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Murphy's Law: For Attorney's Fees Shifting Under the PLRA, Everything That Could Go Wrong Has Gone Wrong

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— Note —

MURPHY'S LAW: FOR ATTORNEY'S FEES SHIFTING UNDER THE PLRA, EVERYTHING THAT COULD GO WRONG HAS GONE WRONG

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INTRODUCTION

On July 25, 2011, Charles Murphy went to sit down for lunch and found a mess of food and water on his seat.[1] As a prisoner at Vandalia Correctional Center, Mr. Murphy ate at an assigned seat at a designated time.[2] He reported the mess on his seat to Correctional Officer Smith, who ended up escorting Mr. Murphy from the dining area in handcuffs.[3] Officer Smith brought Mr. Murphy to segregation, where another Officer asked him some questions.[4] When Mr. Murphy was not forthcoming, Officer Smith started putting "his finger in and

1. Murphy v. Smith, 844 F.3d 653, 655 (7th Cir. 2016), *aff'd*, 138 S. Ct. 784 (2018).

2. *Id.*

3. *Id.*

4. *Id.*

out of Murphy's ear, while asking Murphy if he was deaf."[5] Officer Smith's juvenile behavior quickly escalated to violence after Mr. Murphy, remaining relatively calm, talked back.[6] Smith hit Murphy in the face and put him in a chokehold until he passed out.[7] Then, Smith and another officer dragged the unconscious Mr. Murphy into a cell and pushed him onto the ground.[8] Mr. Murphy's head hit the cell's metal toilet on the way down.[9] Smith and the other officer stripped Mr. Murphy and left him lying on the ground, where he stayed for more than half an hour before anyone checked his condition.[10] The assault left Murphy with a "crushed" eye socket that required surgery.[11]

Mr. Murphy sued the officers for excessive force and recovered $307,733.82 in damages, along with $108,446.54 in attorney's fees.[12] But, under the Prison Litigation Reform Act ("PLRA"), suits brought by prisoners are subject to special rules that do not apply in other civil suits.[13] One of the provisions of the PLRA works to limit available attorney's fees by requiring that up to 25% of a prisoner plaintiff's judgment be applied toward the award of attorney fees.[14] After the Supreme Court ruled in Mr. Murphy's case, the defendants were responsible only for $31,513.09 in attorney's fees.[15] Basically, being a prisoner cost Mr. Murphy about $77,000.[16]

5. *Id.*

6. *Id.* ("Murphy did not struggle with the officers as they walked, although he taunted Officer Smith, promising what would happen the next time he 'ain't got no handcuffs on.'").

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 655–56.

11. *Id.* at 656.

12. *Id.*

13. *See* 42 U.S.C. § 1997e (listing those rules).

14. *Id.* § 1997e(d)(2) ("Whenever a monetary judgment is awarded [to a prisoner plaintiff who is also awarded attorney's fees], 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.").

15. Murphy v. Smith, 138 S. Ct. 784, 787 (2018) ($108,446.54 minus 25% of $307,733.82 is $31,513.09).

16. *See id.* As a practical matter, prisoner plaintiffs might enter into any of a number of types of fee arrangements with attorneys, and payment schedules and enforcement procedures are beyond the scope of the Note. For the sake of clarity, most of the discussion herein will assume that attorneys typically charge prisoner plaintiffs a reasonable fee based on a reasonable hourly rate, as opposed to working pro bono or on a contingent fee basis, and that the prisoner plaintiff is expected to pay the entire fee regardless

Charles Murphy fared relatively well under the PLRA. Presumably, after paying his attorneys, he was left with over $200,000 in damages. This may be significantly less than what the jury determined would make him whole, but it is more than most prisoners can hope for. Jeffery Royal, for example, had his wheelchair confiscated by prison officers, forcing him to crawl on the ground.[17] When he filed grievances against them, they retaliated by putting him in administrative segregation for two months.[18] He sued for retaliation violative of his First Amendment rights and won, but since he didn't suffer a physical injury as a result of the segregation, he was awarded only $1 in nominal damages.[19] Royal persisted through lengthy and expensive litigation, and since he ultimately proved in court that the prison officials had wrongfully violated his constitutional rights, the Civil Rights Attorney's Fees Act of 1976 entitled him to an award of "reasonable attorney's fee[s]".[20] The PLRA limited his award of attorney's fees to $1.50.[21]

The PLRA was intended to reduce only frivolous prisoner litigation,[22] but its attorney's fees provisions severely reduce the compensation awarded to prisoner plaintiffs who have proven in court that their claims have merit.[23] The reduction in attorney's fees directly works against prisoners who have vindicated their rights, and it deters

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of any award of attorney's fees. The award, in theory, functions as compensation to the plaintiff for her costs. This is consistent with the theory underlying the policy of fee shifting in America, *see infra* Part I, as well as the treatment that courts typically give attorney's fees. *See, e.g.*, Shepherd v. Goord, 662 F.3d 603, 610 (2d Cir. 2011) (applying 10% of the judgment toward the fee award by ordering the entire $1 damages award and merely reducing the $1.50 attorney's fee award to $1.40). The purpose of the Note is analyzing the policy supporting the competing interpretations of the PLRA's attorney's fees provisions. As such, fee awards will be considered money in the pockets of plaintiffs to be used to pay their legal bills.

17. Royal v. Kautzky, 375 F.3d 720, 726 (8th Cir. 2004) (Heaney, J., dissenting).

18. *Id.* at 727.

19. *Id.* at 726 (majority opinion).

20. *See* 42 U.S.C. § 1988(b).

21. *Royal*, 375 F.3d at 726. The attorney's fees provisions of the PLRA include the phrase "[i]f the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant," which has been interpreted as a hard cap on attorney's fees at 150% of the judgment. 42 U.S.C. §1997e(d)(2); *see, e.g.*, Walker v. Bain, 257 F.3d 660, 667 (6th Cir. 2001).

22. 141 CONG. REC. 4275 (1995) (statement of Rep. Charles Canady).

23. 42 U.S.C. § 1997e(d).

attorneys from representing clients with *meritorious* claims.[24] An excessive-force claim against a prison guard will elicit a smaller attorney's fee award than the exact same claim against a police officer, even if everything else—the injury, the damages award, the strength of evidence offered, the culpability of the wrongdoer, the amount of time and energy spent proving the claim, the reasonable attorney's fee calculated by the court, etc.—were the same.[25] The exact same right vindicated in the exact same circumstances being compensated to a lesser degree solely because of the plaintiff's status as a prisoner means that rights of prisoners are simply afforded less value. This Note will explore how the PLRA provisions governing attorney's fees have been misinterpreted to the detriment of prisoner plaintiffs. Part I will provide some background about the scheme of attorney's fee awards in the United States, particularly the policy rationale behind when such fees are awarded. Part II will describe the PLRA's fee provisions and revisit the legislative history in the appropriate context provided by Part I. Part III will discuss how courts have failed to properly interpret the attorney's fees provisions of the PLRA, with a special focus on the shallow analysis employed in *Murphy v. Smith*.[26] Part IV will provide an alternate interpretation that better conforms to both the text of the statute and the purpose of the PLRA; one that does not unjustly reduce the value of prisoners' rights.

I. THE AMERICAN RULE AND THE CIVIL RIGHTS ATTORNEY'S FEES ACT

In the United States, the general rule governing the allocation of attorney's fees is the American Rule. In affirming that the American Rule is the default doctrine and the starting point for any judicial decision to award fees, the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*[27] stated the rule clearly and succinctly: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."[28] Each party is responsible

24. *Walker*, 257 F.3d at 670 ("We are aware that § 1997e(d)(2) will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims."); Karen M. Klotz, Comment, *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, 790–92 (2000); Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CALIF. L. REV. 999, 1020 (2001).

25. 42 U.S.C. § 1997e(d)(2). For an illustration, see Branham, *supra* note 24, at 1000–02.

26. 138 S. Ct. 784 (2018).

27. 421 U.S. 240 (1974).

28. *Id.* at 247.

for her own costs, regardless of the outcome. This explicit rejection of the English Rule—which can force the loser to pay the costs incurred by the winning party—has been a feature of American jurisprudence for the vast majority of our country's history.[29]

This shift in fee allocation represents a reflection of American values of "democracy and individualism."[30] One supposed effect of the English Rule is that plaintiffs hesitate to press even meritorious claims in order to avoid having to pay their opponents' fees, disproportionately chilling suits by poor plaintiffs.[31] The American Rule recalibrates this balance of power and incentives. When parties generally have to pay only their own attorney's fees, potential plaintiffs' concerns that they might be slammed with the costs of their opponents' defense and defendants' fear of having to finance attacks against them are both mitigated. While the original rationale for this default rule may be difficult to discern from a historical perspective,[32] in 1967 the Supreme Court described a justification that has been embraced in modern times as a major part of the policy underpinning the practice: poor plaintiffs are discouraged from bringing suits to "vindicate their rights" when failure means taking on their opponents' fees.[33]

29. The American Rule was the "general practice" in the States by at least 1796, when the Supreme Court reversed a lower court that had awarded fees. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); *see also* Phyllis A. Monroe, Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 Alb. L. Rev. 148, 150–54 (1981).

30. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1635 (1993); *see also* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law & Contemp. Probs. 9, 10, 17–18 (1984) (suggesting that "frontier individualism" and the application of freedom of contract to attorney-client arrangements played an ideological role in the formulation in the rule); Monroe, *supra* note 29, at 152–54.

31. Mary Frances Derfner, *The True "American Rule" Drafting Fee Legislation in the Public Interest*, 2 W. New Eng. L. Rev. 251, 256, n.16 (1979); David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 Ind. Int'l & Compar. L. Rev. 583, 607–08 (2005); Monroe, *supra* note 29, at 149.

32. Vargo, *supra* note 30, at 1634 ("[T]here is little historical information about the policies of the American Rule."). *See generally* Leubsdorf, *supra* note 30, at 9 (opening with "[i]n a sense, the American rule has no history" and arguing that the ideological factors that are typically said to support the rule do not actually explain its origin).

33. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("[I]t has been argued that . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."); *see also* Thomas Allan Heller, *An Overview of the Law of Attorney Fees in the United States: The American Rule Is Not So Simple After All*, 10 LeXonomica 51

The same justification has been extended to support the myriad of fee-shifting statutes that amend the American Rule in certain circumstances, reflecting the idea's significance to the fee-allocation regime in the United States. Congress has passed hundreds of fee-shifting statutes[34] authorizing courts to assess a prevailing plaintiff's attorney's fees against the defendant in many situations.[35] A frequent justification for this sort of fee-shifting is the "private attorney general" theory[36] that encouraging individual citizens who have suffered harm to sue wrongdoers is good for everyone because there is a collective or state interest in the vindication of important individual rights or other "polic[ies] that Congress consider[s] of the highest priority."[37]

This interest is strongest in situations where a large corporation or government actor infringes on the fundamental rights of a potential plaintiff who both belongs to a vulnerable population and would typically not be able to afford litigation against a resource-rich defendant.[38] Awarding attorney's fees to prevailing parties in these cases works both ends of the problem by removing a financial barrier to pursuing claims that are in the public interest and increasing the financial incentive to avoid harming others.

If widening access to the justice system for poor plaintiffs is a core feature of the American Rule, then one-way fee shifting[39] when defendants are particularly powerful or the rights being vindicated are

(2018); Vargo, *supra* note 30, at 1635 (citing *Fleischmann Distilling Corp.*, 386 U.S. at 718) ("Litigation of basic rights was not to be discouraged by rules that denied access to the courts."); Monroe, *supra* note 29, at 153–54.

34. Heller, *supra* note 33, at 53.

35. *See, e.g.*, 42 U.S.C. § 1988 (civil rights); 42 U.S.C. § 3613(c)(2) (fair housing); 29 U.S.C. § 216(b) (employment); 15 U.S.C. § 1691e(d) (consumer protection).

36. Armand Derfner, *Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976*, 37 Urb. Law. 653, 654 & n. 6 (2005) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)) (attributing the term to Judge Jerome Frank (citing Associated Indus. of N.Y. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943))); Heller, *supra* note 33, at 53 ("[T]he so-called Private Attorney General doctrine . . . provides that a plaintiff should be awarded attorney's fees when he or she has effectuated a strong Congressional policy which has benefitted a large class of people . . . .").

37. *Piggie Park*, 390 U.S. at 402.

38. *See* Issachar Rosen-Zvi, *Just Fee Shifting*, 37 Fla. St. U. L. Rev. 717, 718–22 (2010).

39. "One-way" fee shifting refers to the common fee shifting schemes that favor awarding fees to plaintiffs but not necessarily defendants. Root, *supra* note 31, at 588.

particularly important is a natural exception to the Rule.[40] In fact, one-way fee-shifting statutes and other exceptions to the basic American Rule have become so prevalent that any understanding of the "true" American Rule is not complete without recognition that there is a conditional one-way fee shift when there is a public interest involved.[41]

Indeed, once the Supreme Court recognized the private-attorney-general theory as the justification for fee-shifting statutes,[42] lower courts began using the theory to award attorney's fees to prevailing plaintiffs even where no statute authorized the award.[43] It didn't take long for the Supreme Court to clarify that only Congress can define the conditions under which the private-attorney-general theory supports a policy of fee shifting.[44] *Alyeska* reestablished the American Rule as the guiding principle for courts, eliminating judges' discretion to shift fees under the private-attorney-general theory without specific statutory authorization.[45] Relying on a statute from 1853, the *Alyeska* Court erased judicial discretion to award attorney's fees "when the interests of justice so require."[46]

Congress responded with its own clarification. In the year following the decision in *Alyeska*, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, codified as 42 U.S.C. § 1988: "In any action or proceeding to enforce a provision of [certain civil rights statutes] . . . 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 . . . ."[47]

Put simply, § 1988 "authoriz[es] the district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation,"

40. Derfner, *supra* note 36, at 654. One-way fee shifting offers the greatest mitigation of concerns about poor plaintiffs not being able to afford to press worthwhile claims because it offers the benefit of the English Rule—i.e., plaintiffs are made whole without incurring fees—without the risk. *See* Vargo, *supra* note 30, at 1635 ("A fee-shifting rule that operates as a one-way shift in favor of injured plaintiffs affords the greatest access to justice.").

41. Derfner, *supra* note 31, at 281 ("[T]he real American rule, every bit as deeply rooted in our history and in congressional policy is that attorneys fees are granted in the United States to private parties who act as agents of public policy." (footnote omitted)); Derfner, *supra* note 36, at 654.

42. *Piggie Park*, 390 U.S. at 402 (examining the rationale behind the fee-shifting provisions to determine that they typically direct courts to award fees "unless special circumstances would render such an award unjust").

43. Derfner, *supra* note 36, at 655–56.

44. *Id.* at 656–57; Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975).

45. *Alyeska Pipeline*, 421 U.S. at 260–64.

46. *Id.* at 272 (Marshall, J., dissenting).

47. 42 U.S.C. § 1988(b).

but courts have had to wrestle with what it means to be a "prevailing party" and what it means for an attorney's fee to be "reasonable."[48] A plaintiff is a prevailing party entitled to reasonable attorney's fees when the court grants some "relief on the merits of [the plaintiff's] claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior" to the plaintiff's benefit.[49] Notably, a plaintiff is a prevailing party even when she wins only nominal damages.[50] The value of shifting the burden of attorney's fees to defendants comes from the nature of the right that was violated and not from the value of the money judgment awarded.[51]

Section 1988 authorizes attorney's fees awards for both prevailing plaintiffs and prevailing defendants, but under different standards.[52] When authorized by statutes such as § 1988, courts should exercise their discretion and award fees to prevailing plaintiffs, except in unusual circumstances.[53] Prevailing defendants, on the other hand, should be awarded fees only when dragged into court by suits that are "clearly frivolous, vexatious, or brought for harassment purposes."[54]

Once the court determines that a party has prevailed, the next step is to calculate a "reasonable" fee using the "lodestar" method of multiplying the reasonable number of hours spent by the reasonable hourly

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

49. Farrar v. Hobby, 506 U.S. 103, 111–12 (1992).

50. *Id.* at 112.

51. City of Riverside v. Rivera, 477 U.S. 561, 574–75 (1986) ("[A] successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. . . . Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief.").

52. Derfner, *supra* note 36, at 660.

53. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (reasoning that the private attorney-general theory supports applying the statute such that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust"). *Piggie Park* predates § 1988, but it involved a fee-shifting statute using substantially the same language conferring discretion to award fees to a "prevailing party." *Piggie Park*, 390 U.S. at 401 n.1 (quoting 42 U.S.C. § 2000a-3(b)). The Senate report that accompanied the passing of section 1988 cited *Piggie Park* to indicate that courts should default to granting authorized awards to prevailing plaintiffs, and the Court embraced this directive. *Hensley*, 461 U.S. at 429.

54. S. Rep. No. 94-1011, at 5 (1976) (citing U.S. Steel Corp. v. United States, 385 F. Supp. 346, 348 (W.D. Pa. 1974), *aff'd*, 519 F.2d 359 (3d Cir. 1975)); *see also* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); Derfner, *supra* note 36, at 660.

rate, often based on "prevailing market rates in the relevant community."[55] Once determined, this figure is presumed reasonable and automatically accounts for all the relevant factors, though the fee could be enhanced if the party requesting the fee provides specific evidence of extraordinary circumstances.[56] By definition, fees calculated using the lodestar amount are not excessive fees that could be considered a windfall to overzealous attorneys chasing fee awards.[57]

The private-attorney-general theory has persisted as the core of fee shifting in civil-rights cases. Prisoner litigation brought to redress violations of constitutional rights falls squarely into the purview of § 1988 and its underlying philosophy, which strikes a balance between deterring frivolous suits and encouraging meritorious ones.[58] It is against this background that Congress turned specifically toward the fee-shifting regime in suits brought by prisoner plaintiffs.

II. Legislative Failure

A. The Attorney's Fees Provisions of the PLRA and the Private-Attorney-General Theory

Alyeska practically invited Congress to legislate on the appropriate scheme of fee shifting in any given circumstance.[59] As discussed in the previous section, determining whether and how to shift fees involves balancing the public's interest in seeing certain rights vindicated against concerns about frivolous litigation and unjust penalties against losing parties. Failing to thoroughly consider the appropriate factors can lead to unjust results, and failing to word fee-shifting statutes clearly and carefully can lead to results that undermine the intent behind them.[60] In 1996, when Congress passed the PLRA and its attorney's fees provisions, it redistributed prisoner-litigation costs either without providing sufficient clarity regarding how they should be applied and

55. Blum v. Stenson, 465 U.S. 886, 895 (1984); Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 563 (1986).

56. Perdue v. Winn *ex rel* Kenny A., 559 U.S. 542, 552–53 (2010).

57. *See id.* at 552 ("[A] reasonable attorney's fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys." (alteration in original) (quoting *Blum*, 465 U.S. at 897)).

58. S. Rep. No. 94-1011, at 5 ("[Section 1988] deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in 'bad faith' under the guise of attempting to enforce the Federal rights created by the statutes listed . . . ."); *see* Fox v. Vice, 563 U.S. 826, 829 (2011) (separating frivolous claims from non-frivolous ones brought in the same action for the purpose of awarding attorney's fees to the defendant).

59. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 271 (1975) ("[I]t is not for us to invade the legislature's province by redistributing litigation costs . . . .").

60. Derfner, *supra* note 31, at 276–81.

possibly without due consideration of the appropriate factors.[61] The PLRA provisions regarding attorney's fees, codified at 42 U.S.C. § 1997e(d), are as follows:

> (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 (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.
>
> (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.[62]

As interpreted by courts to date, paragraph (1) ensures that attorneys cannot recover fees for services or claims ancillary to proving a violation of constitutional rights or for claims that fail.[63] Paragraph (2) is the fee-shifting portion of the statute. The first sentence has recently been found to require that the full 25% of a prevailing prisoner plaintiff's judgment be put toward the award of attorney's fees before

61. A discussion of the relevant legislative history appears below, *infra* Part II(B).

62. 42 U.S.C § 1997e(d).

63. *See, e.g.*, Dannenberg v. Valadez, 338 F.3d 1070, 1075–76 (9th Cir. 2003) (holding that a fee award calculated under the PLRA cannot include time spent by counsel on unsuccessful claims).

the defendant is responsible for any amount of that award.[64] The second sentence is read as a hard cap on available attorney's fees, limiting the fees to 150% of the judgment,[65] even when a nominal-damages judgment results in the reduction of the award to $1.50 when a reasonable fee might have been thousands of dollars.[66] Paragraph (3) establishes a maximum rate that attorneys can use to calculate their fees, supplanting the "reasonable" rates allowed under § 1988 with rates no more that 150% greater than the rates established by the Judicial Conference for payment of court-appointed attorneys.[67] Paragraph (4) simply clarifies that attorneys and prisoners are free to agree on fees that exceed those available as an award.[68]

This scheme of fee awards does not completely recategorize prisoners as plaintiffs who do not deserve fee shifting grounded in the private attorney-general theory. Paragraph (1) mitigates against concerns about frivolous litigation by ensuring that fees are "directly and reasonably" connected to claims that implicate important rights and are comparable to fees paid to public servants, but it stops short of completely overwriting § 1988 for prisoner suits.[69] Paragraphs (1) and (3) work together to limit the possibility of prisoners with less-than-meritorious claims being awarded excessive fees while still compensating attorneys who help prisoners prove actual constitutional violations.[70] The prevailing interpretation of paragraph (2) departs from this model. The hard cap on fees at 150% of the judgment predicates the fee award on the ability of the prisoner plaintiff to win damages as opposed to "proving [a] . . . violation of [her] rights."[71] When coupled with the PLRA's elimination of damages for non-physical injury, certain violations of constitutional rights that result in legally recognized actual injury to prisoners become completely excepted from § 1988 fee shifting,

64. Murphy v. Smith, 138 S. Ct. 784, 786, 790 (2018). A critique of this interpretation and the Court's reasoning in *Murphy* appears below. *See infra* Part III.

65. *See, e.g.*, Walker v. Bain, 257 F.3d 660, 669 (6th Cir. 2001). This is another arguably erroneous interpretation of the text. *See infra* Part III(B).

66. *See, e.g.*, Keup v. Hopkins, 596 F.3d 899, 905–06 (8th Cir. 2010); Boivin v. Black, 225 F.3d 36, 40–41 (1st Cir. 2000).

67. 42 U.S.C. § 1997(e)(d)(3); *see also* 18 U.S.C. § 3006A(d)(1).

68. 42 U.S.C. § 1997(e)(d)(4).

69. *Id.* § 1997e(d)(1) ("In any action brought by a prisoner . . . in which attorney's fees are authorized under section 1988 . . . such fees shall not be awarded, *except to the extent that* [the following conditions are met]." (emphasis added)).

70. Paragraph (1) codifies the narrow availability of fees, and paragraph (3) ensures that the rate used to calculate a reasonable fee is not excessive. *Id.* § 1997e(d).

71. *Id.* § 1997e(d)(1)(A).

even when properly proved in court.[72] Further, the mandate that a defendant is not responsible for an attorney's fee award until that award exceeds 25% of the prisoner plaintiff judgment effectively forces the prevailing plaintiff to pay at least some of her own fees. These provisions return parties engaged in prisoner litigation to the classic American Rule in whole or in part, depending entirely on the amount of damages awarded rather than on the public interest in vindicating the right that was violated.

The un-shifting of fees under paragraph (2) works to discourage all prisoner litigation relative to civil-rights litigation by non-prisoners, regardless of merit or frivolousness and without accounting for the effects of the rest of the PLRA.[73] A review of the PLRA's legislative history casts some doubt on to whether Congress intended this effect.[74] While the record provides little insight into how each provision of the PLRA is justified in light of the others and in pursuit of Congress's stated objective, the objective is clearly articulated as the prevention of frivolous suits *without* hindering meritorious claims.[75] As explored below, Congress either did not thoroughly consider the effects of the attorney's fees provision in the context of the PLRA overall, or they simply drafted an unclear statute that has been misinterpreted.[76]

B. The Relevant Legislative History of the PLRA

The express purpose of the PLRA was to reduce frivolous prisoner litigation through wide-reaching and comprehensive reforms to when and how a prisoner can bring a claim in federal court.[77] Proponents of

72. *See, e.g.*, Thompson v. Smith, 805 Fed. App'x 893, 905 (11th Cir. 2020) (remanding to the district court to determine whether the plaintiff's injuries from being pepper sprayed were *de minimis*, in which case only nominal damages are appropriate and the 1997e(d)(2) fee caps would limit the fee award to less than $15).

73. Branham, *supra* note 24, at 1029–34; Klotz, *supra* note 24, at 793. *See infra* Part IV(B).

74. *See infra* Part II(B).

75. 141 CONG. REC. 35,797 (1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits is not only costly, but makes it difficult for courts to consider meritorious claims. Indeed, I do not want to prevent inmates from raising legitimate claims.").

76. In 1979, over a decade before the PLRA was passed, one commentator wrote that "[a] careless attitude on the part of Congress can result not only in attorneys fee provisions which are ineffective or anomalous, but also in provisions which are extremely counter productive." Derfner, *supra* note 31, at 276.

77. When the PLRA was being considered it sported the following an epitaph: "A BILL [t]o provide for appropriate remedies for prison condition lawsuits, to discourage frivolous and abusive prison lawsuits, and for other purposes." Prison Litigation Reform Act of 1996, S. 1279, 104th Cong. (1995); *see also* 142 CONG. REC. 5193 (1996) (statement of Sen. Kennedy)

the bill pursued this objective by packaging together provisions limiting access to and recovery from courts, including the imposition of stringent exhaustion requirements,[78] restriction of courts' discretion to waive filing fees for indigent prisoners,[79] revocation of prisoners' ability to bring claims for mental or emotional injury "without a prior showing of physical injury,"[80] and, of course, limitations on the recovery of attorney's fees.[81] While proponents of the bill declared that they did not intend to frustrate meritorious prisoner litigation, they did not explain how the legislation would avoid stifling meritorious claims.[82] Nor did they bother to distinguish between meritorious and frivolous claims when explaining their reasoning; in fact, some argue that the PLRA "was clearly designed to cut the number of *all* lawsuits filed by prisoners," not just the frivolous ones.[83]

Congress's deliberation over the PLRA was notoriously short[84] and one-sided.[85] Large swaths of the record are dominated by retellings of the most extreme examples of frivolous prisoner lawsuits the proponents

("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.").

78. 42 U.S.C. § 1997e(a); *see* Woodford v. Ngo, 548 U.S. 81, 88 (2006); Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 301–02 (2007); Kathleen J. McCabe, Note, Woodford v. Ngo*: Creating a Barrier to Justice Using the PLRA Exhaustion Provision*, 17 TEMP. POL. & C.R. L. REV. 277 (2007).

79. 28 U.S.C. § 1915. *See generally* Joshua D. Franklin, Comment, *Three Strikes and You're Out of Constitutional Rights? The Prison Litigation Reform Act's "Three Strikes" Provision and Its Effect on Indigents*, 71 U. COLO. L. REV. 191 (2000); Walker Newell, *An Irrational Oversight: Applying the PLRA's Fee Restrictions to Collateral Prisoner Litigation*, 15 CUNY L. REV. 53 (2011).

80. 42 U.S.C. § 1997e(e).

81. *Id.* § 1997e(d).

82. *See* 141 CONG. REC. 35,797 (1995) (statement of Sen. Hatch).

83. Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant to?*, 49 UCLA L. REV. 1655, 1667 (2002).

84. *See, e.g.*, 142 CONG. REC. 5193 (1996) (statement of Sen. Kennedy); Shay & Kalb, *supra* note 78, at 300 (noting that the PLRA was "[p]assed hastily and with scant legislative history").

85. Winslow, *supra* note 83, at 1666–67; Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away with More than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 209–14 (2004); Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1213–18 (2020).

could find, curated precisely for the purpose of justifying restrictions.[86] Supporters of the PLRA bolstered this anecdotal evidence with statistics, focusing on the cost of defending prisoner litigation, the increase in sheer volume of prisoner claims, and the low rate of prisoner plaintiff success.[87] Like the anecdotal accounts of frivolous cases, these statistics were largely mischaracterized.[88] For example, the increase in prisoner claims was colored as a crisis of frivolous litigation, but the increase in prisoners bringing claims lagged behind the increase in the country's prison population overall—between 1980 and 1996, "the rate at which inmates filed petitions" actually declined.[89]

More troubling than the questionable connection between the evidence of a problem and actual frivolousness of prisoner claims is the questionable connection between caps on attorney's fees and reducing frivolous claims. Proponents of the PLRA were greatly concerned with the estimated $81.3 million in taxpayer money spent annually on defending prisoner suits, though that figure does not distinguish between meritorious and frivolous claims.[90] Many PLRA provisions—the exhaustion requirement and filing-fee limits, for example—mitigate costs on the front end of prisoner litigation by diverting minor claims to

86. Proponents of the bill frequently bemoaned prisoners who brought claims over things like chunky peanut butter and bad haircuts, but commentators have suggested that these suits were mischaracterized. Macfarlane, *supra* note 85, at 1217–18; Chen, *supra* note 85, at 213–14. At one point, a list titled "Top 10 Frivolous Inmate Lawsuits Nationally" was entered into the record. 141 CONG. REC. 27,045 (1995).

87. *E.g.*, 141 CONG. REC. 38,276 (1995) (statement of Sen. Kyl); Winslow, *supra* note 83, at 1663–65.

88. Winslow, *supra* note 83, at 1665 ("[T]he numbers introduced by PLRA proponents were technically correct, but . . . introduced without context.").

89. *Id.* at 1663 (quoting JOHN SCALIA, U.S. DEP'T OF JUST., PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96 FEDERAL JUSTICE STATISTICS PROGRAM 5 (1980–96) (noting that, while the number of petitions filed increased, the rate decreased 17%)). As for the high rate of prisoner suits "dismissed without the inmate receiving anything," success rates of non-prisoner civil suits from about the same time the PLRA was passed are similarly low, and a closer examination of dismissed prisoner claims would probably have revealed that most dismissals had nothing to do with whether the suit was frivolous or not. *Id.* at 1665–66 (quoting Letter from Attorneys General of Nevada, California, Arizona, and Missouri, Chairs and Vice-Chairs of NAAG Inmate Litig. Task Force and NAAG Crim. L. Comm., to Senator Bob Dole (Sept. 19, 1995), *reprinted in* 141 CONG. REC. S14,417-18 (daily ed. Sept. 27, 1995)).

90. *Id.* at 1664–65; 141 CONG. REC. 26,553 (1995) (statement of Sen. Dole); 141 CONG. REC. 38,276 (1995) (statement of Sen. Kyl). Concerns about the burden of prisoner litigation on taxpayers have not disappeared. *See generally* Sarah Vandenbraak Hart, *Evaluating Institutional Prisoner's Rights Litigation: Costs and Benefits and Federalism Considerations*, 11 U. PA. J. CONST. L. 73 (2008).

grievance processes and by giving courts tools with which to easily dismiss meritless claims.[91] The provisions capping attorney's fees, however, directly apply only to prisoner plaintiffs who have proven that their constitutional rights were violated.[92] In contrast to the procedural changes described above, the fee-capping provisions can deter frivolous suits only *indirectly*, by lowering the value of a positive outcome in court. Not only is it unclear why the presumably cost-efficient fee-shifting process under § 1988 is inadequate, but the deterrent effect of PLRA fee capping is questionable at best.[93]

At first glance, the attorney's fees provisions of the PLRA might be an appropriate response to concerns about frivolous prisoner litigation based on the same basic logic as the shift from the English Rule to the American Rule, only in reverse.[94] If the private-attorney-general theory, through § 1988, provided too much incentive for prisoner claims, then it would make sense to mitigate the pro-plaintiff effect that § 1988 has on prisoner litigation by passing prisoner-specific attorney's fees rules. But the attorney's fees provisions of the PLRA were not passed on their own; they were passed together with an exhaustion requirement, filing-fee provisions, a physical-injury requirement, and more.[95] Since there was no reason for Congress to believe these other provisions would be ineffective, the fee-capping provisions were perhaps predictably redundant, especially since fee-shifting under § 1988 already struck a balance that both discouraged frivolous suits and encouraged meritorious ones.[96]

Why burden successful prisoner plaintiffs with reduced attorney's fees if frivolous litigation could and would be limited by the more direct and efficient procedural changes? The cynical answer is that Congress did not hesitate to overcorrect for frivolousness because it was politically advantageous to appear "tough on crime," and only prisoners—a nonvoting population—would be directly harmed.[97] A more forgiving view would note that the PLRA does not make § 1988 attorney's fees

91. 42 U.S.C. § 1997e. Though they are arguably more tailored to preventing frivolous suits than the attorney's fees provisions, these parts of the PLRA have also been widely criticized. *See, e.g.*, Shay & Kalb, *supra* note 78; McCabe, *supra* note 78; Franklin *supra* note 79; Newell, *supra* note 79.

92. Prisoners, even more than other civil-rights plaintiffs, are not entitled to any attorney's fees until they prove the merit of their claims. 42 U.S.C. § 1997e(d)(1).

93. *Id.* § 1988; *see infra* Part IV(B).

94. *See supra* text accompanying notes 30–37

95. 42 U.S.C. § 1997e; *see also* 28 U.S.C. § 1915.

96. *See supra* text accompanying notes 31–55.

97. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1567 (2003); *see* Spencer Abraham, *Tough on Crime? Not the Clinton Justice Department*, Wall St. J., Sept. 25, 1996, at A23.

completely unavailable. In fact, the provisions could be read in a way that is consistent with both the PLRA's overall goal of reducing frivolous prisoner litigation and § 1988's incentive to pursue constitutional claims. If Congress's intent was to tailor the PLRA to avoid unnecessary collateral damage to the ability of prisoner plaintiffs to pursue meritorious claims—an intent reflected in the construction of the prerequisites for awarding fees and the cap on hourly rates—then courts should interpret the fee-shifting provision as consistently as possible with that goal. When given the opportunity to apply the statute in such a way, courts have instead resolved questions consistently against prisoner plaintiffs, furthering the PLRA's overzealous approach to quashing frivolous prisoner litigation.

III. Judicial Failure

A. Murphy v. Smith *Misses the Mark*

Until *Murphy*, most judges exercised discretion over what amount between any non-zero portion and 25% of prisoner plaintiffs' judgments would be diverted to cover some or all of their attorney's fees.[98] Judges might allocate as little as a single dollar of the judgment, finding the defendant responsible for virtually all of the prisoner plaintiff's attorney's fees, but in another case enforce the maximum, diverting a quarter of the plaintiff's judgment to the fees before putting any of the cost on the defendant.[99] This interpretation gave judges some limited control over how much the PLRA eroded § 1988's shift away from the American Rule depending on the distinct factual circumstances. One circuit court, borrowing from another area of law, directed lower courts to consider

98. Murphy v. Smith, 844 F.3d 653, 660 (7th Cir. 2016) ("[The] decisions of other circuits . . . allow such discretion." (first citing Boesing v. Spiess, 540 F.3d 886, 892 (8th Cir. 2008); and then citing Parker v. Conway, 581 F.3d 198, 205 (3d Cir. 2009))); *see, e.g.*, Shepherd v. Goord, 662 F.3d 603, 610 (2d Cir. 2011) (affirming the district court's reduction of the fee award by 10% of the damages); Farella v. Hockaday, 304 F. Supp. 2d 1076, 1081–82 (C.D. Ill. 2004) (applying 10%, $100, as "sufficiently high to recognize that the plaintiff did not succeed in [all of] his claim[s] . . . and did not recover punitive damages . . . [but] sufficiently low to recognize the plaintiff's pro se status, the fact that counsel was appointed by the court pro bono, and the seriousness of the constitutional violation"); Morrison v. Davis, 88 F. Supp. 2d 799, 811 (S.D. Ohio 2000) (applying a nominal $1, 0.000666%, of the judgment toward the award "[i]n light of the facts of this case, the constitutional rights implicated, and the jury's clear signal that the Defendants should be punished"); Clark v. Phillips, 965 F. Supp. 331, 338 (N.D. New York 1997) (applying the full 25%, $2,500, when the plaintiff did not object to the defendant's request that the court apply the maximum amount).

99. *Compare Morrison*, 88 F. Supp. 2d at 811 *with Clark*, 965 F. Supp. at 338.

> (1) the degree of the opposing parties' culpability or bad faith, (2) the ability of the opposing parties to satisfy an award of attorneys' fees, (3) whether an award of attorneys' fees against the opposing parties could deter other persons acting under similar circumstances, and (4) the relative merits of the parties' positions.[100]

Wielding "broad discretion" over the "appropriate percentage," a district court in the Eighth Circuit could consider other relevant factors as well, such as the economic impact of the outcome on the parties.[101] If the objective of the PLRA was to diligently pursue the delicate balance between vindicating the private-attorney-general theory and minimizing the indirect taxpayer funding of prisoner litigation by putting attorney's fees costs on government-funded institutions, then affording the trial judge some discretion makes sense.[102] If the objective was across-the-board reductions in what prisoner plaintiffs take home in order to indiscriminately discourage prisoner litigation, then mandatory enforcement of the full 25% makes sense.

With virtually no consideration of the legislative objective, the Supreme Court, in *Murphy v. Smith*, interpreted the statute to require that prisoner plaintiffs fully discharge any fee award out of their judgment if at all possible, otherwise they must surrender the maximum 25% of their judgment.[103] In order to arrive at this interpretation, the Court purported to follow a conventional model of construction by beginning with the word choice and grammar of the text and resolving any ambiguities by considering the context.[104] After identifying the competing interpretations of the statutory language, the Court split the statute into chunks to be analyzed separately, looking first at "shall be applied" and then focusing on "to satisfy the amount of attorney's fees awarded."[105] Taking "shall be applied" as an indication that courts must apply some part of the judgment and translating "to satisfy the amount" into "with the purpose of . . . fully discharging," the Court

100. *See* Kahle v. Leonard, 563 F.3d 736, 743 (8th Cir. 2009). The court borrowed factors first articulated in the employee-benefits-litigation context. *Id.*

101. *Id.* Indeed, a brief concurrence in *Kahle* by Chief Judge Loken cautioned the district court that failing to apply section 1997e(d)(2) to discharge the entire fee award on remand could be an abuse of discretion. *Id.* (Loken, C.J., concurring). He noted that Kahle's monetary judgment of $1,100,000 was an enormous sum and that the total fee award of $186,208.88 amounted to less than 17% of that judgment. *Id.*

102. *See supra* Part II(B).

103. Murphy v. Smith, 138 S. Ct. 784, 790 (2018).

104. *Id.* at 787 ("As always, we start with the specific language in dispute.").

105. *Id.* at 787–88 (quoting 42 U.S.C. § 1997e(d)(2) ("[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.")).

took the meaning of the statute to be the mandatory application of the full 25% of the judgment toward the fee award.[106] The Court failed to consider, however, that splitting up the text into chunks, translating the chunks, and then stitching them back together is more likely to confuse the statute's actual meaning than reveal it. The majority in *Murphy*, content that this reconstructed statute was able to stand on artificial legs, failed to interpret "applied to satisfy" in the same way it does "shall be applied" and "to satisfy."[107]

As the dissenting opinion pointed out, the plain meaning of "applied to satisfy" is often "'applied toward the satisfaction of' rather that 'applied in complete fulfillment of,'" which would, in the context of § 1997e(d), only require some discretionary non-zero contribution from the judgment.[108] Both the majority and dissenting opinions identified a common meaning of the words used, backed up their interpretation with analogies to other situations in which something is "applied" to "satisfy" a requirement, and offered up alternative language that Congress could have used to more clearly indicate their meaning.[109] Anyone would be hard pressed to read both opinions and still claim that the text was unambiguous. The majority's critical error was how it resolved that ambiguity.

The majority looked to the "larger statutory scheme surrounding the specific language" of § 1997e(d)(2).[110] The statutory context the Court turned to was primarily the word choice of § 1988 rather than the surrounding provisions of the PLRA.[111] The Court justified this choice by characterizing § 1988(b) as the law that the PLRA was designed to constrain, but also because the issue was discretion, which "[§] 1988(b) confers . . . on district courts in unambiguous terms."[112] The Court reasoned that since the language in § 1988 that specifically grants courts discretion is absent in § 1997e(d), they cannot both confer discretion.[113] Congress would otherwise not "bother[] to write a new law; omit all the words that afforded discretion in the old law; and then

106. *Id.* at 787 (emphasis omitted).

107. *Id.* at 792 (Sotomayor, J., dissenting).

108. *Id.* Indeed, this is how the text was interpreted by every circuit court to take up the question before *Murphy*. *Id.*

109. *Id.* at 787–88 (majority opinion); *id.* at 792–93, 794 (Sotomayor, J., dissenting).

110. *Id.* at 789 (majority opinion).

111. *Id.* ("Comparing the terms of the old and new statutes helps to shed a good deal of light on the parties' positions. Section 1988(b) confers discretion on district courts in unambiguous terms: '[T]he court, in its *discretion, may* allow the prevailing party . . . a *reasonable* attorney's fee as part of the costs' against the defendant." (alteration in original) (quoting 42 U.S.C. § 1988(b) (emphasis added)).

112. *Id.*

113. *Id.*

replace those old discretionary words with new mandatory ones."[114] This analysis is deeply flawed. Section 1997e(d) is not a "new" law that replaces or exists alongside § 1988; it is a provision built on top of § 1988 to constrain how it is applied in the specific instance of prisoner litigation. Section 1988 provides the base law of fee shifting in civil-rights cases, and § 1997e(d) works only to modify the application of that statute.[115] The two statutes must be read together.[116] The words "omit[ted]" from § 1997e(d) would be redundant in that section precisely because they appear in § 1988. These "discretionary words" are not "replaced" at all because § 1988 still applies.[117] District courts retain discretion to award attorney's fees to prevailing prisoner plaintiffs, even as the PLRA provides some limitations on that discretion.

After setting up § 1988(b) as the text to which § 1997e(d)(2) should be compared, the majority briefly turned to the rest of § 1997e(d) merely to point out that the other provisions also "seek[] to restrain, rather than replicate, the discretion found in § 1988(b)."[118] Accepting that this suggests Congress intended paragraph (2) as a restraint on judicial discretion, it remains unclear why the fact that a statute works to limit discretion means that it should be construed to eliminate judicial discretion altogether.

Rather than justifying this elusive logical leap, the majority turned back to § 1988(b), noting that the Court had rejected the old twelve-factor test that courts had used to calculate reasonable attorney's fees and replaced it with the lodestar method because the former afforded

114. *Id.*

115. 42 U.S.C. § 1997e(d) begins as follows: "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 . . . ." § 1997e(d) (footnote omitted). First, the statute immediately recognizes that a prisoner plaintiff might be entitled to attorney's fees "under section 1988." *Id.* Then it mandates that the default rule is to not award "such fees," but the rest of section 1997e(d) describes when "such fees," i.e., fees *authorized under section 1988*, are allowed. *Id. See also*, e.g., Walker v. Bain, 257 F.3d 660, 665 (6th Cir. 2001) ("[T]he PLRA *modifies the application of 42 U.S.C. § 1988* to prevailing prisoners by providing stringent limitations on both the availability and the amount of attorney fee awards." (emphasis added) (footnote omitted)).

116. *See, e.g.,* Morrison v. Davis, 88 F. Supp. 2d 799, 809–11 (S.D. Ohio 2000) ("[T]he suitable approach is to harmonize the expansive approach of § 1988 with the more specific requirements of § 1997e(d).").

117. The Court's choice of language here reveals its circular logic: it supports its contested interpretation of the words as mandatory as opposed to discretionary by calling the words "mandatory" and comparing them to other words that are more clearly discretionary. *Murphy*, 138 S. Ct. at 789.

118. *Id.*

too little guidance and produced disparate results.[119] The majority reasoned that because some guidance was deemed desirable under § 1988, § 1997e(d) should be construed to provide maximum guidance in order avoid the "disparate results" that come from "unguided and free-wheeling choice."[120] This reasoning rings hollow given that any discretion that judges might exercise under § 1997e(d) is already constrained first by the common-law limits on § 1988(b) and further by the other PLRA provisions affecting awards of attorney's fees to prisoner plaintiffs. The majority characterized § 1997e(d)(2) as "affording entirely rudderless discretion,"[121] but in reality, judges assessing attorney's fees awards under the PLRA enjoy very little discretion compared to other awards under § 1988.[122]

Essentially, *Murphy* conflates limiting discretion with providing guidance to judges on how to exercise their discretion. As the majority points out, the text of § 1988(b) is broad but unambiguous: "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ."[123] The twelve-factor analysis that was eventually rejected was an attempt by courts, exercising their discretion, to best determine a reasonable attorney's fee.[124] The source of the test, *Johnson v. Georgia Highway Express, Inc.*,[125] was "cited with approval by both the House and the Senate" when passing § 1988.[126] Once experience revealed the test to be unwieldy, the lodestar method was embraced not only for its simplicity and consistency but also because it was found to incorporate all of the appropriate factors.[127] Since it was viewed as accounting for the same factors that supported the twelve-factor test, preference for the lodestar method should not be viewed as the prioritization of direction at the expense of discretion. Under the lodestar method, judges retain the same discretion section conferred by § 1988(b) that they enjoyed when applying the twelve-factor test; they

119. *Id.* at 789–90 (citing Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 562 (1986)).

120. *Id.* at 790.

121. *Id.*

122. Fee awards granted to prisoner plaintiffs are first subject to all of the limitations of § 1988, including the lodestar guidance that the majority refers to, and then are further limited by the provisions of the PLRA. 42 U.S.C. § 1997e(d). *See supra* text accompanying notes 47–70.

123. 42 U.S.C. § 1988(b); *Murphy*, 138 S. Ct. at 789.

124. *Del. Valley*, 478 U.S. at 562 ("Courts have struggled to formulate the proper measure for determining the 'reasonableness' of a particular fee award. [The dominant] method . . . involved consideration of 12 factors.").

125. 488 F.2d 714 (1974).

126. *Delaware Valley*, 478 U.S. at 562 (first citing H.R. Rep. No. 94-1558, at 8 (1976); and then citing S. Rep. No. 94-1011, at 6 (1976)).

127. *Id.* at 564–65 (citing Blum v. Stenson, 465 U.S. 886 (1984)).

merely have a more efficient and consistent tool to determine what constitutes "a reasonable attorney's fee."[128] Giving § 1997e(d)(2) the same treatment would mean developing straightforward guidance for lower court judges on how to determine what portion between one cent and 25% of the judgment should be reallocated, not removing that discretion altogether.[129]

On its face, § 1997e(d) is silent about whether a district-court judge has discretion over the portion of a judgment that will be applied to the fees except to (1) mandate that some non-zero amount is applied and (2) limit the portion to 25%.[130] The most grounded indication that it should otherwise limit the discretion afforded by § 1988(b) comes from the majority's own narrow reading of the phrase "to satisfy."[131] At best, the majority's logic is circular: supporting the assertion that one competing interpretation is superior by comparing the words of § 1997e(d) *as interpreted* to those in a related statute. At worst, the majority, in a vain attempt to achieve efficient and consistent results, selectively amplified a tenuous textual comparison in order to settle on an interpretation of the statute that conforms with a policy of limited discretion for and maximum guidance to district judges.

Other than an attempt to strictly adhere to textualism, there is no explanation for why the majority in *Murphy* never engaged with the congressional intent behind the PLRA. The declaration that "what may have begun as a close race turns out to have a clear winner" is not convincing as an assurance that the text is unambiguous, especially given the robust dispute over the meaning of the plain text and the majority's own dependence on § 1988(b) to support its interpretation.[132] Members of the majority who do not reject legislative intent out of hand as textualists may have found the legislative history so unhelpful that it considered determining Congressional intent a lost cause.[133]

Even a textualist approach that relies on the statutory context and ignores the legislative history[134]—which appears to be precisely how

128. *See id.* at 562–66.

129. If the Court in *Murphy* had decided to develop such a test, it would not have been working against a blank slate. *See, e.g.*, Kahle v. Leonard, 563 F.3d 736, 743 (8th Cir. 2009); *see supra* text accompanying notes 98–102.

130. 42 U.S.C. § 1997e(d); *see infra* Part IV.

131. § 1997e(d); *see supra* text accompanying notes 110–18.

132. Murphy v. Smith, 138 S. Ct. 784, 790 (2018).

133. The closest the majority comes to addressing Congress's intent is a brief look at a particular part of the legislative history to dismiss, in a footnote, one of Murphy's arguments in support of his position. *Id.* at 790 n.2 ("Did anyone voting on the measure even think about this question? There is no way to know, and we will not try to guess.").

134. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 26–30 (2009).

Justice Gorsuch attempted to approach *Murphy*—should yield a reading of § 1997e(d) that preserves judicial discretion.[135] As discussed below, an interpretation that does *not* cap attorney's fees or indiscriminately apply part of the judgment toward them would be far more consistent not only with the plain text, the surrounding text of § 1997e(d), and the context of § 1988, but also with the purpose of the PLRA, including the cost concerns of its proponents and the *Murphy* majority's distaste for disparate results.[136]

B. The Rest of § 1997e(d)(2): The Illusory Fee Cap

Before turning to how § 1997e(d)(2) should be interpreted, a brief review of how the rest of that paragraph has also been egregiously misconstrued is warranted, since reading both sentences of § 1997e(d)(2) together will provide insight into their meaning. The second part of § 1997e(d)(2) states: "If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant."[137] This has been interpreted as a hard cap on attorney's fees awarded to prisoner plaintiffs that "limit[s] defendants' liability for attorney fees to 150 percent of the money judgment."[138] Support for the fee-capping interpretation is based primarily on the erroneous assumption that § 1997e(d)(2) is rendered "absurd" or "meaningless" unless it is understood to mean that the defendant is not responsible for an award that exceeds 150% of the judgment.[139]

This mistake is the result of a logical fallacy known as the "fallacy of the inverse."[140] When Congress mandated that the defendant pay any award of attorney's fees that does not exceed 150% of the judgment, it made a clear if-then statement. Courts do not need to read into the statute that the inverse is true, and to do so is not logically sound.[141] The plain text of § 1997e(d) is silent on what happens when the award *does* exceed 150% of the judgment. It may be frustrating that § 1997e(d)(2) does not tell us what happens when the fee award is

135. First, resolving the ambiguity of § 1997e(d)(2) by deferring to the discretion conferred by § 1988 would read *less* into trying to divine Congress's intent, since it resolves ambiguity by direct reference to existing law instead of inferring one of multiple competing interpretations of the text. *See id.* Second, the surrounding provisions of § 1997e(d) support deference to § 1988. *See infra* text accompanying notes 150–62.

136. *See infra* Part IV.

137. 42 U.S.C. § 1997e(d)(2).

138. Walker v. Bain, 257 F.3d 660, 667 (6th Cir. 2001).

139. *Id.*; *see also* Eleanor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 Am. Crim. L. Rev. 261, 270–72 (2019).

140. Umphres, *supra* note 139, at 273.

141. *Id.* at 273–74.

greater than 150% of the judgment, but it is unclear why that frustration justifies an irrational interpretation when courts could instead fall back on § 1988 more generally.[142] In a footnote, the *Murphy* Court acknowledges the lack of clarity regarding why Congress chose the language it did for § 1997e(d)(2): "Did anyone voting on the measure even think about this question? There is no way to know, and we will not try to guess."[143] The Court was wrestling with the interpretation the first part of § 1997e(d)(2), but the same uncertainty applies to the "150 percent" language. There is no way to know what Congress intended to happen when the fee award exceeds 150% of the judgment because the statute does not say. That the prevailing guess is based on flawed logic should be enough to reject it, but the fallacy of the inverse is not the only reason to reject the fee-capping interpretation of § 1997e(d)(2). The 25% fee shift and the 150% fee cap both operate as indiscriminate limits on available fees, inconsistent with a proper understanding of § 1997e(d) together with § 1988.

IV. An Accurate Reading of § 1997e(d)

The prevailing interpretation of § 1997e(d)(2) returns prisoner litigation, either in part or in full depending on the judgment, to the

142. *See, e.g.*, McLindon v. Russell, 108 F. Supp. 2d 842, 850–53 (S.D. Ohio 1999), *rev'd and vacated in pertinent part*, 19 F. App'x 349 (6th Cir. 2001); Umphres, *supra* note 139, at 276–80. Umphres also offers a possible explanation for why Congress included the "150 percent" language in § 1997e(d)(2), as opposed to imposing a hard cap on fee awards. In what she dubs "The Reminder Theory," she suggests that language explaining what would happen when the fee was greater than 150% of the judgment was not necessary because of the mathematical impossibility of 25% of the judgment covering an entire fee award that exceeds 150% of the judgment. Umphres, *supra* note 139, at 279–80. She speculates that, in such a case, it would be obvious that the defendant would cover the excess. *Id.* On the other hand, in some instances where the award was less than 150% of the judgment, the 25% taken from the judgment may or may not cover the entire award. *Id.* In this area of relative uncertainty, Congress sought to "remind" courts that the defendant should still cover the excess no matter how small the remainder. *Id.* This theory is less than satisfying, as it invites the question of why Congress chose 150% instead of 100% or 50% or 25.01%. Still, the point worth taking is that even the Reminder Theory is "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." *Id.* at 280.

143. Murphy v. Smith, 138 S. Ct. 784, 790 n.2 (2018) ("Did legislators voting on the measure agree with our interpretation of the first sentence and drop the confirmatory language from the second as flabby duplication? Or did they drop it because, as Mr. Murphy supposes, they thought it erroneous or even just bad policy? Did anyone voting on the measure even think about this question? There is no way to know, and we will not try to guess.").

traditional American Rule.[144] Even when damages are substantial enough that fees are not capped at 150% of the judgment, prisoner plaintiffs must pay their own attorney up to 25% of their judgment, often covering the entire fee.[145] If this was Congress's intent, then the wording and structure of the statute are an absolute mess. Paragraph (1) explicitly stops short of excepting all prisoner litigation from the effects of § 1988 fee shifting, and the plain text of the paragraph (2) does not replace a reasonable fee with a fee dependent entirely on the damages.[146] Paragraph (2) of § 1997e(d) should be read as it is written. When applying "a portion of the judgment . . . to satisfy the amount of attorney's fees awarded against the defendant,"[147] judges should have discretion to determine the size of that portion, so long as they do not exceed the 25% maximum. No one should read into paragraph (2) a cap on fees that does not appear in the text.[148] This interpretation of paragraph (2) must prevail for several reasons. First, it is closer to the plain text of § 1997e(d) than the Court's interpretation,[149] especially when paragraph (2) is read together with paragraphs (1) and (3). Second, it better conforms to the purpose of the PLRA of reducing frivolous suits without unduly restricting meritorious ones. Finally, it produces results that are less absurd, more consistent, and more just than the current prevailing interpretation.

A. Reading the Text and Context of § 1997e(d) as a Whole

In addition to misunderstanding the interplay between §§ 1997e(d) and 1988, the *Murphy* Court's interpretation is flawed in that it goes straight to § 1988 without first reading § 1997e(d)(2) in the immediate context of paragraphs (1) and (3).[150] Walking through the section start

144. *See supra* Part I.

145. *See supra* text accompanying notes 64–72.

146. 42 U.S.C. § 1997e(d) ("(1) In any action brought by a prisoner . . . in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, *except to the extent that* . . . . (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." (emphasis added) (footnote omitted)). *See supra* note 115.

147. § 1997e(d)(2).

148. Umphres, *supra* note 139, at 282–83.

149. *See supra* Part III.

150. *See supra* text accompanying notes 111–19.

to finish can give us a more complete understanding of how each individual provision should function.[151]

Paragraph (1) establishes that the default rule is that prisoner plaintiffs will not be awarded attorney's fees under § 1988, but that under certain circumstances "such fees" are available.[152] Parts (A) and (B) of § 1997e(d)(1) provide for those circumstances.[153] Part (A) focuses on ensuring that the fee is sufficiently tied to "an actual violation of the plaintiff's rights," deferring to § 1988 to identify which rights merit fee shifting.[154] Part (B) mandates a proportional relationship between the amount of the fee and "the court ordered *relief*."[155] This focus on relief mirrors the understanding of § 1988 that connects the reasonableness of a fee to the *relief* granted in vindication of civil rights and not the *damages*.[156] Paragraph (1) appears to be drafted with an understanding of its role in the context of § 1988 and thus focuses on making sure prisoner plaintiffs who are awarded attorney's fees are only being compensated for fees accrued in connection with actual relief ordered specifically in response to a violation of one of the rights that § 1988 protects.[157]

Paragraph (3) reins in any hypothetically high market rates that would produce a large fee under the lodestar method by capping the rate at 150% of the rate used to determine pay for court-appointed

151. *See* Cross, *supra* note 134, at 88 ("[Some] traditional canons [of statutory interpretation] . . . establish a presumption that particular words of a statute should be interpreted according to the company they keep and not viewed in isolation. . . . [T]hese canons tend to . . . prevent[] laws from covering matters unrelated to those expressed in the text.")

152. 42 U.S.C. § 1997e(d)(1); *see supra* note 115.

153. § 1997e(d)(1).

154. *Id.*

155. *Id.* (emphasis added). This proportionality requirement applies *before* paragraph (2), meaning that the fee-capping provisions cannot be properly justified through this "proportionately related" language. § 1997e(d)(2) ("Whenever a monetary judgment is awarded *in an action described in paragraph (1)* . . . ." (emphasis added)). Fees can be awarded under § 1997e(d)(1) *only* if the condition in § 1997e(d)(1)(B) is satisfied, i.e., only awards already "proportionately related to the court ordered relief" can be modified by § 1997e(d)(2). § 1997e(d)(1)(B).

156. *See supra* text accompanying notes 48–51.

157. Requiring that fees be "directly and reasonably incurred in proving" a violation arguably codifies the existing interpretation of § 1988. § 1997e(d)(1)(A); Riley v. Kurtz, 361 F.3d 906, 916 (6th Cir. 2004) ("[T]he 'related claim' limitation set out in *Hensley* has been incorporated into the fee limitation section of the PLRA."); *see* Fox v. Vice, 563 U.S. 826, 834 (2011) ("The fee award, of course, should not reimburse the plaintiff for work performed on claims that bore no relation to the grant of relief . . . ." (citing Hensley v. Eckerhart, 461 U.S. 424, 435 (1983))).

attorneys.[158] By tying the rates to those used for court-appointed counsel, the statute implicitly recognizes that attorneys representing prisoners in the vindication of their constitutional rights are serving a role analogous to the role served by court-appointed counsel. Paragraph (3) tells attorneys that even if they can charge a little more than if they had been appointed, they cannot find some great windfall in pressing prisoner claims: awards are available because they serve the public interest, so they will reflect the pay of a public servant.[159] Thus, even as paragraphs (1) and (3) work to limit courts' discretion under section 1988, they stay squarely within that statute's private-attorney-general-theory roots.

Paragraphs (1) and (3) also function by addressing specific concerns regarding awards of attorney's fees. Where Congress was concerned with low-value suits clogging up the courts, paragraph (1) ensures that prisoner plaintiffs will not be compensated for the cost of their attorney's work on any unsupported claims that just happen to be attached to a successful one.[160] Where Congress was concerned with unscrupulous attorneys trying to pass off excessive fees as reasonable based on the private market, paragraph (3) mandates a rate less subject to manipulation or market whims.[161]

Why would Congress craft careful, targeted policy vehicles in paragraphs (1) and (3), but use paragraph (2) to apply rough and indiscriminate fee-award reductions that penalize meritorious claimants at least as much as they deter frivolous litigants? There is another explanation. Proponents of the PLRA were also concerned with the overall cost of prisoner litigation to states and taxpayers through the state-funded defense of correctional institutions and their officials.[162] This concern presents a unique problem under the private-attorney-general theory: fee shifting is *supposed* to deter wrongdoers,[163] so these costs are a feature of § 1988 rather than a bug. Where a prison or its officer engages in wrongdoing—but after applying all the other provisions of the PLRA, the prevailing prisoner plaintiff is granted a relatively small award of damages—fee shifting is an essential aspect of our system of civil-rights litigation and the private-attorney-general theory is operating exactly as conceived.[164] Proponents of the PLRA, however, also conceived of state-funded institutions shelling out millions in damages, perhaps out of proportion to the evil perpetrated

158. *See supra* text accompanying notes 55–70.

159. *See* § 1997e(d)(3).

160. *See* Winslow, *supra* note 83, at 1662–64.

161. *See* Branham, *supra* note 24, at 1021; Hart, *supra* note 90, at 82–83.

162. *See supra* text accompanying notes 88–94.

163. *See supra* Part I.

164. *See supra* Part I.

by the defendant.[165] In the latter scenario, the hypothetical hyper-successful prisoner plaintiff might be in a better position to pay her own attorney's fees than the resource-poor government defendant. It would be exceedingly difficult for Congress to predict which kinds of cases would result in which of the two foregoing scenarios and legislate accordingly, but any egregious imbalance would be apparent to judges applying the PLRA to attorney's fees awarded after the case has been litigated and a judgment has been entered.

Viewed through this perspective, paragraph (2) is a careful solution to a particular problem, and it is drafted with the same awareness of the private-attorney-general theory, § 1988, and the lodestar method that is demonstrated in paragraphs (1) and (3). The first sentence provides direction to judges on how they should apply the discretion conferred on them by § 1988.[166] It addresses Congress's concern that fee shifting might provide some prisoner plaintiffs with a windfall by giving judges the power to reallocate "a portion of the judgment (not to exceed 25 percent)" toward the fee award.[167] In the scenario that proponents of the PLRA probably had in mind—prisoner plaintiffs earning excessive damages—some portion of the judgment less than 25% very well may discharge the entire fee and still leave the plaintiff with enough compensation that she is made whole. In those cases, the litigants are justly returned to the American Rule because the concerns that drive private-attorney-general fee shifting are mitigated by the large award and offset by congressional concerns about the cost to taxpayers.[168] Most prevailing prisoner plaintiffs, however, would fit into the other scenario, where all the justifications for private attorney-general fee shifting would apply.[169] In those cases, judges would be free to take only some nominal amount, such as a penny or a dollar, from the judgment to apply to the fee award.[170] In close cases, judges would

165. *See supra* text accompanying notes 88–94. This is probably not a realistic view of prisoner litigation; even before the PLRA, prisoners rarely prevailed and prevailing prisoner plaintiffs were awarded lower damages on average than their nonprisoner counterparts. Murphy v. Smith, 138 S. Ct. 784, 793 (2018) (Sotomayor, J., dissenting).

166. *Murphy*, 138 S. Ct. at 797 (2018) (Sotomayor, J., dissenting) ("Just as these surrounding statutory provisions in § 1997e(d) set outward bounds on a district court's exercise of discretion while still preserving the exercise of discretion within those bounds, so, too, does § 1997e(d)(2).").

167. 42 U.S.C. § 1997e(d)(2).

168. *See supra* Part I; *see* Kahle v. Leonard, 563 F.3d 736, 743 (8th Cir. 2009) (Loken, C.J., concurring).

169. *Murphy*, 138 S. Ct. at 793. (Sotomayor, J., dissenting). The prisoner plaintiff is at a disadvantage, likely to have difficulty finding or affording representation under the American Rule, and is vindicating an important right. *See supra* Part I.

170. *See, e.g.*, Morrison v. Davis, 88 F. Supp. 2d 799, 811 (S.D. Ohio 2000).

have to weigh the appropriate factors under the specific circumstances and decide whether some other portion, e.g., 10% of the judgment, was most appropriate.[171] It should not alarm the Court that Congress might trust courts to use their wisdom and experience to promulgate their own standards regarding how to determine what percentage of the judgment should be applied to the fee award. Indeed, that process is precisely how we got from the unwieldy general discretion conferred upon courts by § 1988 to the widely embraced lodestar method.[172]

The *Murphy* Court wondered why Congress would use the word "shall" to mandate that some portion of the judgment apply to the award if the drafters of the PLRA envisioned judges subverting the mandate by applying only a negligible amount.[173] Under the interpretation of § 1997e(d)(2) described above, the answer could be that Congress wanted to make sure judges duly considered the equitable adjustments to fee shifting that any situation might demand. If Congress anticipated that judges would be hesitant to dip into a judgment of damages determined by a jury, then it makes sense to include a statutory mandate that judges apply some portion, *any* portion up to 25% of the judgment, because doing so forces judges to consider what amount is appropriate rather than deferring to juries or to the presumptively reasonable lodestar amount.[174]

If the first part of § 1997e(d)(2) mandates that courts exercise their discretion, then the second part—the so-called 150% fee cap—can be read as a limit on that discretion, which flows originally from § 1988. Under earlier conceptions of a reasonable fee under § 1988, judges had discretion to "adjust the [initial] fee [calculation] upward or downward" in order to achieve the most just fee-shifting result.[175] Thus, the first part of paragraph (2) could be read as giving courts a tool with which to adjust the fee downward and inviting them to use it when appropriate.[176] The second sentence then directs courts not to further adjust the amount downward unless the fee is "greater than 150 percent of the

171. *See, e.g.*, Shepherd v. Goord, 662 F.3d 603, (2d Cir. 2011); *Kahle*, 563 F.3d at 743.

172. *See supra* text accompanying notes 123–28.

173. *Murphy*, 138 S. Ct. at 787 ("If Congress had wished to afford the judge more discretion in this area, it could have easily substituted 'may' for 'shall.'").

174. *See supra* text accompanying notes 124–29.

175. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

176. If paragraphs (1) and (3) represent codification and slight adjustments to fee shifting based on the existing common-law understanding of § 1988 at the time, it is conceivable that Congress borrowed concepts from cases like *Hensley* to determine the best ways to direct courts to exercise discretion under paragraph (2) as well.

judgment."[177] Courts retain their discretion when the award of attorney's fees *is* greater than 150% of the judgment, and they can exercise it to reduce the award if appropriate—or not, hence the silence regarding what happens when the award exceeds 150% of the judgment.[178]

The interpretation described above assumes only that Congress meant what it said, and that it was familiar with the applicable precedent when it did; to the extent the § 1997e(d) is ambiguous, it lets § 1988 fill in the gaps. The existing interpretation embraced by *Murphy*, on the other hand, construes the statute to have a meaning that might be textually plausible, but is less consistent with the surrounding text and the general purpose of the PLRA.[179] Even ignoring the statutory purpose of the PLRA, the interpretation described here better adheres to the plain text and structure of the statute. The fee-cap interpretation infers a mandatory provision that applies in a situation not considered by the plain text, and it is based on the application of a logical fallacy.[180] Instead of making assumptions about meaning based on flawed logic, it is better to resolve the silence of the plain text by reference to the larger statutory scheme, in this case the context provided in paragraphs (1)

177. 42 U.S.C. § 1997e(d)(2) ("If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.").

178. *Id.* The decision in *Farrar v. Hobby*, 506 U.S. 103, 116 (1992), denying an award of fees under § 1988 because the plaintiff received only nominal damages, has been used to provide support for an interpretation of § 1997e(d)(2) that caps fees. Bovin v. Black, 225 F.3d 36, 42 (1st Cir. 2000) ("In light of the Supreme Court's recent pronouncement in *Farrar*, the contrast that Boivin seeks to depict may be more apparent than real."). But *Farrar*, decided before the PLRA was enacted, chastised the lower court for *not* exercising its discretion to limit the award. *Farrar*, 506 U.S. at 114 ("Yet the District Court calculated petitioners' fee award in precisely this fashion, without engaging in any measured exercise of discretion."). Moreover, the famous pronouncement is that "[w]hen 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." *Id.* at 115 (citation omitted). Besides being qualified by the Court's use of the word "usually," the reasoning is that the failure to prove damages indicates that the plaintiff has "prevailed" to a lesser degree. In prisoner cases, however, the PLRA prevents recovery of damages for non-physical injuries, § 1997e(e), and First Amendment and due-process cases often include extreme violations, with the potential to spawn critical institutional change, but yield only nominal damages. *See, e.g.*, Royal v. Kautzky, 375 F.3d 720, 726 (8th Cir. 2004). Finally, *Farrar* states that "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all." *Farrar*, 506 U.S. at 115. If the existing scheme under § 1988 allows for courts to deny fees in some cases where the plaintiff received only nominal damages, then the application of the fee cap is redundant in those circumstances and affects only plaintiffs whose claims merit an award under § 1988 despite *Farrar*.

179. *See infra* Part IV(B)–(C).

180. *See supra* text accompanying notes 139–42.

and (3) first and deference to § 1988 second. Rather than finding the meaning of paragraph (2) best supported by the surrounding text, the *Murphy* majority twisted the words of the statute by plucking them out of context and comparing them to § 1988, ultimately making assumptions about what Congress "wished" to do in order to arrive at its conclusion.[181] The interpretation presented here, by contrast, resolves any ambiguity by looking at § 1997e(d) as a whole and landing on a meaning that is arguably better supported by the plain text, without having to speculate about what Congress intended when it passed the PLRA.[182] Congress could have easily used plain language to indicate that fee awards should be capped at 150% of the judgment, or that courts must apply as much of the judgment as possible up to the 25% limit.[183] As the *Murphy* Court explained: "But Congress didn't choose those other words. And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own."[184]

B. The Murphy *Interpretation Does Not Help Reduce Frivolous Prisoner Suits*

While it is difficult to divine exactly why the drafters of the PLRA wrote § 1997e(d)(2) the way that they did, the overall purpose of the statute is no mystery. Congress wanted to reduce frivolous prisoner litigation, and proponents of the PLRA believed it would do that without substantially frustrating meritorious claims.[185] Section 1997e(d)(2), as the *Murphy* Court construed it, does not reduce frivolous prisoner litigation, but it does directly harm prisoner plaintiffs who prevail.[186]

181. *See supra* text accompanying notes 110–22; Murphy v. Smith, 138 S. Ct. 784, 789 (2018) ("If Congress had wished to confer the same discretion in § 1997e(d) that it conferred in § 1988(b), we very much doubt it would have bothered to write a new law; omit all the words that afforded discretion in the old law; and then replace those old discretionary words with new mandatory ones.").

182. *Murphy*, 138 S. Ct. at 792 (Sotomayor, J., dissenting). If we are going to speculate about Congress's wishes, we may as well consider the legislative purpose of the statute, which would support the interpretation described in this section over the one embraced by *Murphy*. *See infra* Subpart IV(B).

183. *Id.* at 794 ("The statute, for example, simply could have said: 'Twenty-five percent of the plaintiff's judgment shall be applied to satisfy the amount of attorney's fees awarded against the defendant.'"). Congress could have written: "no attorney's fees awarded shall exceed 150% of the judgment" or "any award of attorney's fees exceeding 150% of the judgment shall be reduced to that amount."

184. *Murphy*, 138 S. Ct. at 787–88 (majority opinion).

185. *See supra* text accompanying notes 75–89.

186. Umphres, *supra* note 139, at 274–75 ("The fee cap only comes into play once a lawyer has *won* his or her suit—not frivolous by virtue of being

Applying § 1997e(d)(2) to cap and un-shift attorney's fees does nothing to deter prisoners from filing frivolous suits or attorneys from representing them that is not already accomplished by the underlying § 1988 fee-shifting scheme.[187] Attorneys already know that § 1988 grants fees only to prevailing parties, and the other provisions of the PLRA make prevailing that much more difficult.[188] If anything, pressing a frivolous claim will *cost* an attorney money, even with the private-attorney-general theory motivating them to find meritorious ones.[189] The fee caps read into § 1997e(d)(2) do, however, deter meritorious claims by reducing the likelihood that they will be worthwhile for attorneys.[190] If anything, this deterrence frustrates the prevention of frivolous prisoner lawsuits. Well-counseled prisoners are less likely to file and press frivolous claims, and attorneys already have a disincentive under § 1988 to include "noncompensable and sanction-inviting claims."[191]

The alternate interpretation described above, however, allows prevailing prisoner plaintiffs that suffered a significant violation of their constitutional rights to recover a complete reasonable attorney's fee while also providing a relief valve for situations in which fee shifting is not warranted but the plaintiff nonetheless prevails.[192]

C. Disparate Results

Part of the *Murphy* majority's justification for its interpretation of § 1997e(d)(2) is that removing the discretion of trial judges will lead to

meritorious—so the fee cap has no bearing on whether the attorney initially chooses to take on a potentially frivolous case." (footnote omitted)).

187. Branham, *supra* note 24, at 1023–25; Umphres, *supra* note 139, at 274–75.

188. Branham, *supra* note 24, at 1024.

189. *Id.*

190. Umphres, *supra* note 139, at 274–75. This chilling effect is not merely hypothetical. In one case, an attorney accepted an appointment to represent a prisoner under the belief that he would be able to recover fees, and when he realized the PLRA would limit any such award, he attempted to withdraw. Riley v. Kurtz, 361 F.3d 906, 910 (6th Cir. 2004). The court barred the withdrawal, and the prisoner, represented by counsel, won on all four of his claims, securing a judgment of just over $25,000. *Id.* It is worth noting here that proved claims cannot be the only ones with value; plausible claims are not frivolous just because they ultimately lose. Nothing about the PLRA suggests that it should be applied to frustrate weak-but-nonfrivolous claims, much less risky-but-winnable ones like those in *Riley v. Kurtz*.

191. Branham, *supra* note 24, at 1024 ("Encouraging attorneys to represent prisoners with civil rights claims by promising them reasonable compensation for their work if they prevail will actually reduce both the initial filing, and the continued pursuit of, frivolous claims by prisoners.").

192. *See supra* Subpart IV(A).

more consistent results.[193] The Court is confusing the most straightforward test with the most consistent one. Under the interpretation that prevailed in *Murphy*, every prisoner plaintiff who prevails and is awarded fees will have to either pay those fees in full out of their judgment or have 25% of their judgment applied toward the fee award, regardless of the details of their case or the nature of the violation.[194] This rule is easy for judges to apply, but it produces absurd results that bear no rational relationship to traditional fee-shifting analysis. Combined with the 150% fee cap, the determining factor will be the damages award.[195] Inexplicably, the fees will only *ever* shift completely from a prisoner plaintiff to the defendant in claims for injunctive relief, when § 1997e(d)(2) does not apply.[196] In effect, these provisions discard § 1988's mandate that fee shifting is appropriate even when the plaintiff receives little to no damages, and ignore the presumption that the lodestar method produces reasonable fees.[197] All else equal, getting beat up by a correctional officer while confined is *de jure* less compensable than getting beat up by a police officer on the sidewalk.[198] This outcome is difficult to reconcile with the stated purpose of the PLRA.[199]

The accurate reading of the statute, however, provides judges some limited discretion over fee shifting in order to *mitigate* inconsistent results. Without the fee cap, the starting point is the usual reasonable fee calculated using §§ 1988 and 1997e(d)(3).[200] If that fee is anomalously high, then the judge can apply toward the award whatever "portion of the judgment (not to exceed 25 percent)" restores the proper balance.[201]

193. Murphy v. Smith, 138 S. Ct. 784, 790 (2018).

194. *Id.* ("[W]e hold that district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees.").

195. When the award exceeds 150% of the judgment, calculating fees can literally be reduced to an extremely simple equation where the only variable is the size of the judgment: 1.25x or 2.25x for the plaintiff's total compensation. When the award is less than 150% of the judgment, the size of the judgment still dictates who shoulders the burden of the fee award. Either the judgment is so substantial that the award is less than 25% of the judgment and the plaintiff pays her own fees, or the reasonable fee calculated by the lodestar method is reduced by a full quarter of the judgment.

196. *See, e.g.*, Walker v. Bain, 257 F.3d 660, 667 n.2 (6th Cir. 2001) ("[I]f nonmonetary relief is obtained, either with or without money damages, § 1997e(d)(2) would not apply.").

197. *See supra* text accompanying note 55–58, 127–29.

198. Branham, *supra* note 24, at 1042.

199. *See* Hadix v. Johnson, 230 F.3d 840, 847–48 (6th Cir. 2000) (Jones, J., dissenting); Johnson v. Daley, 339 F.3d 582, 612–15 (7th Cir. 2003) (Rovner, J., dissenting).

200. *See supra* Subpart IV(A).

201. 42 U.S.C. § 1997e(d)(2) (2019); *see* Kahle v. Leonard, 563 F.3d 736, 743 (8th Cir. 2009) (Loken, C.J., concurring).

Results under this method can be no more disparate than the results of § 1988 in non-prisoner cases. If the Court's concern in *Murphy* was that courts would come to wildly different conclusions about how to determine the appropriate portion to apply, the majority could have defined a test to guide them, as they ultimately did for determining a reasonable fee under § 1988.[202] As is, we get outcomes like *Royal v. Kautzky*: disabled prisoners can be forced to go weeks without a wheelchair in retaliation for filing grievances, sue for a constitutional violation, win, and be compensated with a mere $2.50 including damages and attorney's fees.[203] Then again, *Royal* was decided in 2004; now, under *Murphy*, Royal would get only $2.25.

CONCLUSION

The ultimate effect of *Murphy* is to indiscriminately reduce the value, in real dollars, of prisoners' constitutional rights.[204] The American Rule supplanted the English Rule for the sake of greater access to the courts, and the private-attorney-general theory took us a step further in the name of the public interest and the sacredness of critical constitutional rights.[205] The fee-capping provision of the PLRA, however, constitutes a stumble backward at the expensive of one of the most vulnerable populations in the country. There is little chance the Court will correct course.[206] Nor is Congress a sure bet. Public opinion on prisoner issues has changed somewhat since the mid-1990s,[207] but because it is so technical, it is hard to get lay voters impassioned about legislative action attacking the PLRA.[208] Many advocate for much

202. *See supra* text accompanying notes 124–28.

203. 375 F.3d 720, 726–27 (8th Cir. 2004) (Heaney, J., dissenting).

204. *See supra* Parts III–IV.

205. *See supra* Part I.

206. There remains a circuit split regarding whether the fee-cap provision in 42 U.S.C. § 1997e(d)(2) applies to fees incurred on appeal. *Compare* Woods v. Carey 722 F.3d 1177, 1181–82 (9th Cir. 2013) (refusing to apply § 1997e(d)(2) to fees incurred on appeal), *with* Riley v. Kurtz, 361 F.3d 906, 914 (6th Cir. 2004) (applying § 1997e(d)(2) to fees incurred through appeal, limiting the ultimate award to 150% of the judgment). If the Court took up the question, it could revisit the whole of paragraph (2), but there is no reason to think *Murphy* would be overturned or the 150% fee cap—which currently enjoys circuit-court consensus—would be rejected.

207. Macfarlane, *supra* note 85, at 1188.

208. John Pfaff, *The 1994 Crime Law Hogs the Legal Reform Spotlight. But a Lesser-Known Law Deserves More Attention*, APPEAL (Oct. 2, 2019), https://theappeal.org/1994-crime-law-biden/ [https://perma.cc/MT7H-5MFX].

broader prison reform,[209] including repealing the PLRA in total,[210] but real change is slow coming. Amending the PLRA by eliminating or clarifying § 1997e(2) to supersede *Murphy* and eliminate the fee cap should be a noncontroversial, incremental change that has the potential revitalize the role of courts in protecting prisoner rights.

Fee shifting in prisoner civil-rights cases is warranted. Plaintiffs like Mr. Murphy deserve to be made whole, whether they are a prisoner beaten up by a guard or a free citizen abused by a police officer. Unfortunately, for now, we are stuck with the fee cap and the *Murphy* rule, which twist the words of the statute to be as hostile to prisoners as possible.

Mark J. Firmin[†]

209. *ACLU Policy Priorities for Prison Reform*, ACLU https://www.aclu.org/other/aclu-policy-priorities-prison-reform [https://perma.cc/PKN8-GDBY] (last visited Apr. 4, 2021).

210. *See, e.g.*, *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH (June 16, 2009) https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states# [https://perma.cc/8BZJ-2SNE].

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