

150% WRONG: THE PRISON LITIGATION REFORM ACT AND ATTORNEY'S FEES

Eleanor Umphres*

INTRODUCTION

Lawyers are professionals. Like doctors or pilots, lawyers perform a job that laypeople would otherwise struggle with tremendously or outright botch without the years of experience and training necessary to carry out such a vocation. Courts rely on lawyers to shepherd clients through the system, and it is typically the lawyers who file suit, write briefs, interview witnesses, argue motions, and take cases up on appeal. When pro se litigants attempt to shoulder the role of lawyer themselves, the system works less efficiently.¹ Additionally, the pro se litigant is arguably worse off without the benefits that competent counsel bring to the table.² Unfortunately, however, prisoners file the vast majority of their lawsuits pro se,³ because very few lawyers are willing to take on prisoner cases given the current disincentives.

By engaging in a strained construction of the Prison Litigation Reform Act (“PLRA”)⁴—unsupported by its actual language—courts have found the Act to cap attorney’s fees at 150% of the monetary award.⁵ The result of this misreading⁶ of § 1997e(d)(2) is a perverse disincentive for attorneys to appear in even potentially *meritorious* cases. The misreading is also incongruous with the Supreme Court’s regular admonishment against embellishing statutory language⁷ and leads

* J.D., Georgetown University Law Center (2018); M.S.S.W. Columbia University School of Social Work (2011); B.A. Vesalius College, Brussels, Belgium (2009). © 2018, Lucy Eleanor Pomeroy Washburne Umphres. Special thanks to John Boston, Marc Cannan, and Shon Hopwood for their mentorship and edits.

1. See Allison Cohn, *Can \$1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act’s Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299, 328 (2006) (noting that “pro se litigation has the effect of substantially slowing the litigation process”); see also Tasha Hill, *Inmates’ Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 182 (2015) (“Pro se claims are particularly time-consuming for courts because of the difficulty in trying to decipher the legal claims in a complaint filed by someone not trained in the law.”).

2. Cohn, *supra* note 1, at 327–28 (“[T]he vast majority of pro se lawsuits fail. The presence of counsel, on the other hand, dramatically improves success rates.”).

3. Hill, *supra* note 1, at 182 (claiming that 94–96% of all prisoner litigation is filed *pro se*); see also Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1624 (2003) (“[N]early all inmate civil rights cases are filed pro se.”).

4. 42 U.S.C. § 1997e (2012); see *infra* Part (B) of the Introduction.

5. See *infra* text accompanying note 35 and Section II.

6. See generally *infra* Section II.

7. See, e.g., *Jones v. Bock*, 549 U.S. 199, 216–17 (2007) (emphasizing the importance of not augmenting a statute, with specific reference to the PLRA, by quoting Justice Frankfurter: “‘Whatever temptations the

to absurd results. For example, a lawyer who brings a successful civil rights suit on behalf of a prisoner client might receive an attorney's fees award of merely \$1.50—despite the days, months, and even years he or she worked on the meritorious litigation.⁸ Such severe consequences deter *lawyers* from taking on prisoner cases, but the PLRA's attorney's fees restrictions⁹ do nothing to stop prisoners themselves from proceeding on their own.¹⁰ The result is that prisoners with vital civil rights claims cannot find lawyers to help them bring suit, and courts remain clogged with prisoners soldiering on pro se.¹¹ To facilitate the just resolution of meritorious prisoner litigation, prisoners' civil rights attorneys should be paid closer to market rate—or at least a *fair wage*—by the losing side, and a correct reading of § 1997e(d)(2) makes this possible.

A. Attorney's Fees in America

Unlike most civil law countries and the United Kingdom,¹² where the losing side pays both its own attorney's fees and the fees of the winning side,¹³ the traditional model in the United States requires that each side pay its own attorney's fees, regardless of who has won. The rationale for this “American Rule” is that no one should be deterred from bringing suit just because they fear losing and having to pay both sides' attorney's fees.¹⁴ The American Rule is not without

statesmanship of policy-making might suggest,' the judge's job is to construe the statute—not to make it better.”); see also *infra* text accompanying notes 111 and 139.

8. See, e.g., *infra* text accompanying notes 91–98.

9. The attorney's fees portion of the PLRA is found in 42 U.S.C. § 1997e(d).

10. Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 900 (2002) (“Restricting the amount of fees attorneys can recover in successful suits . . . can have no material reduction in the amount of frivolous suits actually brought in the federal courts, which inmates remain free to do pro se.”).

11. See *supra* note 3; see also Cohn, *supra* note 1, at 328 (“Given that the PLRA was enacted to free up the federal judiciary's docket so that it could focus on non-prisoner lawsuits, it would seem that a provision that effectively encourages pro se litigation runs counter to that purpose.”).

12. See Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 7 (2006).

13. Known as the English Rule, the rationale is that the successful party should not be saddled with fees associated with winning a suit. If the plaintiff wins, the reasoning is that the plaintiff never would have brought suit had he or she not been wronged by the defendant in the first place, so the defeated defendant should pay. Conversely, if the defendant wins, the reasoning is that the defendant never would have had to bear the burden of litigation had the plaintiff not brought suit to begin with, so the unsuccessful plaintiff should pay for the victorious defendant's troubles. Proponents of the English Rule contend that this rule “deter[s] frivolous or nonmeritorious lawsuits since a defendant facing such a lawsuit has an incentive to vigorously litigate the case, knowing that it will almost certainly win and its adversary will pay its fees.” Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 335 (2013).

14. See Lorraine Wright Feuerstein, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125, 128 (1995) (noting that “the rule ensures open access to courts”).

exception, but it is the prevailing norm in the United States that “absent express statutory authorization to the contrary, each party to a lawsuit ordinarily shall bear its own attorney’s fees.”¹⁵

But in certain instances “when the interests of justice so require,” courts in the United States *may* award attorney’s fees under a “fee shifting” theory.¹⁶ For example, under the “private attorney general rationale,” courts may award attorney’s fees when the suit “further[s] a congressional policy envisioning private enforcement of federal law.”¹⁷ The Civil Rights Attorney’s Fees Awards Act of 1976, known colloquially as § 1988, serves as a case in point.¹⁸ This statute authorizes federal courts¹⁹ to award reasonable attorney’s fees to the prevailing party in specified civil rights litigation.²⁰ For example, 42 U.S.C. § 1983 holds state officials liable for federal constitutional violations.²¹ Thus, if a person is subjected to excessive force during arrest, then the injured person can bring a § 1983 civil rights suit against the arresting officer for unreasonable seizure in violation of the Fourth Amendment,²² seeking a remedy such as compensatory or punitive damages.²³ Section 1988, in turn, authorizes attorney’s fees for the plaintiff if he or she wins the suit.²⁴ Congress passed § 1988 to encourage civil rights litigation by plaintiffs who might otherwise be discouraged “from bringing suit in the absence of a reasonable prospect of recovering attorneys’ fees.”²⁵ Section 1988 is thus statutory authorization for the courts to deviate from the American Rule and award attorney’s

15. *City of Riverside v. Rivera*, 477 U.S. 561, 567 (1986).

16. *Hall v. Cole*, 412 U.S. 1, 4–5 (1973).

17. *The Civil Rights Attorneys’ Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205, 205 (1977).

18. 42 U.S.C. § 1988 (2012).

19. “Although § 1988, by its terms, appears to be addressed to federal courts, the Supreme Court has treated it as applicable to state courts.” Steven H. Steinglass, *Section 1983 Litigation in the Ohio Courts: An Introduction for Ohio Lawyers and Judges*, 41 CLEV. ST. L. REV. 407, 490 n.492 (1994).

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

21. “Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . causes to be subjected, . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .” 42 U.S.C. § 1983 (2012).

22. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. CONST. amend. IV.

23. See *infra* note 96 for a discussion about damages in § 1983 suits.

24. See *supra* note 20.

25. *The Civil Rights Attorneys’ Fees Awards Act of 1976*, *supra* note 17, at 206; see also Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL’Y 1, 13, 15 (2008) (discussing four types of contingent tort cases (good liability/good damages, good liability/bad damages, bad liability/good damages, bad liability/bad damages) and stating: “[T]he ‘private attorneys general’ model is the only way a client with a good-liability/bad-damages case is ever going to find a lawyer, because without fee-shifting, there is no market for his case.”).

fees to the prevailing party, so as—per the private attorney general rationale—to *encourage* suits that would serve to enforce and thus protect civil rights.²⁶

B. The Prison Litigation Reform Act: 42 U.S.C. § 1997e

In 1995, however, twenty years after enacting § 1988, certain members of Congress began a crusade against what they viewed as “frivolous” lawsuits brought by prisoners.²⁷ By 1996, the 104th Congress had enacted the PLRA, a relentlessly harsh piece of legislation that severely curtails prisoners’ ability to bring suit or to obtain relief in suits, including in civil rights cases.²⁸ The PLRA erects substantial barriers to prisoner plaintiffs, such as requiring the exhaustion of all administrative remedies before bringing an action,²⁹ and denying any action “for mental or emotional injury suffered while in custody without a prior showing of physical injury.”³⁰ The PLRA also strikes a damning blow to prisoners’ attorneys’ compensation by restricting the fees authorized by § 1988.³¹ The court must now carefully monitor the fee for proportionality;³² the prisoner must now contribute a portion of his or her award to the fee;³³ and the attorney must now accept a rate that is likely much lower than his or her regular hourly rate.³⁴ Moreover, for decades courts have misread the PLRA to impose a cap on attorney’s fees at 150% of a monetary judgment.³⁵ This so-called “150% cap” neither exists in the statute nor serves the Act’s stated purpose of deterring frivolous suits.³⁶ Instead, this persistent and devastating recurrence of statutory misinterpretation deters and

26. *The Civil Rights Attorneys’ Fees Awards Act of 1976*, *supra* note 17, at 206; *see also* Rochelle Cooper Dreyfuss, *Promoting the Vindication of Civil Rights Through the Attorney’s Fees Awards Act*, 80 COLUM. L. REV. 346, 350–51 (1980) (“It is clear from the legislative history that Congress valued suits by the general public and sought to stimulate private enforcement of the civil rights laws by reinstating a system of fee awards.”).

27. *See infra* Section I(A).

28. 42 U.S.C. § 1997e (2012); *see also* Cohn, *supra* note 1, at 300 (“The PLRA contains a number of provisions that each make it substantially more difficult for prisoners to utilize the judicial system.”); Marissa C. M. Doran, *Lawsuits As Information: Prisons, Courts, and a Troika Model of Petition Harms*, 122 YALE L. J. 1024, 1036 (2013) (“[L]egislators enacted overbroad legislation that has impeded meritorious claims, including valid prisoner filings exposing civil rights abuses.”); Jason E. Pepe, *Challenging Congress’s Latest Attempt to Confine Prisoners’ Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58, 63 (1999) (“Despite Congressional leaders’ assurances, the PLRA . . . radically restricts prisoners’ ability to redress legitimate claims involving serious constitutional deprivations.”).

29. § 1997e(a).

30. § 1997e(e).

31. § 1997e(d); *see infra* Section II(A); *see also* Todd E. Pettys, *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 FORDHAM URB. L. J. 837, 872 (2010) (noting that the PLRA “imposes a daunting cap on the ability of incarcerated plaintiffs to recover meaningful attorney’s fees when they prevail in § 1983 actions”).

32. § 1997e(d)(1)(B)(i). While the court is already required to engage in an examination of the degree of success attained by a party claiming attorney’s fees under § 1988, determining proportionality is a new requirement. *See infra* text accompanying Section III(C).

33. § 1997e(d)(2).

34. § 1997e(d)(3); *see also infra* note 69.

35. § 1997e(d)(2); *see infra* Section II.

36. *See infra* text accompanying note 40.

effectively punishes attorneys who agree to represent prisoners in *meritorious* suits.³⁷ Until Congress clarifies its intent by revising the language of 42 U.S.C. § 1997e(d)(2), courts should enforce the statute as it is written—without supplying extra words³⁸—and in so doing foster meritorious prisoner litigation efforts and vindicate important human rights, regardless of the extent of money damages awarded.

I. THE STATUTE: 42 U.S.C. § 1997E

A. *Legislative Purpose and History*

In 1995, Senator Bob Dole introduced a bill entitled “The Prison Litigation Reform Act of 1995.”³⁹ Its stated purpose was to “provide for appropriate remedies for prison condition lawsuits, to discourage frivolous and abusive prison lawsuits, and for other purposes.”⁴⁰ While introducing the need for the bill, Senator Dole decried a host of shameful prisoner suits that were clogging the courts with a throng of insignificant grievances.⁴¹ Included in this litany of outrageous cases, Senator Dole referred to what would become the archetypal example of frivolity: a lawsuit where a prisoner ostensibly sued for “being served chunky peanut butter instead of the creamy variety.”⁴² In a classic move by a skilled politician—painting a picture designed to evoke outrage, whether substantiated by facts or not—Senator Dole employed the chunky peanut butter reference in order to cement in the minds of his listeners the image of unacceptable disarray in the world of prison litigation.

In fact, the notorious peanut butter case involved a prisoner who sued *not* because he got chunky peanut butter instead of smooth, but because prison officials had failed to refund the price of the jar of peanut butter that the prisoner had returned.⁴³ As pointed out by former Chief Judge Jon O. Newman of the Second Circuit, the price of a jar of peanut butter “is not a trivial loss [of funds]” for a prisoner, and “those in responsible positions ought not to ridicule all prisoner lawsuits by perpetuating myths about them.”⁴⁴ Nevertheless, a catchy expression has the potential to carry the day in politics, and thus the chunky peanut butter allusion persisted, reappearing again and again⁴⁵ to buttress support for a bill that would purportedly end such maddening frivolity.

37. See *infra* text accompanying note 102 and Section II(B)(2).

38. See *infra* Sections I(B), II(B) and (C), and III.

39. 141 CONG. REC. 26,548 (1995) (text of S. 1279).

40. *Id.*

41. *Id.* (statement of Sen. Dole).

42. *Id.*

43. Carl Sifakis, THE ENCYCLOPEDIA OF AMERICAN PRISONS 96 (2003).

44. *Id.*

45. See, e.g., 141 CONG. REC. 26,553 (1995) (statement of Sen. Hatch) (“Prisoners file free lawsuits in response to almost any perceived slight or inconvenience—being served chunky instead of creamy peanut butter, for instance, or being denied the use of a Gameboy video game . . .”); 141 CONG. REC. 27,042, 27,043, 27,045

The PLRA's legislative history appears to have its roots in H.R. 667,⁴⁶ a crime-control bill from February of 1995 with two sections that pertained specifically to prisoner lawsuits.⁴⁷ While H.R. 667 never made it further than the House, one of the two prisoner litigation-related sections contained language⁴⁸ that would be the precursor to the attorney's fees section found in 42 U.S.C. § 1997e(d).⁴⁹ On September 27, 1995, Senator Dole orally introduced the PLRA on the floor of the U.S. Senate,⁵⁰ and on September 29, Senator Hatch proposed the PLRA as amendment number 2838⁵¹ to H.R. 2076, an appropriations bill.⁵² The amendment passed that same day by a voice vote in the Senate,⁵³ and the PLRA fully appeared in the October 10, 1995 public print version of H.R. 2076.⁵⁴ In this October 10 version of the bill, using the same language as that of Senator Hatch's amendment number 2838,⁵⁵ the attorney's fees section stated in relevant part:

Whenever a monetary judgment is awarded in an action . . . a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. *If the award of attorney's fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant.*⁵⁶

(1995) (wherein three Senators managed to mention the peanut butter case five times); 142 CONG. REC. 5,118 (1996) (statement of Sen. Reid) ("If somebody has a good case, a prisoner, let him file it. But not as to whether or not it should be chunky peanut butter or smooth peanut butter, how many times you can change your underwear, whether it is real sponge cake or not sponge cake.").

46. Violent Criminal Incarceration Act of 1995, H.R. 667, 104th Cong. (1995).

47. *Id.* §§ 201–204, 301 ("Title II—Stopping Abusive Prisoner Lawsuits" and "Title III—Stop Turning out Prisoners").

48. *Id.* § 301 ("No attorney's fee under [§ 1988] may be granted to a plaintiff in a civil action with respect to prison conditions except to the extent such fee is—(1) directly and reasonably incurred in proving an actual violation of the plaintiff's Federal rights; and (2) proportionally related to the extent the plaintiff obtains court ordered relief for that violation."). See *infra* text in Section I(B) to compare the attorney's fees language in H.R. 667 with that found in the final version of the PLRA.

49. See *infra* Section I(B).

50. See *supra* text accompanying note 39. In fact, the day before, on September 26, 1995, Senator Abraham introduced Senate Bill 1275, entitled "The Prison Conditions Litigation Reform Act." 141 CONG. REC. 26,448 (1995). Senator Dole's bill, Senate Bill 1279, is the bill that moved forward.

51. 141 CONG. REC. 27,177 (1995) (proposing amendment 2838 to the bill).

52. Department of Commerce and Related Agencies Appropriations Act, 1996, H.R. 2076, 104th Cong. (1995). To view the various actions taken with regard to H.R. 2076 as well as the different versions of the text as it appeared throughout the legislative process and other important related information like amendments to and cosponsors of the bill, see Department of Commerce and Related Agencies Appropriations Act, 1996, H.R. 2076, 104th Cong. (1995), <https://www.congress.gov/bill/104th-congress/house-bill/2076?q=%7B%22search%22%3A%5B%22hr2076%22%5D%7D&r=1> (last visited Sept. 22, 2018).

53. 141 CONG. REC. 27,045 (1995).

54. Department of Commerce and Related Agencies Appropriations Act, 1996, H.R. 2076, 104th Cong. (1995) (Oct. 10, 1995 version of the bill).

55. See *supra* text accompanying note 52.

56. Department of Commerce and Related Agencies Appropriations Act, 1996, H.R. 2076, 104th Cong. § 7(d)(2) (1995) (Oct. 10, 1995 version of the bill) (emphasis added). See *infra* note 110 for certain United States Supreme Court Justices' interpretation of the second sentence of this statutory section, as expressed during oral argument in *Murphy v. Smith*, 138 S. Ct. 784 (2018).

Full stop. There was absolutely no mention of the so-called 150% cap.⁵⁷ Somewhere between October 10 and December 1, however, somebody crafted the cap language with which we are now familiar,⁵⁸ and the PLRA as we know it today first appeared in the Conference Report filed in the House on December 1, 1995.⁵⁹ Senator Biden rose to speak on December 7, expressing great discomfort with re-writing crime policies in an appropriations bill, stating: “In my view, it is a lousy idea. . . . It is unnecessary . . . and it is completely contrary to how the Senate has traditionally worked.”⁶⁰ On December 19, 1995, the President vetoed H.R. 2076,⁶¹ and the PLRA was thus dead on arrival.

However, the PLRA reappeared in March of 1996, in H.R. 3019,⁶² which was an omnibus appropriations bill to fund the Department of Justice for fiscal year 1996.⁶³ Once again, Senator Biden arose to decry altering substantive law in an appropriations bill: “[H]ere . . . we essentially rewrite the law. The fact of the matter is, nobody in this body even knows what is in this bill. . . . None of you, I will bet you a million bucks, has any notion what is in this bill. Zero. I am willing to bet you anything.”⁶⁴ Senator Kennedy also spoke passionately, charging: “Its proponents say that the PLRA is merely an attempt to reduce frivolous prisoner litigation over trivial matters. In reality, the PLRA is a far-reaching effort to strip Federal courts of the authority to remedy unconstitutional prison conditions.”⁶⁵

Unfortunately, despite never being subject to committee mark-up and without a judiciary committee report detailing the effects of the PLRA,⁶⁶ H.R. 3019 was

57. See *infra* text in Section I(B) (noting in bold italics the so-called 150% cap found in 42 U.S.C. § 1997e(d)(2)).

58. See *infra* text in Section I(B) (noting in bold italics the so-called 150% cap found in 42 U.S.C. § 1997e(d)(2)).

59. H.R. REP. NO. 104-378, at 65–77 (1995) (Conf. Rep.). This Conference Report was agreed to in the House on December 6, agreed to in the Senate on December 7, and the enrolled bill was presented to President Clinton on December 13, 1995. Department of Commerce and Related Agencies Appropriations Act, 1996, H.R. 2076, 104th Cong. (1995), <https://www.congress.gov/bill/104th-congress/house-bill/2076/actions> (last visited Sept. 22, 2018) (overview of the actions taken with regard to H.R. 2076).

60. 141 CONG. REC. 35,800 (1995) (statement of Sen. Biden).

61. Department of Commerce and Related Agencies Appropriations Act, 1996, H.R. 2076, 104th Cong. (1995), <https://www.congress.gov/bill/104th-congress/house-bill/2076/actions> (last visited Sept. 22, 2018) (overview of the actions taken with regard to H.R. 2076).

62. Omnibus Consolidated Rescissions and Appropriations Act of 1996, H.R. 3019, 104th Cong. (1996).

63. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, H.R. 3019, 104th Cong. (1996), <https://www.congress.gov/bill/104th-congress/house-bill/3019?q=%7B%22search%22%3A%5B%22hr3019%22%5D%7D&r=1> (last visited Sept. 22, 2018) (summary of the bill).

64. 142 CONG. REC. 4,702 (1996) (statement of Sen. Biden); see also 142 CONG. REC. 5,193 (1996) (statement of Sen. Kennedy) (“In my view, the effort to enact this proposal as part of an omnibus appropriations bill is inappropriate.”). Similarly, Senator Paul Simon lamented: “I am very discouraged that this legislation was considered as one of many issues on an appropriations bill. Legislation with such far reaching implications certainly deserves to be thoroughly examined by the committee of jurisdiction and not passed as a rider to an appropriations bill.” 142 CONG. REC. 5,194 (1996) (statement of Sen. Simon).

65. 142 CONG. REC. 5,193 (1996) (statement of Sen. Kennedy).

66. See Pepe, *supra* note 28, at 62.

signed by the President on April 26, 1996, officially becoming Public Law Number 104-134.⁶⁷ Whether anyone understood the provisions or not, with the stroke of President Clinton's pen, the PLRA became law. This far-reaching, exceedingly harsh piece of legislation came into being under cloak of darkness, and some have argued:

In part because normal channels were not followed in enacting the PLRA, it is . . . not at all clear what purposes Congress contemplated would be served by the 150% cap and the hourly-rate restriction on prisoners' attorney's fees. *In fact, it is highly unlikely that Congress contemplated the provisions' purposes or even contemplated the provisions at all . . .*⁶⁸

B. The Text in Question: 42 U.S.C. § 1997e(d) – Attorney's Fees

What follows is the attorney's fees section of the PLRA in its entirety, with the so-called "150% cap" portion in bold italics:

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(B)(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. ***If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.***

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.⁶⁹

67. Omnibus Consolidated Rescissions and Appropriations Act of 1996, H.R. 3019, 104th Cong. (1996), <https://www.congress.gov/bill/104th-congress/house-bill/3019/actions> (last visited Sept. 22, 2018) (overview of the actions taken with regard to H.R. 3019).

68. Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CAL. L. REV. 999, 1021–22 (2001) (emphasis added).

69. 18 U.S.C. § 3006A is also known as the Criminal Justice Act (CJA) of 1964, and the Judicial Conference of the United States is responsible for the administration and operation of the CJA. See UNITED STATES COURTS, *Criminal Justice Act (CJA) Guidelines*, <http://www.uscourts.gov/rules-policies/judiciary-policies/criminal->

- (4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.⁷⁰

Interestingly, the Congressional Research Service (CRS)⁷¹ Report for Congress entitled “Prison Litigation Reform Act: An Overview” makes no mention of the 150% cap.⁷² The report delineates what it means for the attorney's fees to be “proportionately related to the court ordered relief,”⁷³ and the report also mentions the restricted hourly rate that attorneys may charge,⁷⁴ but nowhere is there any clue as to how to interpret the obtuse language of the so-called 150% cap.⁷⁵

Notably, the report *does* state: “The Reform Act also requires the prisoner to pay up to 25% of any monetary damages to satisfy the fees of his/her attorney,” but the report does *not* then clarify if there is any sort of cap on the defendant's contribution.⁷⁶ It seems terribly odd that the CRS, a division of the Library of Congress tasked with assisting the creation of legislation and then writing reports about enacted public laws,⁷⁷ would fail to address something as crucial as a payment ceiling for defendants. The omission seems decidedly less odd, however, if there is, in fact, no 150% cap in the statute.⁷⁸

justice-act-cja-guidelines (last visited Sept. 22, 2018). Note that “[c]ourts have disagreed whether the hourly rate ‘established’ under § 3006A means the rate determined by the Judicial Conference per the statutory instructions [‘authorized rate’] . . . or the rate actually paid under the CJA [‘rate actually paid’] . . .” John Boston, *Attorney's Fees Under the Prison Litigation Reform Act*, in 33 NATIONAL LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 1241, 1251 (Steven Saltzman ed., 2017). The rate actually paid is currently set at \$132 per hour, for non-capital cases. UNITED STATES COURTS, *Guide to Judiciary Policy*, Volume 7, Part A, § 230.16(a), http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_16 (last visited Sept. 22, 2018). Thus, under the PLRA, attorneys can charge \$198 per hour. However, the authorized rate for FY 2018 is \$147 per hour, which equates to a PLRA rate of \$220.50. Boston, *supra*, at 1252. For a full discussion of the varying interpretations regarding which rate applies, see *id.* at 1250–53. For the purposes of this note, the “CJA rate” will refer to the rate actually paid, i.e., \$132 per hour, and thus \$198 per hour under the PLRA.

70. 42 U.S.C. § 1997e(d) (2012) (emphasis added).

71. The Congressional Research Service (CRS) is a division of the Library of Congress that “serves as shared staff to congressional committees and Members of Congress. CRS experts assist at every stage of the legislative process—from the early considerations that precede bill drafting, through committee hearings and floor debate, to the oversight of enacted laws and various agency activities.” LIBR. OF CONG., *About CRS*, <http://www.loc.gov/crsinfo/about/> (last visited Sept. 22, 2018). CRS produces “analytical, non-partisan reports on topics of interest to members of Congress.” NAVAL POSTGRADUATE SCH. DUDLEY KNOX LIBR., *Congressional Research Service (CRS) Reports*, <http://libguides.nps.edu/CRS> (last visited Sept. 22, 2018).

72. See DOROTHY SCHRADER, CONG. RESEARCH SERV., 96-513 A, PRISON LITIGATION REFORM ACT: AN OVERVIEW (1996).

73. § 1997e(d)(1)(B)(i).

74. SCHRADER, *supra* note 72, at CRS-13; see § 1997e(d)(2).

75. SCHRADER, *supra* note 72, at CRS-13.

76. *Id.*

77. See *supra* note 71.

78. See *infra* Section II(B)(1).

II. HOW 42 U.S.C. § 1997E(D)(2) HAS BEEN INTERPRETED

A. *The Prevailing Interpretation*

Two years after the PLRA was signed into law,⁷⁹ a court grappled with its 150% language for the first time.⁸⁰ In *Blissett v. Casey*, attorneys who began litigation on behalf of a prisoner before the PLRA was enacted and who completed their litigation efforts after the PLRA was in full effect moved for fees under § 1988.⁸¹ Defendant prison officials argued that the PLRA's fee limitations applied to the award in full, because the award was made after the effective date of the Act.⁸² However, expressing concern for lawyers who undertake cases relying on a reasonable fee should they prevail only to be thwarted by a sudden legislative enactment, the court rejected the "rigid rule advocated by the defendants" and affirmed the district court's award of attorney's fees.⁸³ The outcome of the case is secondary, however, to the fact that this appellate court seems to be the first to explicitly reference the 150% cap. As if conjecturing out loud, the court wrote:

[T]he Act requires that up to 25 percent of the plaintiff's judgment be used to pay the fee awarded against the defendant, and *appears (in unclear language)* to provide that the balance is not to be borne by the defendant to the extent it exceeds 150 percent of the judgment.⁸⁴

The court went on to bemoan the fact that the PLRA "might seriously harm the attorney, who labored for years in good faith expectation that a reasonable fee would be paid by the defendant if the plaintiff prevailed, but whose fee recovery *might* now be capped at 150 percent of the damage award."⁸⁵

Other courts followed suit, citing *Blissett* and uncritically relying on that court's tentative but incorrect understanding of the 150% language.⁸⁶ Despite occasional reference to the ambiguous language of § 1997e(d)(2),⁸⁷ for twenty years now courts have imposed an attorney's fees payment ceiling for defendants at 150% of

79. See *supra* text accompanying note 67.

80. See *Blissett v. Casey*, 147 F.3d 218 (2d Cir. 1998).

81. *Id.* at 219.

82. *Id.* at 220.

83. *Id.* at 220–21.

84. *Id.* at 220 (emphasis added).

85. *Id.* at 221 (emphasis added).

86. See, e.g., *Shepherd v. Goord*, 662 F.3d 603, 607 (2d Cir. 2011); *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001); *Carbonell v. Acrish*, 154 F. Supp. 2d 552, 560 (S.D.N.Y. 2001).

87. See, e.g., *Shepherd*, 662 F.3d at 607 (admitting that the "language in § 1997e(d)(2) is *not a model of clarity*") (emphasis added); *Robbins v. Chronister*, 435 F.3d 1238, 1240 (10th Cir. 2006) ("*The statutory language may be inartful*, but appellate courts have consistently interpreted the statute to limit a defendant's liability for attorney fees to 150% of the money judgment.") (emphasis added); *Royal v. Kautzky*, 375 F.3d 720, 725 (8th Cir. 2004) ("*Although awkwardly worded*, the PLRA allows an award of attorney fees for 150 percent of the damages award.") (emphasis added).

the monetary judgment.⁸⁸ Very few cases have directly addressed how to interpret the 150% language, and the opinions of the currently controlling cases shed little light on those courts' reasoning.⁸⁹ This will be discussed further in Section II(C).

In practice, courts look at both the PLRA's hourly rate restriction and the 150% fee cap and then apply "the lesser of the two calculations."⁹⁰ The result of such statutory misinterpretation is that lawyers who labor to bring crucial civil rights cases that ultimately result in low damage awards are sometimes left receiving no more than \$1.50 in fees for their efforts.⁹¹ For example, in *Royal v. Kautzky*, Jeffery Royal was a prisoner who suffered from a spinal cord injury that required him to use a wheelchair.⁹² When prison officials confiscated his wheelchair, Mr. Royal "had to *crawl on the floor*" without it. Over the course of several months he filed multiple grievances to try to have his wheelchair re-issued.⁹³ Tired of Mr. Royal's complaints, prison officials sent him to solitary confinement for sixty days.⁹⁴ Mr. Royal brought a § 1983 suit, and the court found that prison officials "had unconstitutionally retaliated against Royal by placing him in segregation."⁹⁵ Because Mr. Royal did not suffer physical injury from his time in segregation, however, the court only awarded \$1.00 in nominal damages.⁹⁶ As a result,

88. See, e.g., *Shepherd*, 662 F.3d at 610 (affirming \$1.50 award of attorney's fees after plaintiff obtained \$1.00 in actual damages); *Royal*, 375 F.3d at 726 (upholding \$1.50 award of attorney's fees after plaintiff obtained \$1.00 in nominal damages); *Boivin v. Black*, 225 F.3d 36, 38, 46 (1st Cir. 2000) (vacating lower court's award of \$3,892.50 in attorney's fees and remanding the case to comport with 150% cap on \$1.00 nominal damages, i.e., attorney's fees to be awarded at \$1.50).

89. See, e.g., *Walker*, 257 F.3d at 667–68 (using two out of twenty pages of the opinion to discuss the 150% language and relying on the Rule Against Superfluities (see *infra* note 141) as its main reason for reading the 150% language as a cap on attorney's fees); *Harris v. Ricci*, 595 F. App'x 128, 134–35 (3d Cir. 2014) (using a few paragraphs to agree with the *Walker* court's superfluities argument and to indicate an unwillingness to create a circuit split); *McLindon v. Russell*, 19 F. App'x 349, 350 (6th Cir. 2001) (citing *Walker* in one sentence for why 150% indicates a cap). For the non-controlling cases, see, for example, *Harris v. Ricci*, 8 F. Supp. 3d 583, 592–93 (D. N.J. 2014), *aff'd in part, vacated in part, rev'd in part*, 595 F. App'x 128 (3d Cir. 2014) (dedicating nearly one-third of the opinion to careful statutory interpretation); *McLindon v. Russell*, 108 F. Supp. 2d 842, 850–51 (S.D. Ohio 1999), *rev'd and vacated in pertinent part*, 19 F. App'x 349 (6th Cir. 2001) (also dedicating one-third of the entire opinion to thoughtfully analyzing the language of the statute). See also *infra* text accompanying notes 141–58 for a discussion about how the controlling and noncontrolling cases conflict with one another.

90. Alphonse A. Gerhardtstein, *A Practitioner's Guide to Successful Jury Trials on Behalf of Prisoner-Plaintiffs*, 24 PACE L. REV. 691, 719 (2004).

91. See *supra* note 88. See also *infra* text accompanying notes 266–70 for an especially egregious \$1.50 case.

92. *Royal*, 375 F.3d at 726 (Heaney, J., dissenting).

93. *Id.* (Heaney, J., dissenting) (emphasis added).

94. *Id.* at 722 (majority opinion).

95. *Id.*

96. *Id.*; see also *Carey v. Phipus*, 435 U.S. 247, 248 (1978) (establishing that in the absence of physical injury, plaintiffs bringing § 1983 suits may only recover nominal damages for constitutional violations); Cohn, *supra* note 1, at 328–29 (discussing the various damages available to prisoners who file § 1983 suits). "[C]ompensatory damages do not flow from every deprivation of constitutional rights. Rather, damages are to be awarded where the plaintiff succeeds in proving that the defendant both violated a constitutional right and caused an actual injury. . . . On the other hand, where a defendant has deprived the plaintiff of an absolute constitutional right but has not caused an actual injury, the plaintiff's rights should be vindicated through an award of nominal damages. Punitive damages may likewise be awarded apart from showing actual injury as a mechanism to punish the

attorney's fees were awarded in the amount of \$1.50, which the appellate court upheld, basing its rationale on the PLRA's so-called 150% cap.⁹⁷ To be clear, a physically disabled man was thrown into isolation for two months in retaliation for his seeking to have his wheelchair returned; the man proceeded to bring and win a meritorious civil rights case against the prison officials; and yet because the man only received a dollar in damages, his lawyer therefore received an insulting \$1.50 for his *years* of toil on the case.⁹⁸

Unfortunately, damages for constitutional torts are often of low or nominal value, and thus the so-called 150% fee cap, as applied, "makes it even more difficult to encourage competent counsel to pursue prisoner's rights cases."⁹⁹ Likewise, "[t]he PLRA's fee-cap provision has fundamentally altered an attorney's decision to represent prisoners by adding a heavy financial burden that impacts public and private attorneys alike."¹⁰⁰ Civil rights attorney John Williams has said that "the concern over fees 'may seem crass; but few can work very long without an occasional meal.'"¹⁰¹

Courts too have expressed concern about the fee cap, and yet they persist in carrying out what they profess to be the will of the legislature. For example, the court in *Walker v. Bain* wrote:

We are aware that § 1997e(d)(2) will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims. . . . We admit to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate, albeit "technical," civil rights violations. However, we are aware that we are not authorized to act as a "superlegislature. . . ."¹⁰²

defendant for his willful or malicious conduct and to deter others from similar behavior." Cohn, *supra* note 1, at 328–29.

97. *Royal*, 375 F.3d at 726 (Heaney, J., dissenting).

98. Attorney Philip B. Mears began working with Mr. Royal on a related complaint in the year 2000. See Docket Proceedings, *Royal v. Brandt*, No. 00-3726 (8th Cir. Nov. 16, 2000). See also *Royal*, 375 F.3d at 727 n.3 (Heaney, J., dissenting) (noting that this first complaint was filed in 2000 and that "Royal's amended complaint is a retaliation claim and dismisses his original complaints about his medical care."). Attorney Mears began working on the case discussed in the text accompanying this footnote in 2002. See Docket Proceedings, *Royal v. Brandt*, No. 02-3446 (8th Cir. Dec. 26, 2002). He gave oral argument in front of the Eighth Circuit in 2003. Oral Argument, *Royal v. Kautzky*, No. 02-3446, 2003 WL 25891117 (8th Cir. Dec. 18, 2003). And he petitioned the U.S. Supreme Court for writ of certiorari in 2005. Petition for Writ of Certiorari, *Royal v. Reid*, No. 04-1348, 2005 WL 828777 (U.S. Jan. 13, 2005).

99. Tsai, *supra* note 10, at 895.

100. Karen M. Klotz, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759, 790 (2000).

101. *Id.* at 791.

102. *Walker v. Bain*, 257 F.3d 660, 670 (6th Cir. 2001). See *infra* text accompanying notes 150–56 for a discussion about the *Walker* court, in fact, acting like a "superlegislature."

B. The Problem with the Prevailing Interpretation

1. Fallacy of the Inverse

As fate—or the English language—would have it, however, a “superlegislature”¹⁰³ the courts need not be. Rather, judges must merely recognize the logical fallacy of reading a 150% cap into the statute, and proceed to exercise their judicial discretion as to whether “the amount of the fee is proportionately related to the court ordered relief for the violation.”¹⁰⁴

The statute reads in relevant part: “If the award of attorney’s fees is *not* greater than 150 percent of the judgment, the excess shall be paid by the defendant.”¹⁰⁵ It is natural to want to then say: “If the award of attorney’s fees *is* greater than 150 percent of the judgment, the excess shall *not* be paid by the defendant,” but this is a logical fallacy, i.e., an invalid argument known as denying the antecedent, or fallacy of the inverse.¹⁰⁶ “If A, then B” does *not* therefore mean “if not A, then not B.”¹⁰⁷ For example: “If I am not wearing a hat, then I shall go to the grocery store.” The invalid inverse would then be to say: “If I *am* wearing a hat, then I shall *not* go to the grocery store.” Note that “even if the conclusion *seems* to be true, the argument is still invalid” because “the truth of the premise[] does not guarantee the truth of the conclusion.”¹⁰⁸ Ultimately, from the original statement we cannot deduce if I shall go to the grocery store or not, if I *am* wearing a hat. We only know what happens if I am *not* wearing a hat.

Thus, while the PLRA delineates what happens if the award of attorney’s fees is *not* greater than 150% of the judgment (the defendant pays the excess), the statute is wholly silent regarding what happens if the award *is* greater than 150% of the judgment.¹⁰⁹ What did Congress intend? Maybe the defendant *still* pays the excess. Maybe the attorney’s fee *is* capped at some number, possibly 150% of the

103. See *supra* text accompanying note 102.

104. 42 U.S.C. § 1997e(d)(1)(B)(i) (2012). See also *infra* Section III for a detailed analysis of how § 1997e(d) should be interpreted.

105. § 1997e(d)(2) (emphasis added).

106. Robert Bennett, *Denying the Antecedent*, LOGICALLY FALLACIOUS, <https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/77/Denying-the-Antecedent> (last visited Sept. 22, 2018); see also Andy Kiersz, *14 Logical Fallacies That Keep Showing Up in Bad Arguments*, BUSINESS INSIDER (May 14, 2014, 3:15 PM), <http://www.businessinsider.com/common-fallacies-2014-5>.

107. See Bennett, *supra* note 106.

108. *Id.* (emphasis added).

109. See *Harris v. Ricci*, 8 F. Supp. 3d 583, 592–93 (D. N.J. 2014), *aff’d in part, vacated in pertinent part, rev’d in part*, 595 F. App’x 128 (3d Cir. 2014) (“Although the [statute] does not state so, it has been occasionally construed as applicable to those matters where the fees were greater (rather than less or equal to) 150% of the damages awarded. . . . And while some courts found that this 150% cap could also apply to a ‘greater-than-150%’ scenario, even though the subsection (2) is silent as to such cases, those courts that meticulously examined this issue declined to adopt a cavalier approach and elected to tread carefully.”); *McLindon v. Russell*, 108 F. Supp. 2d 842, 850–51 (S.D. Ohio 1999), *rev’d and vacated in pertinent part*, 19 F. App’x 349 (6th Cir. 2001) (“The literal language of section 1997e(d)(2) addresses only the situation where the award of attorney’s fees is not greater than 150 percent of the judgment. The provision does not address the circumstance where an attorney fee award exceeds 150 percent of the judgment.”).

monetary judgment. Maybe the parties call it a draw and all go home. Congress did not legislate what happens when the award of attorney's fees is greater than 150% of the judgment,¹¹⁰ and it is not the province of the judiciary to "enlarge or supplement [a statute] with language that Congress omitted or 'forgot.'"¹¹¹

2. *Unnecessarily Absurd Results That Deter Meritorious Litigation*

These circuit decisions are deeply problematic because judges have, in fact, usurped the role of the legislature by reading imagined words into § 1997e(d)(2).¹¹² Additionally, this judicial intervention has led to absurd results inconsistent with the intent of Congress. The stated purpose of the PLRA was "to discourage frivolous and abusive prison lawsuits,"¹¹³ but a cap on attorney's fees does *not* discourage frivolous lawsuits.¹¹⁴ Worse, such a cap *does* discourage important and *meritorious* civil rights litigation.¹¹⁵ The reason that restrictions on attorney's fees do not deter frivolous lawsuits is twofold. First, "lawyers have no incentive to agree to represent prisoners in frivolous cases whether or not there is an attorney fee cap."¹¹⁶ The fee cap only comes into play once a lawyer has *won* his or her

110. On Wednesday, December 6, 2017, the U.S. Supreme Court heard oral argument in *Murphy v. Smith*. Oral Argument, *Murphy v. Smith*, 138 S. Ct. 784 (2018), <https://www.oyez.org/cases/2017/16-1067>. During the argument, Petitioner's counsel and two of the Justices began discussing the original language of the second sentence of § 1997e(d)(2), which formerly read: "If the award of attorney's fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant." See *supra* text accompanying note 56. This language was ultimately discarded in favor of the language of § 1997e(d)(2) with which we are familiar today. See *supra* text accompanying note 70. However, in discussing the *original* language, Petitioner's counsel and two of the Justices engaged in the following exchange:

Justice Kagan: You think it goes without saying that the plaintiff would have to pay the full 20-percent? Because it doesn't say it.

[Petitioner's counsel]: All it says is the defendant wouldn't have to pay it.

Justice Kagan: Right.

[Petitioner's counsel]: Right. It doesn't say anything about who — whether the plaintiff or — or what would happen."

Justice Alito: And that's the — and that's the point. . . . So that really doesn't — you have to read something into it. That doesn't literally say who pays if it's under 25 percent.

[Petitioner's counsel]: Right.

Transcript of Oral Argument at 19, *Murphy v. Smith*, 138 S. Ct. 784 (2018).

111. *McLindon*, 108 F. Supp. 2d at 852; see also *supra* note 7 and *infra* text accompanying note 139.

112. See *supra* Section II(A) and *infra* Section II(C) for examples of cases that have read the so-called 150% cap into the statute.

113. See *supra* text accompanying note 40.

114. See *infra* text accompanying notes 116–20.

115. See Klotz, *supra* note 100, at 786–87 ("The PLRA, in effect, punishes those prisoners who litigate meritorious lawsuits, not those who contemplate filing frivolous lawsuits.")

116. *Johnson v. Daley*, 117 F. Supp. 2d 889, 897–98 (W.D. Wis. 2000), *rev'd en banc*, 339 F.3d 582 (7th Cir. 2003). In her opinion dissenting from the Seventh Circuit's decision, Judge Rovner explained:

[T]o believe that the fee restriction impacts the decision of *private attorneys* bringing suits on behalf of such prisoners, Congress would have to believe that (1) there are private attorneys who are willing to bring suits on behalf of prisoners despite the difficult standards of proof and the

suit—not frivolous by virtue of being meritorious¹¹⁷—so the fee cap has no bearing on whether the attorney initially chooses to take on a potentially frivolous case. “Ironically, the PLRA’s attorney’s fee-cap provision directly affects only the meritorious lawsuits filed by prisoners.”¹¹⁸ Second, the fee cap does not deter pro se prisoner plaintiffs from bringing suit, because “it is irrational to conclude that [a pro se prisoner] bases his decision [about whether to file a lawsuit] on the distant possibility that at some future time, his presently non-existent lawyer might recover a smaller rather than larger amount of fees.”¹¹⁹ Therefore, while the attorney’s fees cap does not deter frivolous suits, “[t]he scheme penalizes lawyers without affecting the decision making of prisoners that was Congress’s goal.”¹²⁰

The cynical argument is that Congress wanted to curtail *all* prison litigation—meritorious or not—and they couched this unworthy motive in terms of frivolity.¹²¹ But seeking to deter meritorious civil rights litigation flies in the face of the congressional purpose behind § 1988.¹²² Congress sought to promote the vindication of constitutional violations via § 1988, because “[v]iolations of one’s constitutional rights are seen in America as the most serious tort (as is made evident by the fact that Congress exempted civil rights cases from the American Rule in the first place), and are of particular interest to the federal judiciary.”¹²³ Thus, Congress’s aim is either to promote civil rights litigation under the private attorney general rationale,¹²⁴ or to discourage civil rights litigation.¹²⁵ But attempting to have it both

absence of traditional damages such as lost wages and future earnings and (2) those attorneys would file a trivial or frivolous lawsuit even though fees for such lawsuits are not available under § 1988 but (3) those same attorneys would decide not to file the law suit once fees were merely restricted under the PLRA. This sequence is made even more ridiculous considering that only 1% of all prisoner civil rights litigation involves private attorneys, including groups such as the ACLU, but yet we are asked to believe that Congress rationally could think those attorneys are choosing to bring the frivolous or trivial lawsuits and would be deterred from that course by the fee restriction under the PLRA but not the fee prohibition under § 1988.

Daley, 339 F.3d at 601 (Rovner, J., dissenting). For the en banc plurality’s rationale for why Congress rationally believed the PLRA’s fee cap would deter frivolous suits, see *id.* at 593–96.

117. See Lynn S. Branham, *The Prison Litigation Reform Act’s Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 492 (2001) (noting that “attorney’s fees are only awarded in cases in which inmates prevailed, cases that, by definition, are nonfrivolous.”).

118. Klotz, *supra* note 100, at 784.

119. *Daley*, 117 F. Supp. 2d at 896.

120. *Id.*

121. See Cohn, *supra* note 1, at 327 (“While [forcing prisoners to forgo litigation altogether] may seem to be exactly what Congress desired in enacting the PLRA, Congress’s express intention was to limit the amount of frivolous lawsuits while leaving the courts open to prisoners with sincere allegations of constitutional violations.”).

122. See *supra* Part (A) of the Introduction, especially text accompanying notes 25–26.

123. Cohn, *supra* note 1, at 327.

124. See *supra* Part (A) of the Introduction.

125. See Cohn, *supra* note 1, at 326–27 (“[In effect, the fee cap provision] destroy[s] a critical incentive for lawyers to take on prisoner constitutional tort cases, thereby creating an additional impediment on the prisoner who already has many cards stacked against him. The result is that an attorney may only take on cases where the

ways, by promoting civil rights litigation for everyone *but* prisoners, approaches murky Equal Protection territory.¹²⁶

C. *Why Such a Bad Interpretation Has Persisted*

Of course the glaring question is: why did Congress add the 150% language, especially when so many previous versions of the bill did *not* contain that language?¹²⁷ The disappointing answer is that we may never know, because the Congressional Record on the topic is so sparse.¹²⁸ It is worth repeating, however, that “because normal channels were not followed in enacting the PLRA,” it is “highly unlikely that Congress contemplated the [attorney’s fees caps] provisions’ purposes or even contemplated the provisions at all”¹²⁹

The inference that sheds the kindest light on the drafters is that they merely sought to use the cap to deter suits of low value.¹³⁰ But deterring meritorious suits of low value was *never* a stated purpose of the PLRA.¹³¹ As one scholar notes: “[T]he theory that the size of the damages awarded necessarily reflects a claim’s substantiality is without credence.”¹³² In *City of Riverside v. Rivera*,¹³³ the U.S. Supreme Court “rejected the idea that the amount of the damages award necessarily reflects the full value of a constitutional or civil right,” and this is in part because plaintiffs’ damages alone fail to account for the non-monetized value of

prisoner has been physically injured [(so as to receive more than mere nominal damages), *see supra* note 96], ignoring other constitutional cases that are just as meritorious and deserving of judicial attention.”)

126. *See* *Hadix v. Johnson*, 230 F.3d 840, 848 (6th Cir. 2000) (Jones, J., dissenting) (“Given that § 1988 does not permit a fees award for frivolous or trivial suits, the fees limitation . . . cannot be rationally related to either of these purposes. Moreover, unless reducing the meritorious, non-trivial claims of prisoners is a legitimate constitutional objective, which has not been averred by any of the parties, the derivative objectives advanced by the parties—preserving governmental resources, reducing prisoner incentives to file § 1983 actions, and reducing federal oversight of state prisons—are similarly not rationally related to [the fees limitation.]”); *see also* *Johnson v. Daley*, 339 F.3d 582, 617–18 (7th Cir. 2003) (Rovner, J., dissenting) (“Certainly, the states would save money if less meritorious litigation were filed against them, and if fees available for such litigation were restricted Similar savings could be obtained if Congress passed a similar fee restriction applicable to all blue-eyed litigants, all government employee litigants, or all litigation concerning the educational system. Equal protection, however, requires more than just a showing that some goal is furthered by the legislation; rather, equal protection requires some rationality in the nature of the class singled out.”) (internal quotations omitted).

127. *See supra* text accompanying notes 46–59.

128. *See generally* 141 CONG. REC. (1995) and 142 CONG. REC. (1996).

129. Branham, *supra* note 68, at 1021–22.

130. *See, e.g.,* *Shepherd v. Goord*, 662 F.3d 603, 609 (2d Cir. 2011) (“[J]ust as Congress was free to depart from the American Rule to create an incentive to pursue civil rights claims, it was also free to limit the incentive for prisoners pursuing dubious or low-value claims.”); *Boivin v. Black*, 225 F.3d 36, 46 (1st Cir. 2000) (finding that a cap on attorney’s fees could be rationally related to discouraging prisoners from filing “lowvalue suits”).

131. *See supra* text accompanying note 40.

132. Branham, *supra* note 68, at 1030; *see also* Reingold, *supra* note 25, at 17 (discussing fee shifting under § 1988 and noting that “[t]he cases tend to be ones where we view the *right* itself as important, even if the harm—measured in terms of money damages—is often relatively small”).

133. 477 U.S. 561 (1986).

civil rights cases to the public.¹³⁴ In fact, the public “reaps substantial benefits when constitutional and other civil rights are enforced, regardless of the amount of damages awarded a particular plaintiff,” and there is “inherent value to society of enforcing, rather than ignoring, the Constitution and civil rights laws.”¹³⁵

Thus, it is unclear why the “inartful”¹³⁶ language was added. But it *is* clear that the statute is silent with regard to scenarios wherein the award of attorney’s fees is greater than 150% of the monetary judgment.¹³⁷ That silence must be left untouched. While the U.S. Constitution “grants the legislature the power to draft and enact laws,” it also “grants the judiciary the power to interpret those laws.”¹³⁸ Interpreting cannot mean augmenting. As the Court stated in *Iselin v. United States*: “To supply omissions transcends the judicial function.”¹³⁹

Yet courts have persisted in reading a 150% cap into the statute. This is not only because it is so easy to commit the logical fallacy,¹⁴⁰ but also because courts feel compelled to find meaning in every word of a provision.¹⁴¹ The argument in favor of the 150% cap is that the phrase “[i]f the award of attorney’s fees is *not* greater than 150 percent of the judgment”¹⁴² appears meaningless if not paired with an inference of what happens if the award of attorney’s fees *is* greater than 150%.¹⁴³ According to the *Walker* court:

[I]f the fee award is less than 150 percent of the damages, § 1997e(d)(2) applies and defendants are liable for the full amount of the award; if the award of fees is greater than 150 percent of the damages, defendants are liable for the full amount of the award Under this interpretation, the statute would not have any effect on the court’s power to award[,] . . . [and this] interpretation renders the second sentence of § 1997e(d)(2) meaningless.¹⁴⁴

But this is a case of statutory interpretation versus statutory interpretation. Other courts have found that to infer what happens when attorney’s fees *are* greater than 150% of the judgment is to make the word “[i]f” meaningless, because “if”

134. Branham, *supra* note 68, at 1030–31.

135. *Id.* at 1031. See also *infra* note 246 and text accompanying note 276 for quotes about how prison management ultimately benefits from litigation efforts.

136. See *supra* note 87.

137. See *supra* text accompanying note 109.

138. Linda D. Jellum, *Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 936 (2011).

139. *Iselin v. United States*, 46 S.Ct. 248, 251 (1926); see also *supra* note 7 and text accompanying note 111.

140. See *supra* Section II(B)(1).

141. This canon of interpretation is known as the Rule Against Superfluities, which holds: “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (rev. 6th ed. 2000)); see, e.g., *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001) (“While Walker’s interpretation of § 1997e(d)(2) is consistent with the literal language of the statute, it . . . renders the second sentence of the provision meaningless, and must therefore be rejected.”).

142. 42 U.S.C. § 1997e(d)(2) (2012) (emphasis added).

143. *Cf. Walker*, 257 F.3d at 667.

144. *Id.*

indicates a specific condition, which is only a scenario wherein attorney's fees are *not* greater than 150% of the judgment.¹⁴⁵ Stated by the court in *Harris v. Ricci*:

Since the literal and plain meaning of the words utilized by Congress addressed only the situation where attorney's fees are equal to or less than 150% of the judgment, the words 'if' and 'not' in the clause . . . set forth a condition precedent. An expansion of this 150% cap to all cases would automatically render these words . . . wholly meaningless, offending the rules of statutory construction.¹⁴⁶

What should be done then, when different courts use different canons of interpretation to come to different conclusions regarding the same issue, and when, unfortunately, it is the currently controlling cases that have gotten it wrong? The courts in the *non*-controlling cases, *McLindon v. Russell*¹⁴⁷ and *Harris v. Ricci*,¹⁴⁸ both err on the side of caution by accepting the plain meaning of the statute, i.e., acknowledging that Congress only addressed a scenario wherein attorney's fees are *not* greater than 150% of the judgment, so as not to read anything into the provision not already written therein and so as not to make the words "if" and "not" meaningless.¹⁴⁹ The courts of the *controlling* cases, on the other hand, have gotten themselves into quite an odd conundrum. The court in *Walker v. Bain* and those courts that cite *Walker*¹⁵⁰ say that they cannot "rely on the literal language of the statute where such reliance would lead to absurd results or an interpretation which is inconsistent with the intent of Congress."¹⁵¹ They also insist that every word must have meaning, so as to avoid superfluity.¹⁵² And while this sounds good as written, it utterly fails in application.

First, the *Walker* court never indicates what type of absurd results would occur if the statute were applied as written. Rather, it is that court's own interpretation—reading-in a 150% cap that does not exist—that produces absurd results like \$1.50 in attorney's fees in meritorious cases that required years of litigation.¹⁵³ Additionally, the court's augmentation fails to produce results consistent with the

145. See *McLindon v. Russell*, 108 F. Supp. 2d 842, 850 (S.D. Ohio 1999), *rev'd and vacated in pertinent part*, 19 F. App'x 349 (6th Cir. 2001).

146. *Harris v. Ricci*, 8 F. Supp. 3d 583, 593 (D. N.J. 2014), *aff'd in part, vacated in pertinent part, rev'd in part*, 595 F. App'x 128 (3d Cir. 2014).

147. *McLindon*, 108 F. Supp. 2d at 849–53.

148. *Harris*, 8 F. Supp. 3d at 592–94.

149. See *supra* text accompanying notes 145–46; see generally *Harris*, 8 F. Supp. 3d at 592–94; *McLindon*, 108 F. Supp. 2d at 849–53.

150. *McLindon v. Russell*, 19 F. App'x 349 (6th Cir. 2001) and *Harris v. Ricci*, 595 F. App'x 128 (3d Cir. 2014).

151. *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001); but see *McLindon*, 108 F. Supp. 2d at 852 (“[T]he fact that Congress omitted from section 1997e(d)(2) the circumstance presented in the instant case where an award of attorney's fees would exceed 150% of the judgment is not sufficient grounds for refusing to give effect to the plain meaning of the statute.”).

152. *Walker*, 257 F.3d at 667.

153. See *supra* text accompanying notes 92–98.

intent of Congress.¹⁵⁴ So the *Walker* court warns against relying on language that would produce absurd results, and cautions against interpreting statutes in a manner inconsistent with Congress's intent, and yet proceeds to assume the role of "superlegislature,"¹⁵⁵ adding words that produce absurd results inconsistent with the intent of Congress. "It appears that the *Walker* majority first created its own conundrum by expanding subsection (2) in a blanket fashion and then elected to lament over the Frankenstein's-monster qualities of its own creation, all while blaming the lawmakers for the shortcomings Congress never actually made."¹⁵⁶

Second, while the *Walker* court does have its own theory about superfluity and how it applies to the statute,¹⁵⁷ theirs is not any more persuasive than the district courts' theories.¹⁵⁸ Either way one reads this statute—under the controlling cases' interpretation or under the noncontrolling cases' interpretation—there are going to be some words in § 1997e(d)(2) that seem superfluous. It can be conceded that the district courts' contentment to stop where the statute stops (*not* delving into why the drafters added the 150% language and/or why that particular number was chosen) is frustrating. But this contentment not to meddle seems less troubling than does the *Walker* court's propensity to conjure words into the statute, thereby producing absurd results inconsistent with the intent of Congress. As outlined earlier, the statement: "If I am not wearing a hat, then I shall go to the grocery store," is filled with meaning whether or not I specify what occurs if I *am* wearing a hat. It might be frustrating that I do not specify what happens if I am wearing a hat, and it might be doubly frustrating that, absent explicit delineation, if I am wearing a hat I might *still* go to the grocery store! But the initial statement is not meaningless standing alone, without further inferences, and neither is § 1997e(d)(2).

D. "The Reminder Theory"

For those who are not convinced, or who at least want a hypothesis as to why the drafters might have added the 150% language, there is a unique way to read the statute, which does not yield the dreaded result of superfluity. I will call this "The Reminder Theory."¹⁵⁹ According to this theory, in those cases where attorney's fees *are* greater than 150% of the monetary judgment, which—as it so happens—is the bulk of the time,¹⁶⁰ there will never be an instance whereby the prisoner's

154. A 150% cap on attorney's fees does not deter frivolous litigation. *See supra* text accompanying notes 114–20 and note 125.

155. *See supra* text accompanying note 102.

156. *Harris v. Ricci*, 8 F. Supp. 3d 583, 596 (D. N.J. 2014), *aff'd in part, vacated in part, rev'd in part*, 595 F. App'x 128 (3d Cir. 2014).

157. *See supra* text accompanying notes 142–44.

158. *See supra* text accompanying notes 145–46.

159. Author's own theory.

160. *See, e.g.*, Transcript of Oral Argument at 58, *Murphy v. Smith*, 138 S. Ct. 784 (2018) (responding to Justice Kagan's question about how often 25% of the judgment actually satisfies the amount of attorney's fees awarded, Petitioner's counsel replied: "Oh, it's extraordinarily rare because—because, you know, these cases might take hundreds of hours to litigate and the average monetary award is a bit more than \$4,000. So there's an

portion of up to 25% covers all of the attorney's fees. Therefore, *of course* the defendant pays the excess, per § 1988;¹⁶¹ there was no need for Congress to specify something so obvious in § 1997e(d)(2). But in instances where attorney's fees are *not* greater than 150% of the monetary judgment, it *is* possible that a prisoner's portion would cover the entirety of the attorney's fees. For example, if the monetary judgment was \$100,000, and if the attorney's fees ("directly and reasonably incurred"¹⁶²) were only \$10,000 (i.e., *not* greater than 150% of the judgment), then the plaintiff's portion (25% x \$100,000 = \$25,000) could readily satisfy the \$10,000 in attorney's fees. But if the monetary judgment was \$100,000, and if the attorney's fees were \$39,600 (*still* "directly and reasonably incurred,"¹⁶³ and *still not* greater than 150% of the judgment), then the prisoner plaintiff's portion would only cover so much, and the statute serves as a reminder (thus "The Reminder Theory") that the defendant remains liable for the outstanding \$14,600. The Reminder Theory is certainly less absurd than the prevailing reading of the statute, which requires courts to legislate from the bench, reaching preposterous conclusions that serve no stated purpose of Congress and that harm civil rights attorneys.

III. HOW 42 U.S.C. § 1997E(D) SHOULD BE INTERPRETED

A. Section 1988-Authorized Attorney's Fees in Non-Prisoner Suits

When *non*-prisoners win § 1983 suits warranting attorney's fees as authorized by § 1988, the amount of the fee is based on the facts of the particular case at bar,¹⁶⁴ including the plaintiff's degree of success and the time the attorney spent on the case or on the successful claims. The judge determines the fee first by calculating the "lodestar" amount, which is the reasonable hours expended by the attorney multiplied by the reasonable hourly rate, and then the judge makes additions and subtractions to this figure.¹⁶⁵ The district court judge has immense discretion in determining reasonable attorney's fees,¹⁶⁶ and where a plaintiff does not succeed on all claims asserted, a crucial deciding factor so far as fees are concerned is "the *degree* of success attained."¹⁶⁷ There is no "precise rule or formula" for determining the degree of success attained, and to account for limited success in a case, the district court might eliminate certain hours from the calculus or reduce the award

enormous mismatch here. It's a very, very rare prisoner case in which 25 percent of the judgment would even come close to fully, completely paying the—the obligations for attorney's fees, that's right.")

161. See *supra* Part (A) of the Introduction.

162. 42 U.S.C. § 1997e(d)(1)(A) (2012).

163. *Id.*

164. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

165. Alphonse A. Gerhardtstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251, 271 (2016); see also Michael T. Jilka, *Attorneys Fees in Civil Rights Cases*, 74 J. KAN. B. ASS'N 42, 49–51 (2005) (discussing how to calculate the lodestar figure).

166. *Hensley*, 461 U.S. at 432, 437 (emphasizing three times that district court judges have discretion regarding attorney's fees).

167. *Id.* at 436 (emphasis added).

itself.¹⁶⁸ This ability of district court judges to reduce an award is counterbalanced by their ability also to enhance an award based on “exceptional success.”¹⁶⁹ In instances of exceptional success, “the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit”;¹⁷⁰ one need not bring a perfect suit in order to receive attorney’s fees.¹⁷¹ Finally, twelve guiding factors from *Johnson v. Georgia Highway Express, Inc.* also help the court to assess the reasonableness of an attorney’s fees award, and some of these factors include: the time and labor required of the lawyer, the lawyer’s customary fee, and the amount involved in the case and the results obtained.¹⁷²

B. Section 1988-Authorized Attorney’s Fees Under the PLRA: A Reasonable Interpretation

Because the meaning of a statute must be ascertained by reviewing “the language and design of the statute as a whole,”¹⁷³ it is especially crucial to examine the initial provisions found in § 1997e(d)(1) before moving on to § 1997e(d)(2). The provisions of § 1997e(d)(1) delineate when a prisoner may be awarded attorney’s fees. If these requirements are lacking, for example, if the prisoner did *not* win the suit or if the fee was *not* directly and reasonably incurred in proving the actual and protected violation, then the prisoner plaintiff’s attorney cannot recoup fees from the defendant.¹⁷⁴ One never reaches § 1997e(d)(2), in other words, unless the fee is “proportionately related to the court ordered relief for the violation.”¹⁷⁵

What follows, thus, is a proposed guiding framework¹⁷⁶ for how courts should analyze attorney’s fees in prisoner cases under the PLRA, starting at § 1997e(d)(1). **First**, the court must decide if the prisoner is even eligible for an award of

168. *Id.* at 436–37.

169. *Id.* at 435.

170. *Id.*

171. “[P]laintiffs may be considered “prevailing parties” for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” *Id.* at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1st Cir. 1978)).

172. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). All twelve factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.*

173. *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

174. *See* 42 U.S.C. § 1997e(d)(1) (2012); *see also supra* text accompanying note 70.

175. § 1997e(d)(1)(B)(i).

176. Adapted from Fay Stender & Ronald M. Sinoway, *Prisoners’ Rights Litigation*, 22 AM. JUR. TRIALS 1, 224 (originally published in 1975; updated in 2017); *see also* *Morrison v. Davis*, 88 F. Supp. 2d 799, 808–13 (S.D. Ohio 2000) (undertaking a similar step-by-step attempt to calculate attorney’s fees under the PLRA); *Clark v. Phillips*, 965 F. Supp. 331, 335–38 (N.D.N.Y. 1997) (same).

attorney's fees, by determining if the prisoner is a "prevailing party."¹⁷⁷ A plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."¹⁷⁸ And even a civil rights plaintiff who receives a nominal damages award is considered a prevailing party, because "the prevailing party inquiry does not turn on the magnitude of the relief obtained."¹⁷⁹ **Second**, once the court determines that the prisoner has prevailed, the court must calculate the "lodestar amount," i.e., the reasonable hours expended by the attorney multiplied by a reasonable hourly rate.¹⁸⁰ The PLRA limits the fee to those hours "directly and reasonably incurred in proving the actual violation,"¹⁸¹ and the reasonable hourly rate must be the CJA rate.¹⁸² **Third**, the court must determine if the amount of the fee, as calculated in step two, is "proportionately related to the court ordered relief for the violation."¹⁸³ Note that the lodestar figure is a "presumptively reasonable fee," although it may be adjusted upward or downward, depending on the circumstances.¹⁸⁴ Once the fee has been adjusted upward or downward to reflect proportionality, the court has achieved a final and accurate calculation of the fee owed the attorney.

However, two final steps in the analysis remain. **Fourth**: the court must determine what portion, if any, the prisoner must contribute toward the attorney's fees award. If a monetary judgment is awarded in the case, then the court must apply a portion of that judgment (not to exceed 25%) to satisfy the attorney's fees award.¹⁸⁵ And **fifth**, if the fee is *not* greater than 150% of the judgment, then the court must require the defendant to pay the remainder.¹⁸⁶

What happens if the fee *is* greater than 150% of the judgment is where courts disagree, which was discussed in Section II. This note supports the thoughtful

177. § 1997e(d)(1)(A). "In order to qualify for attorney's fees under § 1988, a plaintiff must be a 'prevailing party.'" *Farrar v. Hobby*, 506 U.S. 103, 109 (1992).

178. *Farrar*, 506 U.S. at 111–12. This does not include a party that has failed to secure a judgment on the merits or a court-ordered consent decree but has nevertheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 598–99 (2001).

179. *Farrar*, 506 U.S. at 114.

180. See *supra* note 165.

181. § 1997e(d)(1)(A). This will require detailed timekeeping by the fee applicant and might involve subtracting hours spent on unsuccessful claims. See *supra* text accompanying notes 165–68; see also *Dannenberg v. Valadez*, 338 F.3d 1070, 1075–76 (9th Cir. 2003) (remanding the case for recalculation of the hours spent on prevailing claims). For a discussion about how certain courts have addressed this "reasonably incurred" provision, see JOHN BOSTON, *THE PRISON LITIGATION REFORM ACT 305–06* (2014).

182. § 1997e(d)(3); see also *supra* note 69.

183. § 1997e(d)(1)(B)(i). See *infra* Section III(C) for an analysis of proportionality.

184. Jilka, *supra* note 165, at 49. The fee might be adjusted upward in instances of "exceptional success" (see *supra* text accompanying note 169) or downward to reflect limited success (see *supra* text accompanying notes 166–68).

185. § 1997e(d)(2); see also *Murphy v. Smith*, 138 S. Ct. 784 (2018) (holding that lower courts do not have discretion to order any amount from 0.1% up to 25% but rather that "a portion" means the full 25%).

186. § 1997e(d)(2).

interpretation of the district court in *McLindon v. Russell*, though vacated in pertinent part, that where an award of attorney's fees *exceeds* 150% of the judgment, the second sentence of § 1997e(d)(2) simply does not apply, and the court should apply § 1997e(d)(1)(A) and (B) in conjunction with the normal rules of law governing an award of attorney's fees under section 1988.¹⁸⁷

C. "Proportionately Related"

Executing step three of the analysis above, i.e., determining whether the calculated fee is "proportionately related to the court ordered relief for the violation,"¹⁸⁸ requires an analysis similar to that used in determining "the degree of success attained"¹⁸⁹ in non-prisoner suits where attorney's fees are authorized under § 1988.¹⁹⁰ Part of determining this degree of success is looking at the amount involved and the results obtained,¹⁹¹ and some people view the proportionality requirement as being "meant to act as a guidepost to ensure that excessive attorney's fees are not awarded in a drawn-out lawsuit where only nominal damages are recovered."¹⁹²

However, it cannot be emphasized enough that "the amount involved and the results obtained" factor is just *one* of twelve considerations that a thorough court should take into account.¹⁹³ The twelve factors are not definitive; rather they are guidelines to aid the court in determining reasonable attorney's fees.¹⁹⁴ While the amount of the monetary judgment awarded might be small,¹⁹⁵ the time and labor required by the attorney may have been extensive.¹⁹⁶ And as will be discussed below, civil rights cases are inherently valuable to society, whether or not they yield a sizable monetary judgment.¹⁹⁷

187. *McLindon v. Russell*, 108 F. Supp. 2d 842, 852 (S.D. Ohio 1999), *rev'd and vacated in pertinent part*, 19 F. App'x 349 (6th Cir. 2001). See *supra* Section III(A) for a discussion of how fees are typically calculated under § 1988.

188. § 1997e(d)(1)(B)(i).

189. See *supra* text accompanying note 167.

190. See generally *Dannenbergh v. Valadez*, 338 F.3d 1070, 1075–76 (9th Cir. 2003); see also *supra* Section III(A) (delineating how fees are calculated in non-prisoner suits). For a list detailing how certain courts have interpreted the PLRA's "proportionately related" requirement, see BOSTON, *supra* note 181, at 306 n.1371.

191. See *supra* text accompanying note 172.

192. Maxwell Murtaugh, Note, *The PLRA's Dividing Language: Statutory Interpretation and Applying the Attorney's Fees Cap at the Appellate Level*, 59 ST. LOUIS U. L. J. 219, 248 (2014).

193. See *supra* note 172; see generally *supra* Section III(A). For examples of courts both calculating the lodestar amount and applying the *Johnson* factors, see *Carruthers v. Israel*, 274 F. Supp. 3d 1345, 1349, 1353–54 (S.D. Fla. 2017); *Depriest v. Walnut Grove Correctional Authority*, No. 3:10-CV-00663-CWR-FKB, slip op. at 2, 9 (S.D. Miss. Sept. 22, 2017); *Duvall v. O'Malley*, No. ELH-94-2541, 2016 WL 3523682, at *12–15 (D. Md. June 28, 2016); see also *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550–52 (2010) (mentioning the *Johnson* factors as a possible method for determining a "reasonable fee").

194. See generally *supra* Section III(A).

195. *Johnson* factor eight. See *supra* note 172.

196. *Johnson* factor one. See *supra* note 172.

197. See *supra* text accompanying notes 132–35.

Consider the following scenario: a prisoner plaintiff brings a § 1983 suit for a First Amendment violation, seeking monetary damages alone and not an injunction or any other type of relief. The prisoner—we will refer to him as Paul—wins his suit but only receives \$1.00 in nominal damages, because there was no physical injury involved.¹⁹⁸ Applying the guiding framework of steps delineated in the preceding section, **first**: the court will determine if the prisoner is a “prevailing party,”¹⁹⁹ which Paul is, because he won his suit, and even nominal damages fulfill the prevailing party inquiry.²⁰⁰ **Second**: the court must calculate the lodestar amount, multiplying the hours “directly and reasonably incurred in proving the actual violation”²⁰¹ by the CJA rate.²⁰² For the sake of this hypothetical, let us imagine that Paul’s attorney spent two-hundred hours directly and reasonably proving the First Amendment violation. Multiplying two hundred by the CJA rate of \$198²⁰³ yields attorney’s fees in the amount of \$39,600. **Third**: the court must determine if this \$39,600 is “proportionately related to the court ordered relief for the violation.”²⁰⁴ At this point it may become tempting to ask how \$39,600 could be “proportionately related” to a \$1.00 award. Admittedly, \$39,600/\$1.00 does not seem very proportionate. But the concept of proportionality is not strictly numbers-associated and must, instead, represent the overall degree of success attained.²⁰⁵ (Does the fee make sense, given the win?)

Imagine, for example, a case where the court awards \$1.00 in nominal damages *as well as* an injunction. How does one quantify the injunction so as to determine whether or not the attorney’s fees are proportionately related? In fact, in cases where both monetary damages are awarded and injunctive relief is obtained, § 1997e(d)(2) does not apply.²⁰⁶ Again, it is crucial to look at the overall degree of success attained by the plaintiff, and district courts have substantial discretion in making this determination.²⁰⁷ If the prisoner wins an injunction plus \$5000 in

198. See *supra* note 96 and text accompanying note 30.

199. See *supra* text accompanying note 177.

200. See *supra* text accompanying note 179.

201. 42 U.S.C. § 1997e(d)(1)(A) (2012).

202. See *supra* text accompanying notes 180–82.

203. See *supra* note 69.

204. § 1997e(d)(1)(B)(i).

205. See generally *Dannenber v. Valadez*, 338 F.3d 1070, 1075–76 (9th Cir. 2003) (holding that the district court did not properly consider degree of success in arriving at a reasonable fee award).

206. See *id.* at 1075 (“[F]ees incurred to obtain injunctive relief, whether or not monetary relief was also obtained as a result of those fees, are not limited by [§ 1997e(d)(2)].”); see also *Walker v. Bain*, 257 F.3d 660, 667 n.2 (6th Cir. 2001) (“[I]f non-monetary relief is obtained, either with or without money damages, § 1997e(d)(2) would not apply.”); *Boivin v. Black*, 225 F.3d 36, 41 n.4 (1st Cir. 2000) (“In a case in which the court orders non-monetary redress (say, an injunction) along with a monetary judgment, the fee cap contained in section 1997e(d)(2) would not restrict the total amount of attorneys’ fees that the court could award. In such a ‘hybrid’ case, the court would be free to take into account all the provisions of section 1997e(d).”) *But see Boston*, *supra* note 69, at 1258 (noting that there is support for the proposition that where both monetary damages and injunctive relief are awarded, the 150% cap applies to the damages, and fees for the injunction are computed separately).

207. See *supra* text accompanying notes 166–67.

compensatory damages on one claim but does not win anything on a second claim, for example, then the court—in its discretion—could calculate the hours reasonably spent by the attorney achieving the injunction and the compensatory damages for the first claim, and subtract the hours spent working on the second claim, thus yielding a reasonable, proportionately-related attorney’s fees amount.²⁰⁸ Importantly, the proportionality analysis is holistic rather than one that focuses strictly on numbers.

Therefore, back to Paul’s scenario (where he was awarded \$1.00 in nominal damages): the court might decide that (despite being “directly and reasonably incurred”²⁰⁹ in proving the constitutional violation, and despite taking into consideration some of the other *Johnson* factors²¹⁰) the lodestar amount of \$39,600 is simply not proportionate to the court ordered relief of \$1.00, i.e. to “the amount involved and the results obtained.”²¹¹ But the judge *could* decide that something else, like \$3000, *is* proportionate. There is no need for the judge to say that only \$1.50 can be considered proportionate, for, in fact, \$1.50 is *not* proportionate to the degree of success attained. When one considers the *Johnson* factors (such as the time and labor expended by Paul’s lawyer) plus the fact that Paul brought a meritorious civil rights suit, won the meritorious civil rights suit, sought monetary damages, and received monetary damages—albeit nominal—it is clear that Paul and his lawyer technically achieved a very high degree of success. The 150% analysis comes in the fifth step, and we are only at step three—determining proportionality—at this point.

Some would argue that under *Farrar v. Hobby*, when a court awards only nominal damages, no attorney’s fees are warranted at all.²¹² But the actual statement of the Court was: “When a plaintiff recovers only nominal damages *because of his failure to prove an essential element of his claim for monetary relief*, the only reasonable fee is *usually* no fee at all.”²¹³ But in a First Amendment case with no physical injury, for example, because of the PLRA’s physical injury requirement, the prisoner plaintiff is barred at the outset from seeking compensatory damages.²¹⁴ So it is not that he or she “fail[ed] to prove an essential element of his claim”; he or she was simply foreclosed from seeking more than nominal monetary relief. Additionally, Justice Thomas’s statement in *Farrar* is qualified by the word “usually,” which, once again, points to the discretion of the district courts in

208. See, e.g., *Dammenberg*, 338 F.3d at 1075–76 (remanding the case for recalculation of the hours spent on prevailing claims); *Berrian v. City of New York*, No. 13cv1719 (DLC)(DF), 2014 WL 6611356, at *15 (S.D.N.Y. July 28, 2014) (ordering a reduction in the number of hours an attorney claimed, because the time entries were too vague for the court to assess reasonableness).

209. 42 U.S.C. § 1997e(d)(1)(A) (2012).

210. See *supra* note 172.

211. *Johnson* factor eight. See *supra* note 172.

212. See *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

213. *Id.* (emphasis added) (internal citations omitted).

214. See *supra* note 96 and text accompanying note 30.

determining an appropriate attorney's fees award.²¹⁵ The district court judge may very well come to the conclusion that "[n]ominal relief does not necessarily a nominal victory make,"²¹⁶ and, like the *Johnson* factors,²¹⁷ the judge might look to such "relevant indicia of success [as] the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served . . ."²¹⁸

Back to Paul's hypothetical, let us say that after completing step three's proportionality analysis the judge determines that the \$39,600 lodestar figure is, in fact, too high but that \$3000 is a reasonable attorney's fee. The **fourth** step then requires the judge to decide what portion of Paul's \$1.00 monetary judgment Paul must apply to his attorney's \$3000 award.²¹⁹ Per the Court's recent ruling in *Murphy v. Smith*, the judge must allocate the full, statutorily-authorized \$0.25.²²⁰ Thus, at this point, the defendant is responsible for \$2999.75 in attorney's fees. **Fifth** and finally: the second sentence of § 1997e(d)(2) only applies when attorney's fees are not greater than 150% of the monetary judgment,²²¹ which is not the case in this hypothetical. We are therefore left with the defendant owing \$2999.75 (the reasonable, proportionate \$3000 fee minus Paul's \$0.25 contribution), in accordance with the intent behind § 1988.²²²

One hundred fifty percent of the monetary judgment (\$1.50, for example) is certainly not a definitive cap on what may be considered proportionate. If the plaintiff "wins" everything he or she asks for, then the reasonably-calculated fee²²³ would be necessarily proportionately related to the court ordered relief, because the degree of success would be whole.²²⁴ "[T]he lodestar figure is entitled to a strong presumption of reasonableness and prevents a 'windfall' for attorneys in § 1983 actions by guaranteeing that they receive only the reasonable worth of the services rendered."²²⁵ If the attorney brings several claims but only wins on a few, then the total fee will not be proportionately related to the court ordered relief until those hours spent on unsuccessful claims are subtracted. If he or she seeks \$100,000 in monetary damages and only receives \$1.00 in nominal damages, then this is one factor that will likely influence a downward departure from the lodestar amount,²²⁶ and the court can subtract some amount from the attorney's fees award in order to better reflect proportionality.²²⁷

215. See *supra* text accompanying note 166.

216. *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring).

217. See *supra* note 172.

218. *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring).

219. See *supra* text accompanying note 185.

220. See *supra* note 185.

221. See *supra* text accompanying notes 186–87.

222. See *supra* text accompanying notes 25–26 and 187.

223. See *supra* text accompanying notes 180–82.

224. See *infra* text accompanying note 252 (explaining that "fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim").

225. *Blanchard v. Bergeron*, 489 U.S. 87, 87 (1989).

226. See *supra* text accompanying notes 165–68 and 172.

227. See *supra* text accompanying note 208.

But insisting that attorney's fees hinge on the monetary judgment amount alone makes little sense. Whether seeking a monetary judgment award of \$1.00 or of \$100,000, the attorney does not necessarily work any harder to prove the higher amount. For example, if the attorney seeks \$100,000 in compensatory damages, and if he or she spent ten hours researching or calculating that particular figure to request, then it is not as if the attorney spent one hour per \$10,000 requested. Rather, he or she spent ten hours working out the ultimate \$100,000 figure. When working for monetary damages generally, seeking a *specific amount of damages* (and coming up short) should not be wholly determinative of the calculation of the *attorney's fees*.²²⁸ If an attorney argues for \$100,000 in compensatory damages for his or her client, but the jury only awards \$1.00 or \$10.00 or \$100.00 or \$1000, has the attorney somehow failed? At what point is the degree of success attained affected? What if the attorney argues for \$100,000 in compensatory damages, and the jury awards \$1,000,000? Should the attorney's fees award be augmented? The court certainly has discretion to do so.²²⁹ Again, the discretion of the district court is paramount.²³⁰

The amount of the attorney's fees must be "proportionately related to the court ordered relief for the violation,"²³¹ not strictly tied to the *numerical amount* of the court-ordered relief. While \$1.50 might in some way be considered proportionate to \$1.00, it is not therefore necessarily proportionate to the overall degree of success of having won a civil rights lawsuit. "In the context of prison litigation, which frequently involves constitutional challenges to prison conditions or practices for which the desired relief is primarily nonmonetary, a rule that tether[s] attorneys' fees solely to monetary relief would be difficult to square with the rest of section 1997e(d)."²³² The 150% language²³³ is not a fee cap; it is an indicator of who should pay and when, but *not* how much.

IV. BENEFITS OF A CORRECT READING

Perhaps we should just let sleeping precedents lie. Who, in fact, would actually benefit from a reading of the statute as it is written, without a 150% cap on attorney's fees? The surprising answer is: nearly everyone. "The Constitution embodies our nation's highest values and applies *across the land*, including in jails and prisons."²³⁴ Society is strengthened when the constitutional rights of everyone—even

228. Rather, a more holistic analysis, using the *Johnson* factors, for example, is required. *See generally supra* Section III(A) and text accompanying note 218.

229. *See supra* text accompanying note 169.

230. *See supra* text accompanying note 166.

231. 42 U.S.C. § 1997e(d)(1)(B)(i) (2012).

232. *Dannenberg v. Valadez*, 338 F.3d 1070, 1074 (9th Cir. 2003).

233. § 1997e(d)(2).

234. Eleanor Umphres, Note, *Solitary Confinement: An Unethical Denial of Meaningful Due Process*, 30 GEO. J. LEGAL ETHICS 1057, 1090 (2017); *see also* *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

the most disdained—are honored, and civil rights attorneys are the vanguard protecting those rights we hold most dear.

Most parties, from prisoners to their attorneys to the courts to Congress and even to prison officials, would benefit from a reading of the statute as it is written. First, prisoners²³⁵ will benefit from a reading of the statute that does not impose a 150% cap on attorney's fees, because lack of a strict numerical cap will at least stem one of the disincentives prisoners' potential lawyers face when deciding whether or not to represent such men and women in even the most meritorious cases. In other words, prisoners will have a hair's breadth more of a prayer of attaining counsel *without* the fee cap rather than with the cap.

Second, while attorneys will likely still be wary about taking on cases for which they can only charge half again over the low hourly CJA rate²³⁶ and that will probably yield a low award²³⁷ from which little can be gained through a contingency fee arrangement,²³⁸ at least these lawyers can bring meritorious civil rights cases—to the benefit of prisoners and society alike²³⁹—without having to worry about how to feed their families when their total payout in fees, after months and years of litigation, is \$1.50 or some other similarly absurd amount that fails to truly account for “the degree of success attained.”²⁴⁰

Third, the courts too will benefit by taking back some of the discretion that is rightly theirs in this realm of attorney's fees.²⁴¹ For too long now courts have wrung their hands in unnecessary desperation, lamenting the fee cap yet imposing it nevertheless.²⁴² And yet once judges recognize that the cap simply does not exist within the statute as written,²⁴³ and *re-start* applying the *Johnson* factors and other discretionary considerations,²⁴⁴ courts will finally be back in a position to award fees that adequately compensate civil rights attorneys for bringing and winning such important suits.

Fourth, Congress will benefit by *not* having its legislation encroached upon and augmented by a different branch of government. And if Congress really meant for the language of § 1997e(d)(2) to signify a 150% cap on attorney's fees, then Congress can always re-write the statute for clarity and to signify this purpose.²⁴⁵

235. “Fees are apparently unavailable for Bivens actions brought by federal inmates, . . . because the Equal Access to Justice Act allows fees to be awarded against the federal government only when some other substantive statute authorizes them, . . . or when a case is against the United States directly or an officer in his or her official capacity.” Schlanger, *supra* note 3, at 1631 n.253.

236. *See supra* note 69.

237. *See supra* note 160.

238. *See* 42 U.S.C. § 1997e(d)(4) (2012).

239. *See supra* text accompanying notes 134–35.

240. *See supra* text accompanying notes 167–68.

241. *See supra* text accompanying note 166.

242. *See supra* text accompanying note 102.

243. *See supra* Section II(B)(1).

244. *See supra* Section III(A); *see also supra* text accompanying note 218.

245. As stated by Justice Kennedy: “Congress remains free to alter what we have done.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

Fifth and finally, even prisons will benefit, because litigation efforts that improve conditions of confinement generally for the prisoners also improve daily life for the staff as well.²⁴⁶

When it comes to prisoners facing onerous barriers to bringing suit for the serious constitutional harms suffered at the hands of guards, we have a problem.²⁴⁷ When it comes to courts assuming a superlegislative role in order to read otherwise nonexistent words into a congressionally-crafted statute, we have a problem.²⁴⁸ When it comes to poorly-funded prisons, failing to provide adequate training, staffing, and/or mental health and medical care for their wards, we have a problem.²⁴⁹ When it comes to “prison-ambulances”-chasing²⁵⁰ attorneys seeking “windfall recoveries” by bringing § 1983 suits, we certainly do *not* have a problem.²⁵¹

[T]he very nature of recovery under § 1988 is designed to prevent any such ‘windfall.’ Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff’s civil rights claim. It is central to the awarding of attorney’s fees under § 1988 that the district court judge, in his or her good judgment, makes the assessment of what is a reasonable fee under the circumstances of the case.²⁵²

246. Chase Riveland, *Prison Management Trends, 1975-2025*, 26 CRIME & JUST. 163, 167 (1999) (“Although they [initially] resented the loss of power [when courts asserted their authority over prisons], [prison administrators] also found that they were the beneficiaries of more resources than they traditionally had had to operate their prisons. Indeed, they discovered that their institutions became safer and easier to run when overcrowding was mitigated, programs and work opportunities were expanded, health and mental health services were improved, and many other improvements occurred.”). Chase Riveland is the former secretary of corrections in Washington State and Colorado. *Id.* at 163 n.1. Frank Wood, former director of the Minnesota Department of Corrections, has also said: “The intervention by the courts was very positive. . . . Many of the very positive changes that we have seen occur in our prisons . . . never would have occurred without the involvement, or at least the threat of involvement of the courts.” *Id.* at 171, 183–84.

247. See *supra* text accompanying notes 99–101, 114–20, and note 125. The restriction on attorney’s fees means that “fewer competent attorneys will be available to assist prisoners in articulating valid constitutional claims, and when counsel is retained, there are strong reasons for lawyers to give these less attention and resources than they require.” Tsai, *supra* note 10, at 903.

248. See generally *supra* Section II(A) and text accompanying notes 150–56.

249. Cf. *supra* note 246.

250. William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 671 (2004).

251. There is a persistent fear amongst members of Congress that civil rights attorneys are standing in the wings, waiting with bated breath to bring any and all constitutional claims that might bring a windfall recovery to be footed by the government. But not only are “the monetary recoveries in civil rights cases . . . seldom . . . equivalent to recoveries in most private-law litigation[,]” *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (Brennan, J., concurring in part and dissenting in part), but also § 1988 itself was designed to prevent such windfalls. See *infra* text accompanying note 252; see also 22 AM. JUR. TRIALS 1, 222 (updated 2018) (“There are very few cases where the damages awarded to the prisoner are so substantial as to be analogous to large awards in personal injury litigation. Attorneys should therefore be permitted to move for fees in cases where there is no prayer for damages, where injunctive relief is obtained but damages denied, or where damages are *de minimis*.”).

252. *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989).

While Congress has an arguably valid interest in preventing windfalls to civil rights attorneys—namely, to protect the public fisc²⁵³—this interest is accounted for already when courts apply the lodestar calculation in conjunction with the *Johnson* factors.²⁵⁴ Cases that correctly apply the *Johnson* factors result “in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.”²⁵⁵ And attracting competent counsel is vital, because constitutional rights are vital. Without skilled, dedicated attorneys fighting for prisoners’ rights, defendants have little motivation to change their unacceptable behavior.²⁵⁶

It is important to remember that not all constitutional violations will warrant compensatory damages. In some cases this is because the PLRA prohibits damages for mental or emotional injury without an accompanying physical injury, and in other cases this is because the difficulty of valuing intangible constitutional injuries leads fact-finders to award nominal damages alone.²⁵⁷ Reading a 150% cap into the statute therefore all but forecloses the likelihood of an attorney agreeing to take on a case *not* involving a physical injury.²⁵⁸ But this has crucial consequences. Few First Amendment freedom of religion claims, for example, are going to involve a physical injury. Presumably, we still value the First Amendment and deem it worthy of protection, but few attorneys can *afford* to bring suit on behalf of an indigent prisoner client and only get paid \$1.50. Additionally, prisoners who bring Eighth Amendment challenges to the conditions of solitary confinement—a brutal practice that leaves a lasting negative impact on the mental health and functioning of those individuals who endure such abuse²⁵⁹—may only be able to recover nominal damages, because the mental and emotional suffering experienced within isolation or as a result thereof does not at present fulfill the PLRA’s physical injury requirement.²⁶⁰ There is a tragic irony to the fact that unlike non-prisoner § 1983 claimants, who *can* recover compensatory damages for mental and emotional distress experienced as the result of a constitutional violation,²⁶¹ prisoners—more than

253. See *supra* text accompanying note 102.

254. See *supra* text accompanying note 252; see also *supra* Section III(A).

255. *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.4 (1983) (internal citation omitted).

256. See Reingold, *supra* note 25, at 17–18 (“In a good-liability/bad-damages case, [§ 1988’s ability to regulate defendants’ behavior] can only work if the defendant is forced to pay the plaintiff’s attorney’s fees. Otherwise the damages alone are too low either to induce plaintiffs’ counsel to bring the case or to deter the unwanted conduct. Without the risk of having to pay attorney’s fees, the defendants will either never be sued at all, or they will view the low damages as an acceptable (and deductible) cost of their illegal conduct, happily paying for their sins.”).

257. See *supra* note 96 and text accompanying note 30.

258. See *supra* note 125.

259. See, e.g., Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 327 (2006); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. L. & SOC. CHANGE 477, 529–39 (1997).

260. See *supra* text accompanying note 30.

261. See *Carey v. Phipps*, 435 U.S. 247, 264 (1978).

80,000 of whom are currently in solitary confinement²⁶²—can only recover nominal damages for mental and emotional distress absent physical injury. Until technology and IRB boards enable us to study and image the physical brain damage caused by solitary confinement,²⁶³ the mental and emotional distress involved with such inhumane treatment can only garner pathetic nominal damages, with the \$1.50-like attorney's fees that currently accompany such a pittance. Yet a successful cruel and unusual punishment case is eminently more valuable than whatever nominal damages are awarded, and the prisoner's attorney should be paid a reasonable fee for his or her efforts to right such atrocious wrongs. He or she should also be paid as a means of deterring defendants' bad behavior.²⁶⁴

The overarching point is that not all prisoner-brought cases involving nominal damages are necessarily nominal in nature,²⁶⁵ even if they end up yielding small awards like \$1.00. As mentioned above, sometimes this happens because the physical injury requirement is not satisfied. Other times it is because certain claims—like a claim seeking injunctive relief, or a claim against an official who is later found to have qualified immunity—get dropped along the way. For example, when Arkansas Department of Correction (ADC) prisoner Shawanna Nelson brought suit against various ADC officials for shackling her during her pregnancy—including during labor—her claims against all defendants except for one correctional officer were ultimately dismissed based on those defendants' qualified immunity.²⁶⁶ Six years after initially bringing suit, the case against the remaining officer finally went to trial.²⁶⁷ The evidence was gruesome.²⁶⁸ Yet during the

262. See LIMAN PROGRAM, YALE L. SCH. ASS'N OF ST. CORRECTIONAL ADMINS., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON ii (2015), https://www.law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf.

263. Consider the recent work pertaining to Chronic Traumatic Encephalopathy (CTE), a neurodegenerative disease, and football players' brains: apparently "[a] new discovery by researchers at Boston University's School of Medicine may be a breakthrough toward . . . [t]he ability to diagnose CTE in living patients, something that is not yet possible." Jenny Vrentas, *Diagnosing CTE: A Breakthrough Could Be Here 'In the Next Five Years'*, SPORTS ILLUSTRATED (Sept. 27, 2017), <https://www.si.com/nfl/2017/09/27/cte-diagnosis-living-patients-concussions-football-players> (last visited Sept. 22, 2018). According to Atul Gawande, "Without sustained social interaction, the human brain may become as impaired as one that has incurred a traumatic injury." Atul Gawande, *Hellhole*, THE NEW YORKER (Mar. 30, 2009), <https://www.newyorker.com/magazine/2009/03/30/hellhole>. One day soon we might be able to finally "see" the physical brain injury accompanying prisoners' confinement-caused mental and emotional distress, which would have implications so far as compensatory versus nominal damages are concerned. See *supra* note 96.

264. See *supra* note 256.

265. See *supra* text accompanying note 216.

266. *Nelson v. Turnesky*, No. 1:04CV00037 JMM, 2010 WL 3655565, at *1 (E.D. Ark. Sept. 13, 2010).

267. *Id.*

268. *Nelson v. Correctional Med. Servs.*, 583 F.3d 522, 526 (8th Cir. 2009) ("[A]s a result of being shackled during her labor, [Ms. Nelson] was unable to move her legs or stretch during 'the most painful and stressful' part of it. . . . [T]he shackling caused her extreme mental anguish and pain, permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair. . . . According to Nelson's orthopedist, the shackling injured and deformed her hips, preventing them from going 'back into the place where they need to be.' In the opinion of her neurosurgeon the injury to her hips may cause lifelong pain. . . . [Additionally,] as a result of her injuries [Ms. Nelson could no longer] engage in 'ordinary activities' such as playing with her children or

pretrial conference Ms. Nelson ended up dropping “all claims based on physical injury” except for one having to do with the pain she felt while shackled during labor.²⁶⁹ We do not know why the ghastly physical injury claims were dropped, and perhaps this was part of an exhausted, last-ditch litigation strategy to ensure that Ms. Nelson would win *something* after six years seeking vindication. All we do know is that the jury returned a verdict in favor of Ms. Nelson awarding her \$1.00 in nominal damages, and the court then awarded attorney’s fees in the amount of \$1.50.²⁷⁰ A correct reading of the PLRA could have prevented this.

CONCLUSION

Basing attorney’s fees off of 150% of the monetary award is wrong on all levels: it is a misreading of § 1997e(d)(2);²⁷¹ it is untrue to the purpose behind § 1988;²⁷² and it is disloyal to the constitutional rights that we as a nation profess to value. Prisons are overcrowded, dangerous environments fraught with violence and abuses of power.²⁷³ The answer, however, to how to stem the tide of prisoner-brought litigation is not to close the gates of the courthouse to those men and women seeking redress for having had their civil rights violated. Rather we must somehow stop the unconstitutional abuses from occurring in the first place. But a culture shift is hard to effect,²⁷⁴ and oftentimes bad behavior persists until judicial intervention forces change.²⁷⁵ Back in the 1970s, for example, the courts intervened in how prisons were administered, and “[t]his brought about a remarkable improvement in the professionalism of correctional staff. It brought about significant changes in health care in prisons, due process, and most importantly, the accountability of prison administrators.”²⁷⁶ For the last thirty years or so, however, courts have been loath to become “enmeshed in the minutiae of prison operations.”²⁷⁷ This judicial unwillingness to meddle in prison administration paired with the PLRA’s inauspicious appearance in 1995 has yielded nearly insurmountable barriers to court for prisoners, and the improvements wrought by the litigation

participating in athletics. She [was] unable to sleep or bear weight on her left side or to sit or stand for extended periods. Nelson [was] also advised not to have any more children because of her injuries.”).

269. *Nelson v. Turnesky*, 2010 WL 3655565, at *1 n.1.

270. *Id.* at *2.

271. *See supra* Section II(B)(1).

272. *See supra* text accompanying notes 25–26.

273. “The deplorable conditions and Draconian restrictions of some of our Nation’s prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems.” *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

274. As stated by Reginald Wilkinson, former director of the Ohio Department of Rehabilitation and Correction: “There are probably things we are doing that don’t work—but they are imbedded in our culture.” Riveland, *supra* note 246, at 171, 177.

275. *See supra* text accompanying note 256.

276. Riveland, *supra* note 246, at 172–73.

277. *Bell*, 441 U.S. at 562.

efforts of the 1970s have largely been lost to decades of inattention by the powers that be.²⁷⁸

But the time has come for the courts to reassert themselves. Today, with the growing concern about what actually takes place behind prison walls,²⁷⁹ the time is ripe for the courts to boldly correct bad precedent by acknowledging that there is no 150% cap on attorney's fees in the PLRA, thereby eliminating at least one barrier to prisoner plaintiffs.²⁸⁰ The result would be that a prisoner *might* be able to find an attorney to take his or her case, even if nominal damages are the sole relief available. And again, Congress can always re-write the legislation to further its actual intent.²⁸¹ In the meantime courts should stop committing the logical fallacy of the inverse;²⁸² stop reading nonexistent words into the statute;²⁸³ stop deterring meritorious civil rights litigation;²⁸⁴ and start ensuring that those attorneys who labor on behalf of some of our most vulnerable citizens are appropriately remunerated for their significant form of civil service.²⁸⁵

278. Riveland *supra* note 246, at 174 (“Today . . . many of the positive changes that have occurred in the nation’s prisons . . . are in some jeopardy. . . . Access to courts previously available to inmates to challenge conditions of confinement has been limited by congressional passage of the Prison Litigation Reform Act . . .”).

279. *See, e.g.,* Davis v. Ayala, 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring) (“[T]he condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest. . . . [A]nd consideration of these issues is needed.”).

280. *See generally supra* Section II(B)(1) and text accompanying note 258.

281. *See supra* text accompanying note 245.

282. *See supra* Section II(B)(1).

283. *See supra* Section II(B)(1).

284. *See supra* Section II(B)(2).

285. This author believes that just as *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and the other desegregation cases came to define their era, so too will the conditions of confinement cases—spurred on by a proper reading of the PLRA—come to define the first half of the twenty-first century. Our prison system is our national shame. It is time to remedy this wrong that for too long we have allowed to fester.