th Sess., 68th mtg., Supp. No. 49A, at 199, U.N. Doc. A/RES/45/49 (1990) ("All prisoners shall be treated with the respect due to their inherent dignity and value as human beings."); Standard Minimum Rules for the Treatment of Prisoners, art. 22(2), E.S.C. Res. 663 C (XXIV), U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. E/3048 (1957) (amended 1977) ("There shall be no discrimination on grounds . . . [of] sex"); International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 12(4), 999 UNTS 171, 176 (entered into force Mar. 23, 1976) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.").

¹⁰ 42 U.S.C. §§ 15601-15602 (2003).

¹¹ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

¹² The PLRA applies to all federal actions, not just constitutional ones, but other actions are not relevant to this article. See 42 U.S.C. § 1997e (2004). Additionally, the PLRA contains provisions affecting other aspects of federal litigation on behalf of prisoners, again not relevant here.

is difficult to surmount. Although this barrier to rape lawsuits was probably unintended, courts are still struggling to make sure that this most vile of assaults is subject to viable actions for damages.

In this article, I argue that the PLRA is not necessarily an insurmountable challenge. If courts make a logical, rigorous analysis, rape survivors should still be able to receive compensation for their harms. However, for the sake of clarity and good public policy, the PLRA should be amended to state that a rape in the custodial setting is compensable.¹³ Victims of rape should not be forced to navigate through unnecessary procedural hurdles and endless court motions to receive compensation for their injuries.

In Part I of this article, I define rape, focusing on rape unaccompanied by other physical violence. I also provide an overview of the breadth and depth of the problems the law has had in addressing rape, both in custodial and non-custodial settings. In Part II, I examine the history of the PLRA and how rape has been analyzed under its provisions. Part III discusses the actual harm of rape, examining historical and modern understandings. Finally, in Part IV, I propose an appropriate action for Congress to protect custodial rape victims, to punish custodial rapists, and to generally deter custodial rape.

I. A DEFINITION OF THE PROBLEM AND ITS SCOPE

He was trying to kiss me, and I was trying to get him away. . . . He exposed himself and he was trying to push my head down towards him. . . . He told me that if I didn't give (oral copulation), I wasn't going to get parole.¹⁴

A. A Definition of Rape

First we must define rape itself. Rape is sexual contact forced upon a person who does not want that contact.¹⁵ In a non-custodial context, what comprises consent to a sexual encounter is an issue; in a custodial context, consent is a legal impossibility: the federal government, the District of Columbia, and forty-seven states now criminalize sexual contact between correctional staff and prisoners; only

¹³ State tort law may provide a remedy against the individual rapist guard; however, this article focuses on remedies that would be available federally. State tort law is generally not a preferred method for seeking compensation, as it provides no attorney fees and was not conceived to protect fundamental rights from government intrusion; rather it developed from common law to protect individual rights against encroachment by another individual. See James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV 393, 413 (2003). Additionally, the common wisdom among prisoner's rights advocates is that the federal district jury pools are more favorable to prisoners than are state jury pools, as they usually encompass larger areas and more urban centers.

¹⁴ Debra Harris, *Speaking Out: Guard Says She Was Terrorized and Abused: Guard Not Prosecuted For Sexual Attacks*, ORANGE COUNTY REG., July 29, 1990, at N11.

¹⁵ See, e.g., BLACK'S LAW DICTIONARY 1267 (7th ed. 1999); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 4 (1998).

Alabama, Oregon, and Vermont do not.¹⁶ These statutes are formulated on the belief that the power imbalance between guard and guarded renders true consent impossible.¹⁷ Accordingly, we must assume sexual contact between staff and prisoners is improper, illegitimate, and, by its very nature, within the definition of rape.¹⁸

Within this context of prisoner rape, my analysis will focus on a slightly larger set of rapes than what Professor Susan Estrich has termed "simple rape."¹⁹ Estrich defined "simple rapes" as those committed by "a single defendant [or perpetrator, should he never be prosecuted] who knew his victim and neither beat her nor threatened her with a weapon."²⁰ I examine both "simple rapes" and rapes where the victim was threatened with, but not injured by, a weapon. If there is additional injury beyond the rape itself, a plaintiff will have no trouble meeting the physical injury requirement of the PLRA. Accordingly, I focus on rapes without other violent injuries, and how they are and should be treated by the courts under the Prison Litigation Reform Act.

¹⁶ See 18 U.S.C. §§ 2241-2244 (2004); ALASKA STAT. §§ 11.41.425-427 (Michie 2004); ARIZ. REV. STAT. § 13-1419 (2004); ARK. CODE ANN. §§ 5.14.124-26 (2004); CAL. PENAL CODE § 289.6 (West 2004); COL. REV. STAT. § 18-7-701 (2004); CONN. GEN. STAT. §§ 53a-71, 53a-73a (2004); DEL. CODE ANN. tit.11, § 1259 (2004); D.C. CODE ANN. §§ 22-3014, 22-3017 (2004); FLA. STAT. ANN. §§ 794.011, 944.35 (West 2004); GA. CODE ANN. § 16-6-5.1 (2004); HAW. REV. STAT. ANN. §§ 707.731-732 (2004); IDAHO CODE § 18-6110 (Michie 2004); 720 Ill. Comp. Stat. Ann. 5/11-9.2 (West 2004); IND. CODE ANN. § 35-44-1-5 (Michie 2004); IOWA CODE ANN. § 709.16 (West 2004); KAN. STA. ANN. § 21-3520 (2004); KY. REV. STAT. ANN. § 510.120 (Michie 2004); LA. REV. STAT. ANN. § 14:134.1 (West 2004); ME. REV. STAT. ANN. tit. 17-A, §§ 253, 255 (West 2004); MD. CRIM. LAW CODE ANN. § 3-314 (2004); Mass. Gen. Laws Ann. ch. 268, § 21A (2004); MICH. COMP. LAWS ANN. § 750.520c (Michie 2003); MINN. STAT. ANN. §§ 609.344-345 (West 2004); MISS. CODE ANN. § 97-3-104 (2004); MO. ANN. STAT. § 217-405 (2004); MONT. CODE ANN. §§ 45.5.501-503 (Smith 2004); NEB. REV. STAT. §§ 28-322, 332.01-03 (2004); NEV. REV. STAT. ANN. § 212.187 (2004); N.H. STAT. ANN. §§ 632-A:2-3 (2004); N.J. STAT. ANN. § 2C:14-2 (West 2004); N.M. STAT. ANN. § 30-9-11 (2004); N.Y. PENAL LAW § 130.05(3) (McKinney 2004); N.C. GEN. STAT. § 14-27.7 (2004); N.D. CENT. CODE § 12.1-20-07 (2004); OHIO REV. CODE ANN. § 2907.03 (2004); OKLA. STAT. ANN. tit. 21, § 1111 (West 2004); PA. STAT. ANN. tit. 18, § 3124.2 (West 2004); R.I. GEN. LAWS § 11-25-24 (2004); S.C. CODE ANN. § 44-23-1150 (2004); S.D. CODIFIED LAWS § 22-22-7.6 (2004); TENN. CODE ANN. § 41-21-241 (2004); TEX. PENAL CODE ANN. § 39.04 (Vernon 2004); UTAH CODE ANN. § 76-5-412 (2004); VA. CODE ANN. § 18.2-64.2 (Michie 2004); WASH. REV. CODE ANN. §§ 9A.44.160, 170, 180 (2004); W. VA. CODE § 61-8B-10 (2004); WIS. STAT. ANN. § 940.225 (West 2004); WYO. STAT. §§ 6-2-303, 306 (Michie 2004). Standards for criminal liability are not, and cannot be, altered by a federal statute affecting only civil litigation standards.

¹⁷ See HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS* 10-11 (1996); Patricia J. Falk, *Rape By Fraud And Rape By Coercion*, 64 BROOK. L. REV. 39, 101-05 (1998).

¹⁸ For more discussion of the custodial sexual abuse of women in the United States, see AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE": VIOLATIONS OF HUMAN RIGHTS OF WOMEN IN CUSTODY (1999); HUMAN RIGHTS WATCH, *supra* note 17.

¹⁹ SUSAN ESTRICH, *REAL RAPE* 4 (1987).

²⁰ *Id.* While much of Estrich's work, and that of the scholars that have built upon it, focuses on the general reluctance of the criminal justice system and society to recognize rape as a violent crime, I do not focus on that area of contention, although certainly this is still a concern in developing law. See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1163 (1994) (holding that even when the victim's lack of consent was clearly stated, the defendant must have used physical force in order to be convicted of rape).

Although I focus on the rape of women, by no means do I intend to deny the great tragedy that occurs when male inmates are raped. That topic is simply outside of the scope of this article for several reasons. Women are more likely than men to be raped by prison guards or other correctional system employees. Men are more likely to be raped by fellow prisoners,²¹ which raises a different set of legal requirements.²² Additionally, as noted, this article focuses on rape where there is no accompanying injury to the rape itself. In general, men are more likely than women to be raped anally and therefore to suffer traditional physical injuries.²³ Thus, the PLRA's physical injury requirement is more likely to frustrate women than men.

The other reason that rape of women in prison is of specific concern is the likely reception of the mostly male federal judiciary²⁴ to the rape of women, especially black women, who comprise almost half of the women in the penal system.²⁵ The history of the U.S. legal system is replete with male judges imposing additional hurdles on women complainants to protect the "man's nightmarish fantasy of being charged with simple rape."²⁶ Some male judges have tended to identify with a male accused of raping an acquaintance, and go out of their way to protect the alleged rapist with legal barriers.²⁷ Courts have required a victim of rape to prove that she resisted to the utmost of her ability; that she was previously sexually chaste; that she was behaving and dressing according to social norms; that she had corroboration from physical evidence or witnesses; and that she had promptly reported the rape.²⁸ This nightmare is compounded by America's historical view of black women: "[T]he sexually loose woman who is unrapable, who always consents, and who is therefore unprotected by the law."²⁹ Prisoners, almost by definition, lack virtue, and in our society "[u]nvirtuous women . . . are consenting, whores, unrapable."³⁰ The justice system is reluctant to see these

²¹ See Leanne Fiftal Alarid, *Sexual Assault and Coercion Among Incarcerated Women Prisoners: Excerpts from Prison Letters*, 30 PRISON J. 391 (2000); Cindy Struckman-Johnson et. al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RESEARCH 67, 74 (1996).

²² See *Farmer*, 511 U.S. at 837. In an inmate on inmate rape case, the plaintiff must prove that a prison official actually knew of and disregarded an excessive risk that an inmate would be raped by another inmate.

²³ See Cindy Struckman-Johnson et. al., *supra* note 21, at 74. See also *Medical Examination of the Rape Victim*, in MERCK MANUAL OF DIAGNOSIS AND THERAPY 1832 (Robert Kerkow ed., 16th ed. 1992) ("The male victim is more likely to have physical trauma than the female.").

²⁴ According to the Federal Judiciary Center, 83% of the federal judiciary is male. See Federal Judiciary Center, Judges of the United States Courts, at <http://www.fjc.gov/newweb/jnetweb.nsf/hisa> (last visited Jan. 18, 2005).

²⁵ See LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS (1999).

²⁶ ESTRICH, *supra* note 19, at 55.

²⁷ See David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1206-07 (1997).

²⁸ See Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399 (1998).

²⁹ Dorothy E. Roberts, *Rape, Violence and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 365 (1993).

³⁰ CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175 (1989).

women as rape victims.³¹

Finally, although this article is primarily concerned with the rape of women, case law involving the rape of male inmates is cited. The larger number of men in the U.S. correctional system,³² and the greater concern paid to these rapes by the public and the judiciary,³³ creates a situation where more of these cases make their way to appellate courts than those involving women.

B. Incidence of Rape in the Custodial Setting.

As many researchers have found, the prevalence of rape in the free world is hard to quantify.³⁴ Similarly, the frequency of rape behind bars is difficult to measure.³⁵ Even the studies that do exist must be viewed skeptically, as "discovery and documentation of this behavior are compromised by the nature of prison conditions, inmate codes and subculture and staff attitudes."³⁶

Recognizing the lack of reliable research studies, Congress recently passed the Prison Rape Elimination Act of 2003 to "provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape."³⁷ As part of the legislative process, Congress held hearings during which expert academicians and practitioners presented the latest research regarding sexual assault of inmates. The House Report summarized:

Insufficient research has been conducted and insufficient data reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.³⁸

³¹ Governments as diverse as the United States and India are guilty of ignoring the sexual abuse of female prisoners. See HUMAN RIGHTS WATCH, WORLD REPORT 1999: WOMEN'S HUMAN RIGHTS (1999), available at <http://www.hrw.org/worldreport99/women/index.html> (last visited Jan. 18, 2005).

³² See PAIGE M. HARRISON & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2002, at 5-8 (2003) (reporting men are fifteen times more likely than women to be incarcerated).

³³ The Congressional Hearings for the Prison Rape Elimination Act of 2003 and Prison Rape Reduction Act of 2002 rarely mention the rape of women in prison. See also Stop Prisoner Rape, *Resources for Coping With Rape* (listing three sources for prisoner to prisoner advice for male victims of rape, and none for female victims), at <http://www.spr.org/> (last visited Oct. 10, 2004).

³⁴ See generally ESTRICH, *supra* note 19, at 10-13 (discussing the underreporting of rape in studies and official statistics); Alarid, *supra* note 21 (noting the need for more research).

³⁵ See Robert W. Dumond, *Inmate Sexual Assault: The Plague That Persists*, 80 PRISON J. 407, 410 n.4 (2000).

³⁶ D. J. Cotton & A.N. Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47, 48 (1982).

³⁷ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003).

³⁸ H.R. Rep. No. 108-219, at § 2(2) (2003).

Although these House Report statistics do not differentiate by gender, the studies that have been done suggest that up to twenty-seven percent of women are sexually assaulted or coerced while in custody at some facilities.³⁹ These women who are raped will find that they face a collision course with the PLRA when they attempt to sue for redress of their injuries.

II. THE PLRA'S TREATMENT OF RAPE

*I had been denied a shower for more than 2 weeks, when I finally was permitted the guard came to get me at 3 am. He proposed I smoke a cigarette with him [smoking was not permitted in this facility] this he thought allowed him access to rape me. And he did.*⁴⁰

Given the large scope and severity of the problem, one might assume that the law has had ample opportunity to make it clear that a woman who was raped by a prison guard had her rights violated and was due remuneration.⁴¹ After all, "[t]he U.S. Constitution's prohibition against cruel and unusual punishment is a clear indication that the founding fathers did not intend jails or prisons to be institutions where correctional officials could deliberately harm inmates through odious policies or specific abusive actions."⁴²

That assumption would be wrong. Congress has erected major road blocks to federal civil actions through the PLRA. The specific provision at issue here, codified at 42 U.S.C. § 1997e(e), mandates, "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."⁴³ This language forms the basis for courts' confusion over how to treat prison rape.

³⁹ See Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, J. SEX RES. (2002); see also Dumond, *supra* note 35, at 4 ("It has also become increasingly apparent that women in confinement face substantial risk of sexual assault by a small number of ruthless male correctional staff members, who use terror, retaliation, and repeated victimization to coerce and intimidate confined women.").

⁴⁰ H. Farrer, *Survivor Stories*, Stop Prisoner Rape, at <http://www.spr.org/en/survivorstories/hfarrer.html> (last visited Sept. 4, 2003).

⁴¹ U.S. CONST. amend. VIII. The Constitution itself provides no mechanism for plaintiffs to go to court to enforce the rights it comprises. Plaintiffs must sue either under 42 U.S.C. § 1983 (against state actors) or according to the theory delineated in *Bivens v. Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (against federal actors).

⁴² ROGER A. HANSON AND HENRY W.K. DALEY, DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION (1994).

⁴³ 42 U.S.C. § 1997e(e) (2004).

A. History of the PLRA

Signed by President Clinton on April 26, 1996, the Prison Litigation Reform Act passed as part of Title VIII of the Omnibus Consolidated Receptions and Appropriations Act of 1996.⁴⁴ It seems unlikely that the sponsors of the PLRA intended to make it hard for victims of rape by prison guards to sue. Statements by the PLRA's sponsors seemed to indicate a basic regard for rights of the incarcerated. Note the remarks of Senator Spencer Abraham, one of the bill's sponsors:

And convicted criminals, while they must be accorded their constitutional rights, deserve to be punished. I think virtually everybody believes that while these people are in jail they should not be tortured, but they also should not have all the rights and privileges the rest of us enjoy, and that their lives should, on the whole, be describable by the old concept known as hard time.⁴⁵

While hardly soft on crime, Secretary Abraham did acknowledge that prisoners had basic human rights.

Nevertheless, the bill that changed the face of civil rights litigation for a growing segment of the American population⁴⁶ received only a minimal amount of debate.⁴⁷ Senator Robert Dole stated that the purpose of the PLRA was to curtail frivolous suits which involved issues such as "insufficient locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety."⁴⁸ Legislators supporting the PLRA were concerned with limiting frivolous law suits and never considered the effect of their proposals on sexual assault cases. Even those lawmakers who opposed the

⁴⁴ See Omnibus Consolidated Receptions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996). This legislation resolved the Congressional/Presidential budgetary stand-off that closed the federal government in 1996.

⁴⁵ 141 Cong. Rec. S14316 (1995) (remarks of Sen. Abraham). Spencer Abraham was the Secretary of Energy during the first George W. Bush administration.

⁴⁶ There are now more than two million people in correctional custody in the United States. Just under one million are women. See HARRISON, *supra* note 32.

⁴⁷ Judge Harold Baer, Southern District of New York, stated:

First it is worth noting that some believe that this legislation which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not. A single Senate hearing before the Judiciary Committee, one substantive House Report, and some floor debate is all we can find.

Benjamin v. Jacobson, 935 F. Supp. 332, 337 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 124 F.3d 162 (2d Cir. 1997).

⁴⁸ 141 Cong. Rec. S14413 (1995) (remarks of Sen. Dole). I cannot responsibly mention this famous "chunky peanut butter" example without clarifying that it was at best a misunderstanding of the actual case, and, at worse, an outright distortion for political gain. The facts behind this case, and other cases proponents of the PLRA used as examples, are exposed in an article by Hon. Jon O. Newman, who was, until 1997, the Chief Judge of the Second Circuit Court of Appeals. See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519 (1996). The "chunky peanut butter case" was not about the wrong kind of peanut butter, but rather about improper debiting of a prisoner's account. See *id.* at 521.

enactment of the PLRA did not raise the issue of rape cases.⁴⁹ It appears that none of these lawmakers considered the effect that the PLRA would have on rape cases. There was essentially no section by section analysis of the provisions,⁵⁰ and no definition of what constitutes mental/emotional injury or physical injury.⁵¹ Not surprisingly, a 1994 report that wielded influence in the political drive to limit the availability of prisoner civil rights suits, never once even mentioned rape.⁵² This report, issued by the Department of Justice, Bureau of Justice Statistics, analyzed the outcomes of various types of Section 1983 cases.⁵³

Regardless of the arguments raised during the legislative debate, the unfortunate fact is that the PLRA is now law.⁵⁴ Thus, litigators on behalf of prisoners are forced to confront the physical injury requirement of the PLRA, while courts are forced to ask themselves what the exact injury of rape is: is it a physical injury in and of itself? In other words, must an inmate raped in prison prove simply that she was raped, or must she prove that she sustained other physical injuries during the assault before her Constitutional suit against her rapist may go forward?

B. State of Law under PLRA

Very few courts have reached the direct questions of whether a rape, in and of itself, is a physical injury within the purview of the PLRA. One might expect that it would take several years for cases that arose after the passage of the PLRA to progress to the level of reported decisions. One might also expect that cases where inmates allege rape and have relatively strong evidence to back their claims will be more readily settled, and thus not reach the level of a reported decision. Nevertheless, several circuits have had the opportunity to begin to look at this issue. However, despite these decisions, the question of whether rape is a qualifying physical injury under the PLRA remains open.

⁴⁹ See 142 Cong. Rec. S2292 (1996) (remarks of Sen. Graham).

⁵⁰ See, e.g., James E. Robertson, *A Saving Construction: How to Read the Physical Injury Rule of the Prison Litigation Reform Act*, 26 S. ILL. U. L. J. 1, 3-13 (2001); Theodore K. Cheng, *Invading an Article II Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act*, 56 WASH. & LEE L. REV. 969, 973-83 (1999).

⁵¹ See Omnibus Consolidated Receptions and Appropriations Act.

⁵² ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, *CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION* (1994).

⁵³ "Section 1983 cases" is a term of art for cases brought under 42 U.S.C. § 1983.

⁵⁴ As an advocate for human rights and the rule of justice and law, I believe the enactment of the PLRA was an assault on human dignity. This article focuses on only one aspect of that assault, but the PLRA provisions, from limiting access to in forma pauperis lawsuits, see 28 U.S.C. § 1915(b) (2004), to limiting attorney fees, see 42 U.S.C. § 1997e(d) (2004), to requiring exhaustion of inane grievance processes, see 42 U.S.C. § 1997e(a) (2004), serve only to ensure prisoners can be mistreated and abused by guards and prison officials with impunity.

1. Some Courts Declare Rape a Physical Injury, With No Analysis

Some courts have not been persuaded when the defendant has raised the argument that rape is not an inherent physical injury. Unfortunately, these opinions make general pronouncements, leaving out any in-depth examination of the issues. While these decisions set tenable case law, they lack satisfactory analysis.

The premiere example of this approach is *Liner v. Goord*.⁵⁵ A male inmate, Mr. Liner, brought his suit alleging, among other things, that prison guards had sexually assaulted him on three separate occasions.⁵⁶ The district court had dismissed these claims for failure to allege a physical injury.⁵⁷ Noting that the PLRA did not define a physical injury, the Second Circuit simply held that "the alleged sexual assaults qualify as physical injuries as a matter of common sense."⁵⁸

Unfortunately, "common sense" is not always evident if the rape did not involve a male victim.⁵⁹ Women have continually feared that "when we go to court, the incident will not be seen from our point of view."⁶⁰ Women must worry what "common sense" will yield given the unique historical mistrust of women charging rape, and the "unrapable" status of the non-virtuous female prisoner.⁶¹

We have some idea of what "common sense" yields when female inmates are the plaintiffs from a Southern District of New York case that, following the *Liner* appellate court, offered no analysis in concluding that rape is itself a physical injury.⁶² Ms. Noguera, a female inmate, filed suit alleging that a male officer sexually assaulted her and then further put her at danger by spreading rumors that she was a snitch.⁶³ Defendants argued that the retaliatory rumor-spreading was not compensable, since there was no physical injury.⁶⁴ Citing *Liner*, the court simply held that the rape is a physical injury, and thus all the acts should be considered together as compensable:

The Court concludes that the alleged abuser's acts should be considered together and that the physical abuse alleged satisfied the "prior physical abuse" requirement. . . . The potential for frivolous suits and feigned emotional injuries is greatly diminished in rape cases where the victim makes a showing of physical injury resulting from the rape itself.⁶⁵

⁵⁵ *Liner v. Goord*, 196 F.3d 132 (2d Cir. 1979).

⁵⁶ *Id.* at 132.

⁵⁷ *Id.* at 134.

⁵⁸ *Id.* at 135.

⁵⁹ See *supra* notes 24-31 and accompanying text.

⁶⁰ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 82 (1987).

⁶¹ See *supra* notes 24-31 and accompanying text.

⁶² *Noguera v. Hasty*, No. 99 Civ. 8786, 2001 U.S. Dist. LEXIS 2458 (S.D.N.Y. Mar. 12, 2001).

⁶³ *Id.* at 1. Being identified as a snitch inside the prison may have injurious and even fatal consequences for those so identified. See JEFFREY IAN ROSS & STEPHEN C. RICHARDS, *BEHIND BARS: SURVIVING PRISON* 23 (2002).

⁶⁴ *Noguera*, 2001 U.S. Dist. LEXIS 2458, at *14.

⁶⁵ *Id.* at *14-15 (citation omitted).

Although this court simply followed its circuit's precedent, it is frustrating that the court gave no analysis of what defines the actual physical injury of rape. This lack of analysis is repeated in two other decisions: both at the district court level, declaring that sexual assaults are physical injuries.⁶⁶ Neither of these courts provided analysis explaining how they reached their conclusions.

Without strict analysis, the decisions provide no persuasive authority for other courts, which may not share the same outlook or the same definition of "common sense."

2. Some Courts Avoid the Question by Focusing on Accompanying Physical Injuries

In male rape cases, some courts have latched onto minor injuries to get past the 42 U.S.C. § 1997e(e) requirements. Before looking at these cases, it is helpful to understand the general interpretation of the physical injury requirement in a non-rape context. One of the best expressions of the general rule is found in a U.S. District Court case from the Fifth Circuit:

Thus, an appropriate *de minimus* standard would be whether as a common-sense category approach to the injury; would the injury require or not require a free world person to visit an emergency room, or have a doctor attend to, give an opinion, diagnosis and/or medical treatment for the injury? In effect, would only home treatment suffice?

....

A physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional. It is not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks. People in the regular and ordinary events and activities in their daily lives do not seek medical care for the injuries they receive unless it obviously appears to be of a serious nature, or persists after home remedy care.⁶⁷

By ruling that no physical injury exists, courts have dismissed non-rape cases involving inmates suffering from the following injuries: nausea and vomiting; general bruising; bruised ribs; swelling; minor bleeding; abrasions and lacerations; generally injured body parts; skin fungus; dehydration; migraine headaches; increased blood pressure; aggravated hypertension; dizziness; insomnia; loss of appetite; burning eyes; shortness of breath; chest pain; mosquito bites resulting in

⁶⁶ See *Nunn v. Mich. Dep't of Corr.*, No. 96-CV-71416, 1997 US Dist. LEXIS 22970, at *10-11 (E.D. Mich. Feb. 4, 1997) ("The court concludes that allegations of rape and sexual assault are latent with the notion of physical injury sufficiently to support Plaintiffs' claim and to survive a Rule 12(b)(6) motion."). See also *Marrie v. Nickels*, 70 F. Supp. 2d 1252, 1265 (D. Kan. 1999) ("The court is persuaded by the Second Circuit's reasoning and finds that sexual assaults would qualify as physical injuries under § 1997e(e).").

⁶⁷ *Luong v. Hatt*, 979 F. Supp. 481, 486 (N.D. Tex. 1997). It is worth noting that nothing in this formulation states whether this reasonable person is insured or uninsured. This oversight may have class implications in future developments if courts expand upon this notion.

fever; and the smell of cells smeared with feces rendering sleep impossible.⁶⁸

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

The court notes [increased blood pressure, aggravated hypertension, dizziness, insomnia, and loss of appetite] are all symptoms typically associated with people suffering stress or mental distress. Prison itself is a stressful environment. If the symptoms alleged by [the plaintiff] were enough to satisfy the physical injury requirement . . . very few plaintiffs would be barred by the physical injury rule from seeking compensation on the claims for emotional distress. The court has no basis upon which to conclude that result was intended by Congress. The court finds that construing the allegations in the light most favorable to Plaintiff, the injuries alleged do not pass the de minimus test.⁶⁹

These abovementioned injuries probably should not be considered significant physical injuries. In fact, many people may consider most of these physical injuries to be relatively minor. However, compare these cases with those involving rape.

The Sixth Circuit Court of Appeals, in a brief, unpublished decision, implicitly decided that a rape itself is not enough of a physical injury to satisfy the PLRA requirement and looked to other injuries reportedly suffered by the inmate.⁷⁰ *Styles v. McGinnis*⁷¹ arose when Mr. Styles, a prisoner in the Michigan state system, appealed the District Court's dismissal of his action alleging sexual assault during the course of a physical exam by an emergency room doctor after he was admitted for angina.⁷² Mr. Styles complained that he received an unnecessary and nonconsensual rectal exam.⁷³ The trial court dismissed the case directly on the grounds that Mr. Styles did not allege a physical injury that would satisfy the

⁶⁸ See *Alexander v. Tippah County Mississippi*, No. 02-61033, 2003 U.S. App. LEXIS 23410 (5th Cir. Nov. 17, 2003), cert. denied, 124 S. Ct. 2071 (2004) (nausea, swelling, bleeding); *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003) (feces smeared cell); *Oliver v. Keller*, 289 F.3d 623 (9th Cir. 2002) (general injuries); *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999) (feces smeared cell); *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997) (bruising); *Paldo v. Herman*, No. 2:02-CV-0280, 2003 U.S. Dist. LEXIS 16885 (N.D. Tex. Sept. 26, 2003) (burning eyes, shortness of breath, chest pain); *Gillis v. Guerrero*, No. 2:02-CV-0255, 2003 U.S. Dist. LEXIS 16545 (N.D. Tex. Sept. 22, 2003) (swelling); *Anderson v. Contreras*, No. 7:02-CV-005-R, 2003 U.S. Dist. LEXIS 13150 (N.D. Tex. July 14, 2003) (bruised ribs, bleeding); *Henderson v. Kendrick*, 2002 U.S. Dist. LEXIS 11729 (N.D. Tex. Jul. 19, 2002) (swelling, bleeding, abrasions, lacerations); *Tamfu v. Two Unknown Agents of TDCJ*, No. 3:02-CV-1404-D, 2003 U.S. Dist. LEXIS 11776 (N.D. Tex. July 10, 2003) (nausea, dehydration, migraines, mosquito bites causing fever); *Simmons v. Tatro*, No. 7:02-CV-037-R, 2002 U.S. Dist. LEXIS 4310 (N.D. Tex. Mar. 14, 2002) (bruising, swelling, bleeding, abrasions, lacerations); *Todd v. Graves*, 217 F. Supp. 2d. 958 (S.D. Iowa 2002) (increased blood pressure, hypertension, dizziness, insomnia, loss of appetite); *Ford v. Page*, 169 F. Supp. 2d 831 (N.D. Ill. 2001) (skin fungus); *Luong*, 979 F. Supp. 481 (bleeding, abrasions, lacerations, general injuries).

⁶⁹ *Todd v. Graves*, 217 F. Supp. 2d. 958 (S.D. Iowa 2002).

⁷⁰ See *Styles v. McGinnis*, 28 Fed. Appx. 362 (6th Cir. 2001).

⁷¹ See *id.*

⁷² See *id.* at 363.

⁷³ See *id.* at 364.

requirements of 42 U.S.C. § 1997e(e).⁷⁴

The appellate court, although perhaps not outraged by the facts of the case,⁷⁵ seemed concerned that an alleged “sexual assault” would not meet the requirements of the PLRA. Rather than hold that unwanted penetration is a physical injury or conducting any analysis as to whether it should be so considered, the court skirted the issue by focusing on Mr. Styles’ “increased blood pressure, chest pain, tachycardia, and numerous premature ventricular contractions.”⁷⁶ The court focused on the relatively minor symptoms that Styles claimed to be a result of the alleged sexual assault and not the angina with which he was originally admitted to the emergency room, concluding that these physical injuries allowed Mr. Styles to defeat a motion to dismiss.⁷⁷

It is not clear in the court’s short decision how they distinguished the symptoms resulting from the sexual assault from the increased blood pressure and chest pain that accompanies angina.⁷⁸ Additionally, it is never discussed how both tachycardia (i.e., rapid heart beats) and premature ventricular contractions, both of which occur in healthy people under stress, are cognizable physical injuries distinguishable from stress,⁷⁹ which is generally understood as an emotional, rather than a physical, state.

Despite these somersaults of reasoning, the court must have been uncomfortable with its own analysis and mentions *Liner v. Goord*⁸⁰ for the proposition that rape in and of itself is a physical injury, but does not go so far as to rule on these grounds. Instead, the Sixth Circuit preferred to find something it regarded as a traditional physical injury rather than examine whether rape itself is a physical injury. Because of its unwillingness to face the central issue, the court produced an opinion that focused entirely on the symptoms of the presenting disease, or simply stress. Again, one is left to wonder if the court would have been so generous in the case of a raped woman exhibiting signs of stress. Is it the gender of the plaintiff that convinced the court?

Kemner v. Hemphill is another case concerning a male inmate who was sexually assaulted. The District Court for the Northern District of Florida performed analytical gymnastics similar to the court in *Styles*: reaching a conclusion that accompanying minor physical injuries (mostly symptoms of stress) allow a suit to survive the PLRA’s limiting language.⁸¹ The plaintiff in this case

⁷⁴ See *id.* at 363.

⁷⁵ The actions under consideration appear to be agreed by all involved to be a digital rectal examination, assumed for the purpose of a motion to dismiss to be nonconsensual on the part of Mr. Styles. See *Styles*, 28 Fed. Appx. at 364. This is not the general conception of what constitutes sexual assault. However, Mr. Styles so characterized it. See *id.* at 363.

⁷⁶ *Id.* at 364.

⁷⁷ See *id.* at 364–65.

⁷⁸ See THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 501 (Robert Berkow ed., 16th ed. 1992).

⁷⁹ See *id.* at 488; STEDMAN’S MEDICAL DICTIONARY 1550 (25th ed. 1990).

⁸⁰ See 196 F.3d 132 (2nd Cir. 1999).

⁸¹ See 199 F. Supp. 2d 1264 (N.D. Fla. 2002).

was Mr. Kemner, a prisoner of the Florida Department of Corrections. Mr. Kemner alleged he was left alone in the cell with another inmate who sexually assaulted him, forcing him to perform oral sex.⁸² Mr. Kemner alleged that he suffered "physical pain, cuts, scrapes, and bruises," in addition to vomiting after the other inmate ejaculated in his mouth.⁸³ Faced squarely with a challenge from the defendants that these injuries were not sufficient under 42 U.S.C. § 1997e(e),⁸⁴ the court had to address what would be a sufficient physical injury under the PLRA. As the court itself states, "The courts are troubled, however, where offensive bodily intrusion or sexual touching is involved."⁸⁵ In dicta, the court discusses the nature of sexual assault and rape:

There can be no question, therefore, that sexual battery is an extreme act of violence to human dignity, and that sexual battery involving penetration is "repugnant to the conscience of mankind."

Sexual battery often involves more than a *de minimus* use of force. But where only fear and intimidation are used, it might appear that no physical force is present. But that is error. A sexual battery involves, at a minimum, the physically forceful activity of the assailant. Copulation requires movement. . . . This kind of physical force, even if considered to be *de minimus* from a purely physical perspective, is plainly "repugnant to the conscience of mankind." Surely Congress intended the concept of "physical injury" in § 1997e(e) to cover such a repugnant use of physical force.⁸⁶

However, in the end, this court was not willing to legally hold that sexual assault was a *per se* physical injury. Resting on the plaintiff's claims of cuts, bruises, abrasions, shock, and vomiting, the court found that the plaintiff had suffered a physical injury.⁸⁷ But again, bumps and bruises are often considered too mundane in other contexts to overcome the barrier of 42 U.S.C. § 1997e(e), and shock and vomiting are often considered signs of stress, not physical injuries.⁸⁸ In fact, they must have been signs of stress in this case, albeit understandable stress, as there is nothing inherent about ejaculate that would cause a person to vomit or go into shock.⁸⁹

Neither of the analyses in the above two cases is satisfying. First, they both avoid the central question: whether a rape is a physical injury. Second, they both avoid the question by focusing on injuries that in other contexts are not considered

⁸² See *id.* at 1266. Because this assault appeared to have arisen from the purposeful ignorance of the correctional staff, Mr. Kemner was able to overcome the additional constitutional difficulties present in inmate on inmate rape cases. See *supra* Part IA.

⁸³ *Kemner*, 199 F. Supp. 2d at 1266.

⁸⁴ See *id.* at 1266.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1270.

⁸⁷ *Id.* at 1271.

⁸⁸ See *supra* note 68 and accompanying text.

⁸⁹ Ejaculate is part of natural human reproduction and a necessary component for survival of the species.

even remotely serious enough to defeat the requirements of 42 U.S.C. § 1997e(e). Finally, the fact that these cases exist shows the sexism inherent in the legal process.

Why is it that all but two of the prisoner cases I found addressing rape involve men and not women? Why is it that the only case holding that nausea is a qualifying physical injury is one where the nausea was caused by a man having to taste ejaculate? The answers to those questions lie in the biases of the legal system: finding an injury when a man is sexually assaulted, but assuming sexual accommodation when a woman is sexually assaulted.⁹⁰ Unlike the few cases recognizing male rape as a physical injury or inherently causing a physical injury, there are only two available decisions, both made by district courts, finding that the custodial rape of a woman is a physical injury under the PLRA. There are no cases holding that the accompanying physical effects on a woman are a physical injury. Would the injuries to which she could point be considered simply the result of emotions and therefore non-physical, as is the situation in cases where judges are not shocked by the conditions male prisoners are subjected to?⁹¹

Might a female prisoner be considered an unrapable “whore”⁹² whose injuries are not shocking enough to motivate a court? Often, the courts find the rape of a woman to be somehow less of an injury than the rape of a man. After all, many of the women in prison have been sexually active with men,⁹³ and there is widespread “male incomprehension that, once a woman has had sex, she loses anything when subsequently raped.”⁹⁴ The stress that a woman feels could be dismissed as nothing serious, simply a normal female response to sex.⁹⁵ Even numerous women have not considered forced sex by a non-stranger to be rape.⁹⁶ Might the mostly male judiciary agree?

The law must squarely confront whether and why rape, especially rape of a woman, is a physical injury. Good legal scholarship garners its vitality from strict analysis, not grand pronouncements. Assurance that women are adequately protected from custodial sexual abuse requires this strict analysis. To begin our examination of whether rape is a physical injury within the meaning of the PLRA, we must first understand the harm of rape itself.

⁹⁰ See *supra* notes 24-31 and accompanying text.

⁹¹ See *Alexander v. Tippah County Miss.*, No. 02-61033, 2003 U.S. App. LEXIS 23410 (5th Cir. Nov. 17, 2003) (vomiting occurred in reaction to the smell and sight of raw sewage); *Tamfu v. Two Unknown Agents of TDCJ*, No. 3:02-CV-1404-D, 2003 U.S. Dist LEXIS 11776 (ND Tex. Jul. 10, 2003) (vomiting occurred as a result of stress and overexposure to heat and sun).

⁹² See MACKINNON, *supra* note 30, at 175.

⁹³ See Lawrence A. Greenfield & Tracy L. Snell, *Women Offenders*, BUREAU OF JUSTICE STATISTICS, 7 (1999) (finding that approximately seventy percent of women in custody have children under eighteen).

⁹⁴ MACKINNON, *supra* note 30, at 173.

⁹⁵ *Id.* at 173-74.

⁹⁶ See ESTRICH, *supra* note 19, at 12. See also ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, SURVIVING DATE AND AQUAINTANCE RAPE* (1994).

III. THE HARM OF RAPE

On that night in March 2000, I was woken up at approximately 3:30 a.m. by prison guard Michael Miller, a Senior Officer of the Bureau of Prisons. . . . Miller started forcing himself on me, kissing me and groping my breasts. I was pushed into a storeroom where supplies were kept for the inmates. He continued to assault me; the more that I begged and pleaded for him to stop, the more violent he became. He tried to force me to perform oral sex on him. He then threw me against the wall and violently raped me.

I can still remember him whispering in my ear during the rape: "Do you think you're the only one? Don't even think of telling, because it's your word against mine, and you will lose." Miller also said to me "who do you think they will believe, an inmate or a fine upstanding officer like me?"⁹⁷

A. Rape Historically Has Been Considered More Serious Than Assault

"[R]ape is inherently one of the most egregiously brutal acts one human being can inflict upon another."⁹⁸ Rape is more than a physical assault. It traditionally has been considered "the most serious and personally devastating of non-lethal offenses."⁹⁹ This is in part because of the unique universe of harms that accompany rape. "Every rape victim experiences literally the threat of loss of life. Although this is readily recognized when the victim has been physically damaged by the assailant in ways other than those occurring from forced sexual intercourse, it is experienced as an ever-present danger by all rape victims."¹⁰⁰ Society has clearly considered rape to be much more serious than simple assault.

Rape has been subject to some of the most severe penalties a criminal justice system can impose. Biblical laws proscribed death for the rapist, explaining, "[t]his case is like that of a man attacking another and murdering him."¹⁰¹ Modern American laws did not depart far from this approach. In 1925, eighteen states, the District of Columbia, and the Federal Government allowed imposition of the death penalty for rapists.¹⁰² Even the existence of rape as a separate crime in the criminal common law indicates an understanding that "the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary

⁹⁷ 149 Cong. Rec. Ext. 1371 (2003) (statement of Marilyn Shirley, former prison inmate).

⁹⁸ *Coker v. Georgia*, 433 U.S. 584, 607-08 (1977) (Burger, C.J., dissenting).

⁹⁹ Donald J. Cotton & A. Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON AND JAIL HEALTH 47 (1982).

¹⁰⁰ Deborah S. Rose, MD, "Worse Than Death": *Psychodynamics of Rape Victims and the Need for Psychotherapy*, 143 AM J PSYCHIATRY 817-824 (1986).

¹⁰¹ Deuteronomy 22:25-26 (applying at least to rapes of engaged women occurring in unpopulated areas).

¹⁰² *Coker*, 433 U.S. at 593.

assault.”¹⁰³ Historically, second only to murder, rape has been considered “the ultimate violation of self.”¹⁰⁴

B. Rape Is a Physical Violation of Bodily Boundaries

Rape is also a violation of a person’s physical boundaries of her own body. The violation of those boundaries is a harm that differs from almost any other kind of assault. In a rape, “the site of the inner self, the interior body space, is violated.”¹⁰⁵ The overwhelming of bodily boundaries creates its own harm. “Rape disrupts the sense of autonomy, control, and mastery over one’s body. The body’s boundaries are violated, orifices are penetrated, aversive sensory stimuli cannot be escaped, motor and verbal functions are controlled by the assailant.”¹⁰⁶

The penetration itself can cause severe pain, tearing vaginal walls, and even leaving scars.¹⁰⁷ But apart from that, the penetration itself is a harm: it is in itself a violent act causing pain.¹⁰⁸ We conceive of ourselves as part of our physical bodies,¹⁰⁹ and intrusion past the boundaries of that physical body is in fact a physical injury.

C. Rape Exact a Unique Harm upon the Victim

Rape differs from other assaults in that the harm it exacts is different.¹¹⁰ We can see this in some common usage. For example, in questions seeking information on violence-related physical injury, the National Violence Against Women Survey distinguished between additional injuries and the injury of rape itself.¹¹¹ As another author has put it, “Rape is *sui generis*. . . . It is a primal

¹⁰³ *People v. Liberta*, 474 N.E.2d 567, 574 (N.Y. 1984); see also Linda Jackson, *Marital Rape: A Higher Standard Is In Order*, 1 WM. & MARY J. OF WOMEN & L. 183, 194 (1994) (“[T]he very existence of rape laws indicates a recognition that harm caused by rape, any rape, is more severe than harm caused by assault and should be treated as such.”).

¹⁰⁴ *Liberta*, 474 N.E.2d at 597 (internal citations omitted). Much of the historical treatment of rape in America is intertwined with the history of slavery and racism. For a broad discussion of this topic see SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975).

¹⁰⁵ Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing, and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439, 446 (1993).

¹⁰⁶ Rose, *supra* note 104, at 817-24.

¹⁰⁷ Robin L. West, *Legitimizing the Illegitimate: A Comment of Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993).

¹⁰⁸ Robin L. West, Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 150 (1994).

¹⁰⁹ Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY L.A. L. REV. 845, 894 (2002).

¹¹⁰ While this article concerns itself with examining rape as a physical injury, it is important to keep in mind the psychological impact of rape. “The psychological traumas of rape have been noted to include threat of death, massive environmental assault, violation of bodily boundaries, narcissistic injury, overwhelming of usual ego functions, loss of control, profound regression, activation of unconscious conflicts and fantasies on many levels, and disruption of important relationships.” Rose, *supra* note 104, at 817-24.

¹¹¹ See TJADEN, *supra* note 15, at 49. This was a joint project conducted by the National Institute of Justice and the Centers for Disease Control and Prevention and interviewed 8,000 women and 8,000 men regarding their experiences with violence. The survey itself was conducted from November 1995 through May 1996, and numerous reports based on the data it yielded were issued.

experience to which other events might be meaningfully analogized—the ‘rape’ of the land, the ‘rape’ of a people. But rape itself cannot be reduced to other painful experiences.”¹¹² Why? What makes rape different? Chief Justice Burger once explained:

A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack—it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and this in turn may have a serious detrimental effect upon her husband [sic] and any children she may have. . . . Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery.¹¹³

One of the differences between rape and other assaults is that it is inherently sexual. I mean not to contradict the understanding that rape is primarily a display of power, not lust, but to point out that it is also sexual for both the attacker and the attacked.¹¹⁴ The rapist garners sexual pleasure, sometimes to the point of orgasm. The victim of rape also experiences rape as an assault to her sexual organs and sexuality, forcing her to participate in acts that resemble those in which she might engage in as a positive expression of sexuality. The concern here is not with the attacker, but with the injury to the attacked. It is precisely that sexual nature of the attack and the loss of control of the most intimate of self-conceptualizations that make rape unique.¹¹⁵ Thus, even without accompanying physical injuries (the traditionally conceptualized “bashing and slashing”¹¹⁶ that signifies a sexual assault) a rape victim is uniquely harmed. The sexual nature of the harm creates damages that “are pervasive and devastating, with profound physical, social, and psychological components.”¹¹⁷

Over all other explanations, it is the sexual nature of rape for both the victim and the victimizer that gives rape the ability to exact such a unique harm: “a crime to the soul.”¹¹⁸

¹¹² West, *supra* note 107, at 1449 (“Appreciating the sexual nature of the harm proves essential to understanding the wrong of this kind of rape.”).

¹¹³ *Coker v. Georgia*, 433 U.S. 584, 611-12 (1977) (Burger, C.J., dissenting).

¹¹⁴ See MacKinnon, *supra* note 60, at 87-88 (“Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse.”).

¹¹⁵ Pillsbury, *supra* note 110, at 891.

¹¹⁶ Schafran, *supra* note 106, at 441.

¹¹⁷ Robert W. Dumond, *Inmate Sexual Assault: The Plague that Persists*, 80 PRISON J. 407, 409 (2000).

¹¹⁸ Pillsbury, *supra* note 110, at 895.

D. Rape Is In and Of Itself a Physical Injury

Since the beginning of recorded law, rape has been considered a heinous crime. It has been classified as an offense worthy of the death penalty. It violates the boundaries of the physical body and intrudes into the sanctity of the sexual conception of the self. It has been called “spiritual murder.”¹¹⁹

Quite simply, rape is not equivalent to the “chunky peanut butter” or bad hair cuts of the PLRA’s proponents’ statements. Rape is so heinous and injurious that it falls into that category that “virtually everybody believes”¹²⁰ is too torturous to force upon any convicted criminal. Rape is much more than an “emotional injury,” intended by the PLRA to be uncompensable.¹²¹ “Prison rape, like all other forms of sexual assault, is torture.”¹²²

In the current legal system, the PLRA dictates 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.”¹²³ The PLRA forces a complicated choice. Is rape an emotional injury or a physical one? Within the world created by the PLRA, we are left with only one choice. If rape results in more than a non-compensable emotional injury, it must leave a physical injury.¹²⁴ There is no in-between. Congress left us two choices. One is clearly inapropos. The other must be the answer. Rape, by process of elimination, must leave a physical injury within the meaning of the 42 U.S.C. § 1997e(e).

¹¹⁹ West, *supra* note 108, at 1448.

¹²⁰ 141 Cong. Rec. S14316 (1995) (remarks of Sen. Abraham).

¹²¹ 42 U.S.C. § 1997e(e) (2004).

¹²² *The Prison Rape Reduction Act of 2002: Hearing on S. 2619 Before the S. Judiciary Comm.*, 107th Cong. (2002) (statement of Hon. Frank R. Wolf, Rep., Va.).

¹²³ 42 U.S.C. § 1997e(e).

¹²⁴ *Id.*

IV. CONGRESS MUST ACT

He was standing by an open door that led into a catwalk between the gym and the library. As I stepped in, he stepped in and closed the door and bolted it. He flipped the light switch off, it was pitch black in there. He pushed me down on to a mattress and proceeded to pull down my pants and panties. We are required as prison inmates to wear state issue clothing to our assigned jobs which are elastic waist bands, so he had no problem getting them down. The catwalk was about 4 ft. wide, open wall beams (2x4's). He bit my forearm in the three different places, I had bruises on my legs and back where I fought him and tried to turn over, as I was face down. Anyway, I ended up hysterical.¹²⁵

While I believe that rigorous analysis shows that rape must be considered a physical injury within the contours of the PLRA, reaching what should be this straightforward conclusion requires a lot of work. Thus, to avoid future confusion and to clarify that custodial rape is a compensable Eighth Amendment harm, Congress must act.¹²⁶ The United States Congress must either repeal the PLRA in its entirety, which is unlikely, given the election mileage candidates get out of being tough on criminals;¹²⁷ repeal the physical injury requirement of 42 U.S.C. § 1998e(e), which is also unlikely, given that the spurious original concerns that prisoners litigate too much still exist;¹²⁸ or amend the PLRA to clarify that rape is a compensable injury, either as a physical injury or in its own right. The last option seems to have minimal political downsides, as most people publicly denounce rape and would not want to condemn a politician for addressing rape as an issue. It would certainly do a great deal to address what Congress knows is a great problem.

¹²⁵ Johanna, *Survivor Stories*, Stop Prisoner Rape, at <http://www.spr.org/en/survivorstories/johanna.html> (last visited Sept. 4, 2003).

¹²⁶ Alternatively, the U.S. Supreme Court could definitively issue a decision that rape falls within the definition of PLRA "physical injury." The problem is that the Court only has the opportunity to announce rulings in the less than 100 cases per year that it hears. Additionally, there is no way of predicting when a case that raises this issue will arise before the Court. Finally, real cases generally tend to have several legal issues presented, rather than one clear issue that forms the crux of the case. Rather than waiting for all the right circumstances to fall into place for a Supreme Court pronouncement, and letting countless victims suffer in the meantime, Congress should act now.

¹²⁷ See, e.g., 2004 Republican Party Platform: A Safer World and a More Hopeful America, Strengthening Our Communities, Protecting Our Rights, Fighting Criminals, and Supporting Victims ("We believe that the best way to deter crime is to enforce existing laws and hand down tough penalties against anyone who commits a crime with a gun."); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 Kan. L. Rev. 503, 504 (1995) ("[W]e live at a time when legislators, state as well as federal, are zealous in their efforts to be tough on crime, or at least to create the appearance of toughness.")

¹²⁸ See, e.g., Governor Agreement Reached On Prisoner Litigation Reform (Aug. 4, 1999) (press release from NY Governor Pataki's office, decrying the cost of inmate initiated lawsuits to the state), available at http://www.state.ny.us/governor/press/year99/aug04_1_99.htm); Pennsylvania Department of Corrections Inmate Strike Index (listing inmates who have brought suits against the DOC), available at <http://www.cor.state.pa.us/legal/site/default.asp>. See also ALASKA STAT. § 09.19.200 (Michie 2004) (a state PLRA which took effect in 1999); VA. CODE ANN. §§ 8.01-689-695 (Michie 2004) (a state PLRA which took effect in 2002).

A. Congress Has Already Established That Rape in Prison Is a Large Problem

As discussed in Section IA, Congress recently passed the Prison Rape Elimination Act of 2003. The testimony presented at both Senate and House hearings and the official findings demonstrate that, at a minimum, Congress understands that rape in custody is a devastatingly large problem.¹²⁹ Congress has already recognized that custodial rape “involves actual and potential violations of the United States Constitution.”¹³⁰ In fact, for Congress to deny that fact would undermine the basis for its authority to enact the Prison Rape Elimination Act of 2003 under Section 5 of the Fourteenth Amendment. Congress has also recognized that we must have “a zero-tolerance standard for the incidence of prison rape in prisons in the United States.”¹³¹

If addressing the incidence of rape in custody is hindered by an unintended consequence of the PLRA, Congress must either accept the PLRA’s formulation with the understanding that some courts may leave rapes unaddressed, or amend the PLRA to remove the difficulty.

B. A Change in the PLRA Would Have Symbolic and Deterrent Effects

Society hopes that laws, including Section 1983, deter individuals from doing what is prohibited. “The purpose of § 1983 is to deter state actors from using their positional authority to deprive individuals of their constitutionally guaranteed rights and to provide a remedy to victims if such deterrence fails.”¹³² Laws also make statements about what is right and wrong in an attempt to push social norms in the right direction.¹³³ “Behavior and choice are a product not only of other people’s behavior, but also of the perceived judgments of other people, and those judgments have a great deal to do with—indeed they constitute—social norms. People act in accordance with their perceptions of what other people think.”¹³⁴

Thus, there is a large social good in emphasizing that rape, especially of those in the custody of the state, is unacceptable in our civilized society. Such a statement would push social norms further against the rape of imprisoned people. Additionally, a law explicitly condemning custodial rape and making it compensable may deter those who would otherwise rape. It would also lead to greater precision in the definition of the right of an inmate to be free from rape, as it would establish incentives for inmates to bring constitutional torts for rape, and that “contributes to a broader process of rights definition” in specific factual

¹²⁹ H.R. REP. NO. 108-219 (2003) (concluding that the procedures in place to protect inmates from violence committed by other inmates are lacking).

¹³⁰ The Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2(13), 117 Stat. 972, 973 (2003).

¹³¹ *Id.* at § 3(1).

¹³² *Smith v. Cochran*, 216 F. Supp. 2d 1286, 1290 (N.D. Okla. 2001).

¹³³ Cass R. Sunstein, *Symposium: Law, Economics, & Norms: On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

¹³⁴ *Id.* at 2032.

situations.¹³⁵

C. Amending the PLRA Will Reduce Spurious Claims of Qualified Immunity

Another important consequence of amending the PLRA to explicitly include rape as a physical injury would be to reduce the potential for rapists to raise a qualified immunity defense. Qualified immunity is a doctrine that protects government agents from liability unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known,"¹³⁶ or it was not objectively reasonable to believe that a right was not being violated.¹³⁷

While attempts to claim qualified immunity are generally unsuccessful in the rape context, government prison employees¹³⁸ and agents have asserted it in every conceivable situation. The defense has failed where defendants asserted they did not know sexual assault was prohibited,¹³⁹ the sexual contact was consensual,¹⁴⁰ they were not guards but agents of the prison,¹⁴¹ they were not the rapist but a lookout for the rapist,¹⁴² they were only supervisors,¹⁴³ and the plaintiff was transgendered.¹⁴⁴ Many conclusions could be drawn from this array of examples, but it is clear that custodial rapists will often assert that they did not realize that rape was a basic violation of a person's constitutional rights.

To prevent the success of a qualified immunity defense, plaintiffs are required to demonstrate that the specific law protecting their rights has been well-settled.¹⁴⁵ Thus, given the possible ambiguities of the PLRA's physical injury requirement, Congress should clarify that rape is a physical injury.

¹³⁵ James J. Polk, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 419 (2003).

¹³⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹³⁷ *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987).

¹³⁸ Employees of privately run prisons, while constrained by the Eighth Amendment, are not able to claim qualified immunity. See *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

¹³⁹ *Williams v. Prudden*, 67 Fed. Appx. 976 (8th Cir. 2003). See also *Mathie v. Fries*, 935 F. Supp. 1284, 1301 (E.D.N.Y. 1996) ("The Court finds that any reasonable prison Director of Security knew that to try to force unwanted and prohibited sexual acts on a powerless inmate is objectively unreasonable and in violation of the inmate's rights.").

¹⁴⁰ *Smith v. Cochran*, 216 F. Supp. 2d 1286 (N.D. Okla. 2001), *aff'd*, 339 F.3d 1205 (10th Cir. 2003).

¹⁴¹ *Id.*

¹⁴² *DeFoor v. Rotella*, No. 99-1202, 2000 U.S. App. LEXIS 5028 (10th Cir. Mar. 24, 2000).

¹⁴³ *Morris v. Eversley*, 205 F. Supp. 2d 234 (S.D.N.Y. 2002); *Noguera v. Hasty*, 99 Civ. 8786, 2000 U.S. Dist. LEXIS 11956 (S.D.N.Y. Jul. 21, 2000).

¹⁴⁴ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

¹⁴⁵ *Siegert v. Gilley*, 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991).

D. Clarify Standards for Courts and Free Them from Worries of Judicial Activism

Recent political debate seems to use the charge of “activist judge” to mean a judge the speaker wishes would have reached a different result.¹⁴⁶ This charge is especially true in the prison litigation context, where “politicians had long campaigned against judicial activism, and took court orders regulating prison conditions as a prime example of judicial overreaching.”¹⁴⁷ Generally, “judges are considered activists when they articulate new constitutional rights not explicitly mentioned in the Constitution or when they overturn statutes based on their own readings of constitutional values.”¹⁴⁸ Congress should free judges from the worry of being so attacked and simply clarify that rape is a compensable injury under the PLRA.

¹⁴⁶ See, e.g., the following FAQ on the website of Alliance for Justice, a liberal advocacy group:

Q: Republicans talk a lot about judges being “activist.” What do they mean?

A: The term “activist” was coined by conservatives to label judges whom they deem too liberal. It is difficult to define, since it is basically just a political term. One definition used by conservatives is a judge who “legislates from the bench” by rewriting constitutional provisions, laws, and/or prior cases to arrive at a decision he or she wants, regardless of whether it is the legally correct decision. By this definition, however, most of today’s activists are conservative judges, some of whom have used any and all means to limit Congress’s power to ban discrimination, protect the environment, and regulate guns.

Alliance for Justice, Frequently Asked Questions, *available at*

<http://www.allianceforjustice.org/judicial/about/frequently.html> (last visited Dec. 27, 2004).

¹⁴⁷ Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 13 (1997).

¹⁴⁸ Donald H. Zeigler, *The New Activist Court*, 45 AM. U.L. REV. 1367, 1369 (1996).

V. CONCLUSION

By requiring that plaintiffs demonstrate a physical injury in order to recover damages, the PLRA erected a major hurdle for prison rape victims to overcome. This perhaps unintended barrier forces women to prove to a historically inhospitable judiciary¹⁴⁹ that their rape was in and of itself a physical harm.

In the few cases that have arisen since the PLRA's enactment, courts have taken one of two approaches. They have either declared rape a physical injury without analysis, or have focused on injuries that in other contexts would most certainly be ruled too minor to qualify as physical injuries.¹⁵⁰

Most observers would consider these results unjust. An average person would think that rape easily should be declared a compensable injury. The overwhelming body of medical knowledge, historical literature, and legal precedent concludes that rape is second only to murder in vileness.¹⁵¹ If offenses against the person were ordered from least to most severe, emotional injury might be first, producing the least severe harm; followed by physical injury; then rape, causing even more injury than a general physical assault; then murder, obviously causing the most severe harm. Rape is different than other assaults but is certainly among the most severe. It should be grounds for a constitutional suit for damages when it is perpetrated by a prison official against a prisoner.

Congress needs to act in order to ensure that rape is in fact grounds for a suit. Failure to do so undermines the appearance of the strong commitment to ending custodial sexual assault Congress made in passing the Prison Rape Elimination Act and leaves federal judges without necessary guidance. Additionally, it leaves a gap in the basic net of human rights protections the United States of America should provide to everyone.

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

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury, *sexual assault or abuse*.

That simple addition would make clear that while rape is qualitatively different from other assaults, it is at least as severe as a physical injury. The change would allow plaintiffs to sue when they are raped by those charged with their orderly safekeeping. It would make clear what should have been clear from the beginning: rape is wrong.

¹⁴⁹ See *supra* notes 24–31 and accompanying text.

¹⁵⁰ See *supra* Section IIB.

¹⁵¹ See *supra* Section III.