INMATES WHO CRIED WOLF: THE DANGERS OF APPLYING THE PLRA'S LIMIT ON APPELLATE ATTORNEY'S FEES IN PRISONER DEPRIVATION OF RIGHTS CLAIMS

"[E]ating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State . . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State."[1]

I. INTRODUCTION

Beginning in the mid-1970s, the incarceration rate in the United States began to skyrocket, increasing rapidly during the "War on Drugs" in the 1980s and continuing to rise as states began to adopt three-strikes laws.[2] The exponential increase in the prison population inevitably led to an increase in prisoner grievances.[3] In 1995, the year prior to the passage of the Prison Litigation Reform Act ("PLRA"), prisoners filed 41,679 civil rights actions nationwide, more than double the number of such actions filed a decade earlier.[4] Prisoner civil rights actions accounted for more than thirteen percent of all civil cases filed in the federal district courts,[5] and the estimated cost of inmate lawsuits totaled $81 million.[6] Given the high frequency of prisoner civil rights claims as well as the escalating costs associated with prisoner litigation, lawmakers grew concerned that federal courts were being inundated with expensive cases that lacked merit.[7] Members of Congress emphasized that "prisoner litigation does not operate in a vacuum," but rather "tie[s] up the courts, waste[s] valuable legal resources, and affect[s] the quality of justice enjoyed by law-abiding

1. Marissa C.M. Doran, Note, *Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms*, 122 YALE L.J. 1024, 1055 (2013) (quoting Preiser v. Rodriguez, 411 U.S. 475, 492 (1973)).

2. Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 299 (2007) (citing Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 331–35 (2005)).

3. *Id.* (citing Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1586–87 (2003)).

4. Denise M. Pennick, *Limitations on Relief: Prisoner Litigation*, HAW. B.J., Sept. 1997, at 6 (citing Leonidas Ralph Mecham, ADMIN. OFF. OF THE UNITED STATES CTS., *Judicial Business of the United States Courts*, REP. OF THE DIR. 139 (1995)).

5. *Id*.

6. *Id.* at 6 (citing Jonathan Kerr, *Pennsylvania: Bills Would Head Off Prisoner Lawsuits*, June 20, 1996 WEST'S LEGAL NEWS 5869, 1996 WL 336059).

7. *See, e.g.*, 141 CONG. REC. S14611-01 (1995).

citizens."[8] Lawmakers' concerns intensified in light of the small fraction of meritorious inmate claims. The vast majority of inmates who file lawsuits ultimately fail to secure a favorable judgment,[9] as the bulk of claims are later deemed frivolous.[10]

In 1996, Congress hastily passed the PLRA following limited congressional debate.[11] This Note examines a recent circuit split concerning one of the PLRA's central provisions, a limitation on the amount of attorney's fees which may be awarded for successful representation of an inmate. Part II outlines the development of the PLRA and the circumstances surrounding the pertinent legislative history. Part III discusses three germane provisions of the PLRA: (A) the requirement of exhausting alternative remedies prior to filing complaints, (B) the physical injury requirement, and (C) the limitation on attorney's fees. Part IV analyzes a recent circuit split between the Sixth Circuit and Ninth Circuit over the application of the PLRA's attorney's fee cap when fees have been accumulated defending a judgment on appeal. Emphasis is placed on evaluating the Sixth Circuit's and Ninth Circuit's rationales for determining whether the cap on attorney's fees applies to appellate fees in addition to fees accrued in order to secure an initial monetary judgment on behalf of a prisoner. Finally, this Note evaluates the practical and policy implications of interpreting the PLRA's fee cap to limit an award of appellate fees, advocating for the Ninth Circuit's rationale in *Woods v. Carey*.[12]

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8. *Id.* (statement of Sen. Robert Dole). The record also highlighted that the National Association of Attorneys General estimated that prisoner civil rights actions cost the states in excess of $81 million each year, with the majority of expenses stemming from the defense of unfounded civil rights claims. *Id.*

9. *See* Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 364 (1998) (citing *Review & Outlook: Criminal Oversight*, WALL ST. J., June 10, 1996, at A18). Kuzinski went on to give the example of prisoner defendant Harry Franklin who had earned a reputation for frivolous claims with the court. *Id.* at 366 n.32 ("Chief Judge James Burns of the United States District Court in Oregon used this evocative language to introduce an opinion discussing inmate Harry Franklin . . . : 'This is another chapter in the Harry Franklin saga. No longer am I tempted to call it the final chapter, as desirable as that would be to me. I mention mournfully that only the finality of death—his or mine—would enable the other of us to use the term 'final' in that way. And, of course, if mine comes first, I have no doubt that another judge will someday express lamentations such as these. They will be packaged and labelled, by reason of tradition, as opinions.'") (quoting Franklin v. Oregon, 563 F. Supp. 1310, 1316 (D. Or. 1983), *aff'd in part, rev'd in part sub nom.*, Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984)).

10. *See id.* at 364.

11. Geoffrey Christopher Rapp, Note, *Low Riding*, 110 YALE L.J. 1089, 1092 & n.21 (2001) (citing Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998)).

12. 722 F.3d 1177 (9th Cir. 2013).

II. LEGISLATORS RESPOND TO A RISE IN UNSUBSTANTIATED PRISONER COMPLAINTS

In 1994, in response to a barrage of frivolous inmate court filings and the immense costs associated with hearing the claims, legislators began to rally support to adopt legislation aimed at deterring such litigation.[13] Strategically, legislators highlighted the most outrageous prisoner complaints in order to underscore the absurd, and at times, even comedic nature of the lawsuits: "America was warned, [prisoners] were bogging down the courts with abusive lawsuits."[14]

The legislative history of the PLRA provides a flavor of inmates' purported injuries. In one case, an inmate sued for "$1 million in damages for civil rights violations because his ice cream had melted."[15] The court noted "that the right to eat ice cream was clearly not within the contemplation of our Nation's forefathers."[16] In another case, "an inmate alleged that being forced to listen to" country music amounted to cruel and unusual punishment.[17] One prisoner brought suit for damages because a piece of cake on his dinner tray was "hacked up" when it was served to him.[18] Similarly, another inmate sued when "he was served chunky instead

13. *See* William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 667 (2004) ("State attorney generals [sic] rushed out their 'top ten frivolous litigation' lists to support passage of what was to become known as the Prison Litigation Reform Act. California cited one example of an inmate who claimed prison officials had implanted an electronic device in his brain that controlled his thoughts which were then broadcast over the prison PA system. According to then Attorney General Dan Lungren, the Department had to prove it had not performed surgery on the inmate and submit a declaration that the prison did not have the electronic capability of broadcasting thoughts over the PA system.") (internal citations omitted). However, not everyone was in agreement that the PLRA should have been adopted. Collins goes on to write that in response to the push for prisoner litigation reform through legislation which would deter lawsuits, "[t]he ACLU National Prison Project countered with its Top Ten Non-Frivolous Lawsuits list." *Id.* (citing ACLU Nat'l Prison Project, *The Top Ten Non-Frivolous Lawsuits Filed By Prisoners*, AMERICAN CIVIL LIBERTIES UNION OF OREGON, http://archive.acluor.org/archive/Leg_2005/pdf/Leg_2005_HB2140_top10.pdf, *archived at* http://perma.cc/8C47-7JR8). The list includes examples of sexual assault, flagrant prison guard brutality, and one instance of prison officials ignoring health safety warnings and "fail[ing] to implement basic tuberculosis detection and control procedures," leading to the spread of tuberculosis to over 400 prisoners. *Id.*

14. Roger Roots, *Of Prisoners and Plaintiffs' Lawyers: A Tale of Two Litigation Reform Efforts*, 38 WILLAMETTE L. REV. 210, 210 (2002) (citing Rick M. Steinmann, *Are Inmate Lawsuits Out of Control? Yes, in* CONTROVERSIAL ISSUES IN CORRECTIONS 239, 241 (Charles B. Fields ed., 1999)). Roots also points to a *New York Times* article in the time period prior to the passage of the PLRA which "warned the public that prisoners' claims were 'overwhelm[ing] state attorneys' and 'costing taxpayers millions in legal fees.'" *Id.* at 210–11 (citing Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1, B4).

15. 142 CONG. REC. S3703-01 (1996) (statement of Sen. Spencer Abraham).

16. *Id.*

17. *Id.*

18. *Id.*

of smooth peanut butter."[19] Aside from food-related injustices, one particularly trendy prisoner commenced litigation demanding LA Gear or Reebok Pumps instead of Converse tennis shoes while imprisoned.[20] With such an outrageous list of extreme examples, lawmakers were able to gather support for legislative reform without dissent. Senator Spencer Abraham summarized, "These kinds of lawsuits are an enormous drain on the resources of our States and localities, resources that would be better spent incarcerating more dangerous offenders instead of being consumed in court battles without merit."[21]

III. THE ENACTMENT OF THE PLRA

In 1996, Congress passed the PLRA "to reduce the burdens on the federal courts from what was perceived as a tidal wave of lawsuits—many of them frivolous—brought by imprisoned individuals."[22] Though advocates of the legislation touted the anticipated decrease in frivolous complaints due to the law's stringent limitations on inmate access to the courts, the new law's swift passage also received immediate criticism. For example, the PLRA has been disparaged as "being the result of a rushed enactment that was subject to little congressional debate," sheepishly pushed through as a rider to an appropriations bill.[23] Among the critics, "Senator Edward Kennedy complained that '[t]he PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.'"[24] Rather than a fully vetted law, "[i]t has been described by Professors Mark Tushnet and Larry Yackle as a 'symbolic statute'—one passed so that legislators [could] 'tell their constituents that they [had] done something about a problem,'—but with all too 'real consequences.'"[25]

Despite the criticism, the PLRA aimed to reduce the amount of lawsuits filed by prisoners[26] in several ways.[27] In order to appreciate the

19. *Id.*
20. *Id.*
21. *Id.*
22. Philip White, Jr., Annotation, *Construction and Application of Prison Litigation Reform Act—Supreme Court Cases*, 51 A.L.R. FED. 2D 143 (2010).
23. Allison Cohn, Comment, *Can $1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act's Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299, 305 (2006).
24. *Id.* (quoting 142 CONG. REC. S22, 96 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy)).
25. Shay & Kalb, *supra* note 2, at 300 (quoting Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prisoner Litigation Reform Act*, 47 DUKE L.J. 1, 2–3, 85 (1997)).
26. For a discussion of whether the PLRA's limitations should also apply to juvenile offenders,

full magnitude of the circuit split over the limitation on attorney's fees, it is important to review the greater scheme of perhaps the most pertinent PLRA-initiated limitations on prisoner complaints, as well as how they mesh.

A. Exhaustion Requirement

First, the PLRA prohibits a prisoner from filing a lawsuit under § 1983,[28] a civil action for deprivation of rights, without first seeking other forms of redress.[29] What has been referred to as the exhaustion requirement in the statute states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[30] If a state has not adopted an administrative grievance procedure, the absence of such a process could be grounds for bringing a prisoner civil rights claim.[31]

The exhaustion requirement's scope is wide-ranging and has withstood challenges to its application. For example, in *Porter v. Nussle*, an inmate challenged the exhaustion requirement in his case in which he alleged excessive use of force by prison officials.[32] The inmate argued that exhaustion should not be required when the alternative remedial process is controlled by the same prison officials who are accused of wrongdoing.[33] The Court disagreed, holding "the PLRA's exhaustion requirement applies

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see Anna Rapa, Comment, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263 (2006). Rapa argues that the PLRA should not apply to juveniles because "juveniles do not typically file frivolous lawsuits" and "juveniles are more vulnerable, less educated, and less able to advocate for themselves." *Id.* at 265.

27. Aside from the PLRA's attorney's fees provision discussed below, the PLRA also attempts to limit the filing of *pro se* actions through the elimination of fee waivers: "Courts can no longer waive filing fees for indigent (i.e., almost all) inmates but now can only put the inmate on a monthly payment plan. Payment will be extracted from all funds that show up on an inmate's account." Collins, *supra* note 13, at 669 (internal citations omitted).

28. 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1996).

29. 42 U.S.C. § 1997e(a) (1996).

30. *Id.*

31. 42 U.S.C. § 1997e(b) (1996).

32. 534 U.S. 516, 519–20 (2002).

33. *Id.*

to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[34] Thus, the exhaustion requirement must still be met despite prison officials' disincentives to address grievances when they are the very agents causing a prisoner's complaint.[35] Prison power dynamics prove to be obstacles in fulfilling the exhaustion requirement because oftentimes inmate complaints must first be filtered through the personnel who are the alleged transgressors.[36]

B. Physical Injury Requirement

A second pertinent provision of the PLRA is the physical injury requirement. Section 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[37] Like the exhaustion requirement, the physical injury requirement has also been criticized as overly restrictive.[38] "While the PLRA was enacted to limit the number of frivolous lawsuits . . . [it] has been applied to numerous constitutional torts that can hardly be deemed frivolous—infringement of the First Amendment right to free exercise of religion, violation of the constitutional right to privacy, [and] infliction of psychological torture . . . ."[39] The distinction between physical and nonphysical injury is problematic because "[t]hese constitutional injuries are rarely accompanied by physical injury, yet are still fundamental rights protected under the Constitution."[40] Thus, one commentator has argued that drawing such a distinction creates an erroneous "hierarchy of injuries," providing transgressors with immunity so long as no physical scars are left behind.[41] "The result is that an attorney may only take on cases where the prisoner has been physically

34. *Id.* at 532.

35. *See* Shay & Kalb, *supra* note 2, at 319 ("The counter-productive result of such changes is that grievance systems become more technical and complex, and thus less likely to lead to the quick resolution of prisoners' complaints—the ostensible purpose of the exhaustion requirement. Indeed, turning grievance procedures into a preliminary step in litigation could discourage officials from diligently investigating and resolving complaints, for fear of generating information that could increase their legal exposure. Under a procedural default regime, it is much safer to dispose of complaints with unassailable technical denials.").

36. *See id.*

37. 42 U.S.C. § 1997e(e) (1996).

38. *See, e.g.*, Cohn, *supra* note 23.

39. *Id.* at 315 (internal citations omitted).

40. *Id.*

41. *Id.*

injured, ignoring other constitutional cases that are just as meritorious and deserving of judicial attention."[42]

Moreover, the physical injury requirement's restrictions specifically, and the PLRA provisions in their totality, have been criticized for weakening institutional and societal interests in maintaining the integrity of the justice system.[43] While imprisonment may be viewed as a proper vehicle for retribution, the legitimacy of the prison system as a state institution is undercut when inmates are unlawfully abused. For example, Doran characterizes prison as "a managed environment[] in which prisoners' lives may be entirely controlled by their captors."[44] Doran goes on to explain that "[i]n limiting prisoners' ability to access the courts, the physical injury requirement interferes with the critical role played by lawsuits in facilitating the flow of information about prison life to the outside world."[45] With inmates' hampered ability to communicate grievances, complaints are often stalled at the cell walls and inmates are again hindered in addressing potentially serious complaints.[46]

C. Award of Attorney's Fees

Third, the most recent controversial way in which the PLRA seeks to deter the filing of frivolous prisoner civil rights claims is by placing a ceiling on the amount of attorney's fees that may be recovered in connection with the representation of an inmate.[47] A 'prisoner' is defined

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42. *Id.* at 327.

43. *See* Doran, *supra* note 1, at 1055.

44. *Id.*

45. *Id.*

46. For a discussion of the PLRA's effects on diminishing inmates' constitutional protections which have historically been upheld, see Cohn, *supra* note 23. Cohn underscores that inmate constitutional protections have been engrained in society notwithstanding incarceration:

> In *Wolff v. McDonnell*, the Court held that although incarceration necessarily causes citizens to lose many rights and privileges, a prisoner is not wholly stripped of all constitutional protection: "There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. They retain right of access to the courts. Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law."

Cohn, *supra* note 23, at 302 (quoting Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) (citations omitted)).

47. Section (d) of the PLRA provides, in relevant part:

> (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

as any adult serving a prison sentence following a conviction, those who have been indicted but not convicted of a crime, as well as juveniles accused of delinquency.[48] The PLRA's mandated limitation on attorney's fees contains a disputed proportionality requirement which seeks to ensure that fees are comparable to the award of damages in each case.[49] The proportionality requirement restricts the hourly rate that can be used in determining the proper attorney's fees to 150 percent of the rate lawyers defending indigent individuals facing federal criminal charges may receive.[50] Interpretations of the scope of coverage of the PLRA's attorney's fees provision have differed among courts.

IV. THE CIRCUIT SPLIT REGARDING WHETHER THE CAP ON ATTORNEY'S FEES APPLIES TO FEES ACCRUED DEFENDING A JUDGMENT ON APPEAL

Two circuits have ruled on questions pertaining to the limitation of attorney's fees in prisoner deprivation of rights actions under section 1983.[51] The Sixth and Ninth Circuits' interpretations conflict as to whether the limitation applies only to fees accrued while successfully litigating an issue at the trial court level or whether the cap applies to all attorney's fees, including fees incurred while defending a judgment on appeal.[52] The Sixth Circuit was the first circuit to rule on the issue in 2004.

> 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.

42 U.S.C. § 1997e(d) (1996).

48. Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CAL. L. REV. 999, 1007 (2001).

49. *See id.* at 1006.

50. *Id.*

51. For a discussion of the history of immunities and defenses to § 1983 claims, see Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 933–34 (2009).

52. *See* Riley v. Kurtz, 361 F.3d 906 (6th Cir. 2004) (*Riley II*); Woods v. Carey, 722 F.3d 1177 (9th Cir. 2013).

A. The Sixth Circuit Holds the PLRA's Limit on Attorney's Fees Applies to Fees Accrued Defending a Judgment on Appeal

The correct calculation of appellate attorney's fees under the PLRA became a contested issue in *Riley v. Kurtz*.[53] In *Riley*, the plaintiff, an inmate, brought suit against a prison guard, alleging the guard illegally opened his mail outside of his presence in violation of his First Amendment rights.[54] He also alleged that the guard created a false misconduct report against him in violation of his Eighth Amendment right to be free from cruel and unusual punishment.[55] The inmate filed a complaint *pro se*, and the trial court appointed him counsel.[56] The jury found in favor of the inmate on all of his claims and awarded the inmate approximately $25,000 in damages.[57] The case was appealed to the Sixth Circuit where the court overturned the jury verdict in part.[58] The court also remanded the inmate's remaining claims for a new trial, but gave the inmate the option of a remittitur.[59] After the inmate elected for the remittitur, the court reduced the award of damages to approximately $1,000.[60]

The inmate's attorney subsequently sought compensation for appellate fees totaling nearly $26,000[61] pursuant to section 1988(b).[62] Opposing the request for attorney's fees, the defendant argued that $26,000 was an impermissible fee request under the PLRA given the reduction in the amount of damages to approximately $1,000.[63] As to the appellate fees, the district court found that the PLRA does not limit the attorney's appellate fees because, in part, "the PLRA does not apply to time spent by a prevailing prisoner plaintiff defending challenges of judgments by prison officials."[64]

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53. *Riley II*, 361 F.3d at 906.
54. Riley v. Kurtz, 194 F.3d 1313 (6th Cir. 1999) (*Riley I*).
55. *Id.*
56. *Riley II*, 361 F.3d at 910.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* "Traditionally, parties to litigation bear their own costs unless a specific statute or contractual provision provides otherwise. In 1976, the courts were given discretion to award a reasonable attorney's fee to prevailing civil rights litigants." *Id.* at 911 (quoting Farrar v. Hobby, 506 U.S. 103, 111–12 (1992)). Moreover, "[a] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111–12.
63. *Riley II*, 361 F.3d at 910.
64. *Id.*

Arguing that appellate fees too must be limited to 150 percent of the amount of a judgment awarded in favor of an inmate, the defendant contended that the inmate's attorney was limited to a maximum of $1,504.50 in fees.[65] The inmate's attorney responded that "the PLRA does not limit his appellate fee request because the PLRA does not apply to appeals filed by the defendant."[66] The attorney also argued "that an appeal filed by a defendant is not an 'action brought by a prisoner,' that the limitation on attorney's fees" would thus not apply, and that he was "entitled to the full amount of his requested appellate fees."[67] The Sixth Circuit ultimately held "that the PLRA applies to all the attorney's fees generated by a prevailing prisoner—trial, post-trial, and on appeal."[68] The court's rationale relied on statutory interpretation, legislative history analysis, and public policy concerns, explored below.

1. The Sixth Circuit's Statutory Interpretation Rationale

The Sixth Circuit recognized that reasonable attorney's fees may be awarded to prevailing prisoner civil rights litigants.[69] In order to assess the appropriate amount of attorney's fees, the court outlined the relevant provisions of the PLRA subject to interpretation. The first provision states that "[i]n 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 under certain circumstances.[70] Those circumstances include when 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

65. *Id.* at 913.
66. *Id.*
67. *Id.*
68. *Id.* at 917.
69. *Id.* at 911 (citing 42 U.S.C. § 1988(b) (1976)). Section 1988 provides guidance on attorney's fees for proceedings in vindication of civil rights. It explains:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Id.
70. § 1997e(d), *quoted in Riley II*, 361 F.3d at 911.

fee may be awarded under section 1988 of this title; and the amount of the fee is proportionally related to the court ordered relief for the violation."[71] Alternatively, fees may be awarded if "the fee was directly and reasonably incurred in enforcing the relief ordered for the violation."[72] The statute goes on to provide that:

> Whenever a monetary judgment is awarded in an action described [above], 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.[73]

This latter "portion of the PLRA has been interpreted to mean that an attorney's compensation comes first from the damages (up to 25 percent), and then, if inadequate, the defendant is liable for attorney's fees under [section] 1988 up to 150 percent of the monetary judgment."[74]

The defendant in *Riley* argued that based on the terms of the statute, the absence of an explicit exception to the 150 percent limitation for appellate fees meant no appellate fees should have been awarded.[75] Implicitly, he also argued that the fee cap applies to all attorney's fees, regardless of the time or phase of litigation.[76] In its analysis, the Sixth Circuit keyed in on the phrase "in any action brought by a prisoner" within the PLRA.[77] The court stated that "[t]he issue . . . is whether the appeal filed by the defendant is part of the original action, or if, as argued by [the inmate's attorney], it is a completely separate action."[78] The court reasoned:

> There appears to be no reason why an appeal brought by the losing party should be considered anything other than a continuation of the original action. There is no final judgment or decree until the appeals process has ended. Therefore, we reject [the inmate's attorney's] first argument and find that an appeal filed by the defendant is part of the original action.[79]

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71. *Id.*
72. *Id.*
73. *Id.*
74. *Riley II*, 361 F.3d at 911.
75. *Id.*
76. *Id.*
77. The court stated that the term "action" is not defined in the statute, but noted that Black's Law Dictionary defines it as "any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree." *Id.* at 914 (citing BLACK'S LAW DICTIONARY 29 (7th ed. 1999)).
78. *Id.*
79. *Id.*

Second, the court moved onto the portion of the statute authorizing attorney's fees under section 1983 for the prevailing party in the lawsuit.[80] Here, the defendant argued that the legislative intent supported his theory that the fee cap equally applies to appellate fees, pointing to a report issued by the House Committee on the Judiciary concerning the PLRA's attorney's fees provision.[81] The report put forth by the House Committee on the Judiciary dated February 6, 1995 ("House Report") contained relevant proclamations with respect to the award of attorney's fees. First, the House Report made explicit that the PLRA "permits prisoners challenging prison conditions under 42 U.S.C. § 1983 to receive attorney fees but reasonably limits the circumstances under which fees may be granted as well as the amount of the fees."[82]

The House Report goes on to explain several ways in which attorney's fees are restricted, beginning with the interpretation of the definition of a prevailing party: "First, [the PLRA] narrows the judicially-created view of a 'prevailing party' so that a prisoner's attorney will be reimbursed only for those fees reasonably and directly incurred in proving an actual violation of a federal right."[83] The objective was to narrow who qualifies as a prevailing party in order to "eliminate both attorney fees that penalize voluntary improvements in prison conditions and attorney fees incurred in litigating unsuccessful claims, regardless of whether they are related to meritorious claims."[84] Intended results were twofold: to "eliminate[] the financial incentive for prisoners to include numerous non-meritorious claims in sweeping institutional litigation," and to "retain[] the financial incentive to bring lawsuits properly focused on prison conditions that actually violate federal law."[85]

Moreover, legislators factored in potential ulterior motives of attorneys who might seek excessive compensation through drawn-out litigation of unmeritorious inmate claims. For instance, the House Report highlighted the PLRA's "effect of reducing attorney fee awards by eliminating fees for litigation other than that necessary to prove a violation of a federal right. This eliminates the financial incentive for attorneys to litigate ancillary

80. *Id.*
81. *Id.*
82. *Id.* at 914 (quoting H.R. REP. NO. 104–21, at 28 (1995), *reprinted in* BERNARD D. REAMS, JR. & WILLIAM H. MANZ, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996 (1st vol., 1997)).
83. *Id.*
84. *Id.*
85. *Id.*

matters, such as attorney fee petitions, and to seek extensive hearings on remedial schemes."[86]

Along the same lines, the proportionality requirement sought to ensure that any fees award was comparable to the amount of time and work put into an inmate's representation.[87] The House Report underscored, "This proportionality requirement will discourage burdensome litigation of insubstantial claims where the prisoner can establish a technical violation of a federal right but he suffered no real harm from the violation," and "appropriately reminds courts that the size of the attorney fee award must not unreasonably exceed the damages awarded for the proven violation."[88]

The court reiterated that even a party that is only awarded nominal damages is nevertheless considered a prevailing party for purposes of the statute, and despite the fact that the plaintiff's damages were limited, he was nevertheless a prevailing party because he succeeded on multiple claims of his lawsuit.[89] However, the court recognized that the defendant's legislative intent argument which limited the category of who qualifies as a prevailing party had merit, and shifted its analysis to the PLRA's proportionality requirement.[90]

With respect to the statute's proportionality requirement and whether attorney's fees for appellate work may be awarded at all, the court focused on the PLRA's provision stating that "[a] prisoner may only qualify for attorney's fees under the PLRA if the fees were 'directly and reasonably incurred in proving an actual violation of the plaintiff's rights and if the fee is proportional to the amount of damages awarded for the violation.'"[91] The defendant argued that to defend a judgment on appeal is not the equivalent of "proving an actual violation," and therefore the plaintiff's attorney should not recover for appellate attorney's fees.[92] In determining whether appellate work constituted work to prove an actual violation, the court looked to case law for guidance.[93] The court concluded that no

86. *Id.*
87. *Id.*
88. *Id.* at 915 (quoting H.R. Rep. No. 104–21, at 28 (1995)).
89. *Id.* at 914.
90. *Id.* at 915.
91. *Id.* at 915 (quoting 42 U.S.C. § 1997e(d)(1)(A)–(B) (1996)).
92. *Id.*
93. The only analogous case the Sixth Circuit noted was *Sallier v. Scott*, a district court case in the Eastern District of Michigan. *Id.* at 916 (citing Sallier v. Scott, 151 F. Supp. 2d 836 (E.D. Mich. 2001). *Sallier* concerned

> [W]hether the post-judgment work done by the prisoner's attorney included "proving" a violation. Based on the definition of "prove" in *Black's Law Dictionary* (to establish or make certain), the district court found that "hours spent defending the jury award against the defendants' motion for judgment as a matter of law may also be considered hours spent to

provision in the PLRA explicitly contravenes other case law holding that reasonable appellate fees may be granted for a prevailing party.[94] Thus, the court found that attorney's fees for appellate work may be awarded to a prevailing party under the PLRA, though subject to the PLRA's proportionality requirement.[95] The proportionality requirement, the court reasoned, applies to all fees, and thus the PLRA's 150 percent limitation would apply to all fees as well.[96]

2. Legislative Purpose Rationale

Following its statutory interpretation, the court reasoned that a limitation on appellate attorney's fees was necessary to carry out congressional intent in enacting the PLRA. The court stated, "[o]ne of Congress' purposes in passing the PLRA was to reduce the large number of frivolous prisoner lawsuits being filed in federal courts.[97] The fee cap provisions are directly related to this purpose."[98] Additionally, the court reasoned that "the fee cap could 'counter-balance' a prisoner's numerous incentives to litigate and place prisoners and non-prisoners in a similar decision-making position."[99]

Describing the equitable result of limiting attorney's fees, the court opined, "Just as a non-prisoner civil rights litigant should consider all the costs of bringing the action, including appellate costs, so should a prisoner litigant. . . . [T]he fee cap provisions are rationally related to protecting the federal and state treasuries."[100] The court relied on the rationale of Sixth Circuit precedent as well, noting "the twin goals of decreasing marginal lawsuits and protecting the public fisc are legitimate government interests, and . . . decreasing an attorney fee award in the context of prisoner civil rights litigation serves both of these interests."[101]

'make certain' the verdict."

Id. (quoting *Sallier*, 151 F. Supp. 2d at 838–39) (internal citations omitted).

94. *Id.* at 915. The Sixth Circuit looked to case law for guidance on this issue of first impression. *Id.* The court noted that "[s]hortly after the enactment of § 1988, the courts interpreted its provisions as including awards for fees earned for the successful defense of a judgment on appeal." *Id.* (citing Hutto v. Finney, 437 U.S. 678, 693–698 (1979); Weisenberger v. Huecker, 593 F.2d 49, 54 (6th Cir. 1979); Adcock-Ladd v. Sec'y of the Treasury, 227 F.3d 343, 351 (6th Cir. 2000)).

95. *Id.* at 917.

96. *Id.* at 918.

97. *Id.* at 917. In contrast, the inmate's attorney argued that "once a prisoner has prevailed at the trial level, the claims can no longer be considered frivolous." *Id.*

98. *Id.*; *see* Hadix v. Johnson, 230 F.3d 840, 844 (6th Cir. 2000) (citing 141 CONG. REC. S7498–01 (daily ed. May 25, 1995) (statement of Sen. Dole)).

99. *Riley II*, 361 F.3d at 917 (quoting *Hadix*, 230 F.3d at 845).

100. *Id.* (citing Walker v. Bain, 257 F.3d 660, 669 (6th Cir. 2001); *Hadix*, 230 F.3d at 845).

101. *Id.* (quoting *Walker*, 257 F.3d at 669).

3. Public Policy Rationale

Third, the Sixth Circuit reasoned that placing a limitation on all attorney's fees furthers important public policy goals. The inmate's attorney's main public policy argument contesting that the PLRA's fee limitation should apply to appellate work centered on the potentially deleterious incentives that would be created by such a rule.[102] He argued that if the limitation on attorney's fees applied to appellate work, a prison official who was accused of a civil rights violation would not be deterred from filing an appeal, even if the appeal lacked merit.[103] This, in turn, would cause an inmate's attorney to expend numerous billable hours preparing to defend a judgment on appeal, but that work would go uncompensated.[104]

However, the court analogized the situation of an attorney choosing to represent a prisoner in a civil rights action and potentially defending a judgment on appeal to an attorney operating on a contingency fee basis.[105] The court stated, "[t]he possibility of having to defend a favorable judgment on appeal is just another factor a prisoner's lawyer has to take into account in deciding whether to take the prisoner's case in the first place."[106] The court again injected principles of equity into its analysis to reason that attorneys must consider whether to take on a prisoner civil rights claim by weighing factors as they would when representing plaintiffs in cases where the fee structure creates a possibility of zero compensation.[107]

B. The Ninth Circuit Holds the PLRA's Limit on Attorney's Fees Does Not Apply to Fees Accrued Defending a Judgment on Appeal

In *Woods v. Cary*, the Ninth Circuit was recently confronted with the same issue of whether the PLRA's limitation on attorney's fees applies to

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* For a differing point of view, see Schlanger, *supra* note 3, at 1656. Schlanger argues that the parallel to attorneys who operate on a contingency fee basis is flawed when used in connection with prisoner civil rights litigation. She writes, "[O]rdinary contingency-fee economics do not work very well for inmates, at least for prison inmates. First, inmates typically receive low damages even for serious injuries." *Id.* She goes on to explain that "contingency-fee lawyers usually count on a good portion of their cases settling; if every case went to trial, plaintiffs' lawyers would require far higher fees, at least for low-damages cases." *Id.*
106. *Riley II*, 361 F.3d at 917.
107. *See id.*

appellate fees.[108] An inmate, Woods, brought an action *pro se* against a prison appeals coordinator for a violation of his Eighth Amendment right to be free from cruel and unusual punishment.[109] He alleged that the coordinator repeatedly screened out his medical grievances, thereby causing him prolonged pain and suffering because he was prevented from seeking medical attention to fix his broken dentures.[110] At trial, the jury found in favor of Woods and awarded him $1,500 in compensatory and punitive damages.[111] On appeal, Woods was represented by counsel, and the judgment in his favor was affirmed.[112] Woods then filed a timely motion for attorney's fees in the amount of $16,800 and $521.09 for costs under section 1988(b).[113]

In response to the motion for attorney's fees, the defendant argued that he was only required to pay $2,250, equal to 150 percent of the judgment, because the PLRA's limit on attorney's fees also applies to fees accumulated while defending a monetary judgment on appeal.[114] The defendant's argument was consistent with the Sixth Circuit's decision in *Riley*; however, as a case of first impression in the Ninth Circuit, the court held that "the fee cap in § (d)(2) does not apply to attorney's fees earned in conjunction with an appeal in which prison officials seek unsuccessfully to reverse a verdict obtained by the prisoner before the district court."[115] By ruling that the PLRA's limitation on attorney's fees does not apply to fees accrued while defending a judgment on appeal, the Ninth Circuit created a circuit split with the Sixth Circuit's interpretation of the PLRA. The Ninth Circuit reasoned that statutory interpretation, legislative intent, and sound public policy support the conclusion that the PLRA's cap on attorney's fees only applies to fees accumulated while securing an initial monetary judgment.

1. Statutory Interpretation

First, the court engaged in a statutory interpretation analysis, beginning with a reading of the PLRA's fee cap provision in light of its plain

108. 722 F.3d 1177, 1179 (9th Cir. 2013).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 1180. In *Dannenberg v. Valadez*, 338 F.3d 1070 (9th Cir. 2003), the Ninth Circuit held that the PLRA's limitation on attorney's fees only applies to monetary damages, and not to attorney's fees accumulated in the course of seeking injunctive relief. *Woods*, 722 F.3d at 1179.
115. *Woods*, 722 F.3d at 1184.

meaning.[116] According to the court, the relevant statutory language is ambiguous.[117] "The section states: 'Whenever a monetary judgment is awarded in an action [the fee cap shall be applicable].'"[118] The court determined that the statutory language could be interpreted in two ways. Either the fee cap applies to attorney's fees awarded only in conjunction with obtaining a monetary judgment, a single occurrence throughout a lawsuit, or the fee cap applies to any attorney's fees awarded throughout the course of a lawsuit in which a monetary judgment has been awarded.[119]

After considering the two options in light of the statutory ambiguity, the court chose the first alternative, reasoning that "[t]hroughout the course of an action, courts may award fees on multiple occasions, but only the district court awards 'a monetary judgment' and then only on one occasion—either after summary judgment or after a verdict in the prisoner's favor."[120] The Ninth Circuit analogized to its prior opinion in *Dannenberg*, finding that just as it would be inconsistent with section (d)(1) to limit the award of attorney's fees in an action seeking injunctive relief, it would also be a mistake to apply the limitation to the appellate work aimed at ensuring a judgment or verdict is not overturned.[121] Additionally, the court reasoned that "the statute uses the present tense—'[w]henever a monetary judgment *is* awarded'—meaning the point in the course of an action at which the monetary judgment is awarded, rather than in any case in which a monetary judgment *has been* awarded."[122] For the court, the use of the present tense reinforced its finding that the fee cap applies only to attorney's fees accrued in connection with the initial award of a monetary judgment.[123]

2. Legislative Purpose Rationale

Next, the Ninth Circuit justified its holding by concluding that placing the fee limitation only on those fees accrued to secure a monetary judgment furthers congressional intent. Importantly, the court first

116. *Id.* at 1181. While the majority in *Woods* found that the PLRA's statutory language with respect to the limitation on attorney's fees was ambiguous, the dissent disagreed. Judge Murguia argued for the dissent that the fee cap provision is not ambiguous, that the plain meaning of the text should have been dispositive, and that the plain meaning requires a finding that the fee cap also applies to fees accrued while defending a judgment on appeal. *Id.* at 1184–85 (Murguia, J., dissenting).

117. *Id.* at 1181.

118. *Id.* (alteration in original).

119. *Id.*

120. *Id.* at 1182 (quoting 42 U.S.C. § 1997e(d)(2)).

121. *Id.* (citing Dannenberg v. Valdez, 338 F.3d 1070 (9th Cir. 2003)).

122. *Id.*

123. *Id.*

reasoned that its holding would further the purposes of the PLRA because "it ensures that prisoners who have prevailed on a constitutional claim before the district court will not lose the relief that they have been awarded because they cannot secure counsel on appeal."[124] The court distinguished between legislators' objectives in deterring frivolous prisoner complaints and prisoner complaints which progressed to the appeals stage.[125] The Ninth Circuit explained that "Congress did not . . . intend to discourage the collection of awards in those comparatively few meritorious cases in which the district court had found that the prisoner's constitutional rights had been violated and that the prisoner was entitled to collect damages for that violation."[126]

In addition, the court reasoned that the PLRA's objective to deter prisoners from initiating burdensome and unfounded claims is not undercut when the fee limitation does not apply to an attorney's appellate fees because the appeal is not initiated by the prisoner.[127] Positions are reversed as the defending prison official files the appeal, and the prisoner is required to defend the judgment if she hopes to preserve it.[128] There is no indication that the PLRA was meant to shield prison officials who have had verdicts entered against them in their attempts to appeal while placing prisoners at a disadvantage during the appeals process. The Ninth Circuit found that "[w]hile Congress meant to discourage the filing of § 1983 claims . . . , it did not seek to compel those comparatively few prisoners with meritorious claims to forfeit their monetary awards by rendering the prisoners unable to secure counsel to defend the judgment."[129]

Finally, The Ninth Circuit reasoned that its opinion would promote

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124. *Id.*

125. *Id.* The court stated that "Congress enacted the PLRA to deter frivolous prisoner lawsuits that needlessly wasted judicial resources and to provide for their dismissal at an early stage." *Id.* (citing Madrid v. Gomez, 190 F.3d 990, 996 (9th Cir. 1999); 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995)). However, since "a substantial portion of the judiciary's costs related to these types of cases is incurred in the initial filing and review stage prior to any dismissal," the legislative intent to limit attorney's fees would not apply to the few meritorious prisoner complaints that had garnered a judgment or verdict and advanced to the appeals stage of litigation. *Id.* (quoting Judicial Impact Office, Violent Criminal Incarceration Act of 1995, H.R. 667 (1995)).

126. *Id.* The need to preserve the relatively few meritorious cases cannot be overstated. *See* Roots, *supra* note 14, at 222. Roots underscores the fact that "modern prison administration does not provide any real guarantee that the worst abuses in America's prisons are a thing of the past." Roots, *supra*, at 222. Roots goes on to state that "[t]he limitation of access to the courts by pro se inmates poses serious threats that unconstitutional prison conditions will go unremedied . . . . In the worst cases of prison maladministration, prison officials have been known to subvert such processes entirely, discarding inmate complaints and illegally punishing inmates who complain." Roots, *supra*, at 222.

127. *Woods*, 722 F.3d at 1183.

128. *Id.*

129. *Id.*

judicial economy.[130] The court noted that preserving an option to award an attorney's appellate fees would deter baseless appeals of judgments favoring inmates.[131] The court reasoned, "[i]f we were to hold to the contrary, defendants would always have an incentive to appeal monetary judgments in the prisoners' favor . . . . Such unnecessary appeals needlessly burden the judicial system—the exact opposite of Congress' goal in enacting the PLRA."[132]

3. Public Policy Consequences of the Statutory Cap on Attorney's Fees

The Ninth Circuit also reasoned that applying an absolute limitation on attorney's fees, including fees accrued while defending a judgment on appeal, would have harmful public policy repercussions. Highlighting the potentially high impact of successful prisoner civil rights claims, the court noted, "[t]he majority of these actions result in low-damage awards for the prisoner, but can affect substantial change in the prison conditions or prisoner treatment."[133] Limiting appellate attorney's fees discourages inmates from seeking legal redress for grievances by creating "an effective barrier to accessing the legal system."[134] Such a barrier is created because "[a]lthough these fee restrictions are not as burdensome as the strict exhaustion requirements embodied in the PLRA, they significantly limit the incentives of inmates and attorneys to litigate."[135] Moreover, rather than deterring frivolous prisoner complaints in their totality, the PLRA's limitations only increase the number of *pro se* litigants[136] while decreasing the number of attorneys willing to represent inmates.[137]

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1182. The Ninth Circuit also pointed out the relatively limited reach of its holding given the small number of prisoner complaints which make it to the appellate stage. *See id.* at 1182 n.5.

134. Walker Newell, *An Irrational Oversight: Applying the PLRA's Fee Restrictions to Collateral Prisoner Litigation*, 15 CUNY L. REV. 53, 57 (2011).

135. *Id.*

136. While many *pro se* actions are swiftly dismissed, it is not unheard of that an action brought *pro se* can effect real change. For a comprehensive discussion of one such instance, see Collins, *supra* note 13, at 670 (citing STEVE J. MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS—THE WALLS CAME TUMBLING DOWN (1987)). The article recounts that "[w]hile most inmate lawsuits result in nothing for the inmate, some of the most significant litigation began as pro se complaints." *Id.* The book traces the story of "the almost never-ending Ruiz case in Texas that remade the entire Texas correctional system [and] began as pro se complaints. So it can be presumed that some cases that inmates now don't file have merit at the 'reform' level . . . and eventually result in some form of significant change." *Id.*

137. *See* Schlanger, *supra* note 3, at 1655. In *Inmate Litigation*, the author conducted interviews with several jail supervisors and other officials familiar with prison conditions. In one interview on the

V. PROPOSAL

The Ninth Circuit's rationale for applying the PLRA's attorney's fee limitation to monetary judgments secured at the trial court level, and its recognition of the dangers of extending the fee cap to appellate work, is persuasive in light of the statutory language, legislative history of the PLRA, and public policy considerations.

A. Statutory Language

As the Ninth Circuit pointed out, the statutory language of the PLRA is ambiguous with respect to whether appellate attorney's fees are also subject to the 150 percent limitation.[138] The Sixth Circuit's approach reads into the statute a limit on appellate fees when such a limit is not explicit. For example, it is logical that "[i]f Congress had intended attorney's fees for an entire monetary case to be limited to 150% of that judgment, it would have used language to dictate such. Congress could have stated that 'all' fees are limited to 150% of any monetary judgment."[139] The PLRA's fee cap provision does not specifically address the distinction between fees accrued while securing a monetary judgment and fees accrued defending a judgment on appeal. Thus, the statutory uncertainty necessitates further inquiry into Congress' goals in enacting the PLRA.

B. Legislative History

Given that the statutory language is ambiguous as to whether the proportionality requirement is meant to be imposed on attorney's fees accumulated while defending a monetary judgment on appeal, the

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perceived effects of the PLRA, the jail supervisor stated that the primary effect of the PLRA has been the increase in the number of cases with *pro se* inmate plaintiffs, making cases "easier to defend." *Id.*

138. *See Woods*, 722 F.3d 1177; *see also* Erica M. Eisinger et al., *Prisoners' Rights*, 52 WAYNE L. REV. 857, 914 (2006). The authors of *Prisoners' Rights* criticize the Sixth Circuit rationale: "[i]n *Riley v. Kurtz*, a Sixth Circuit panel ignored the statutory language and legislative history of the PLRA in holding that the hours spent defending against an unsuccessful appeal of a monetary judgment against prison staff could not be greater than 150% of that judgment." Eisinger, *supra* at 914.

139. Eisinger, *supra* note 138, at 919–20. Relatedly, Congress arguably would have been much more explicit in designating the fee cap to apply not only to a monetary judgment, but to appellate fees if that was the intention. As Eisinger et al. argue:

> If Congress had intended § 1997e(d)(2) to apply to fees awarded by district and appellate courts, it would have used different language. Congress could have replaced 'a' with 'any,' and its intent to apply subsection (d)(2) to all awards of attorney's fees, including trial and appellate, would have been clear. Thus, subsection (d)(2) would have then read: "Whenever *any* monetary judgment is awarded."

Id. at 919.

legislative history and potential policy implications are also especially significant to a court's determination of whether to adopt the Sixth Circuit approach or the Ninth Circuit approach. In that regard, the Ninth Circuit's rule achieves an even balance between the primary purposes of Congress in enacting the PLRA and deterring a deluge of unmeritorious prisoner actions masked as legitimate deprivation of rights claims.

Take, for example, a case in which an inmate brings a legitimate claim for a constitutional violation. A blanket limitation on the award of attorney's fees would not achieve the goals enumerated prior to the enactment of the PLRA. "Nowhere in the Legislative History of the PLRA is there an expressed intent to impose restrictions on appellate fees where a jury has determined the prisoner's lawsuit is nonfrivolous and awards damages."[140] A disconnect exists between the legislative intent and actual consequences of the fee restriction when adopting the Sixth Circuit approach because of the categorical limit on appellate fees even when the inmate's claim is legitimate. Importantly, "There is no mention in the PLRA's Legislative History concerning abuses that prevailing prisoners inflicted on the appellate courts in defending against appeals by losing defendants."[141]

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140. *Id.* at 920 (citing BERNARD D. REAMS, JR. & WILLIAM H. MANZ, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996 (1st ed. 1997)).

141. *Id.* at 920 n.362 (citing Dannenberg v. Valadez, 338 F.3d 1070 (9th Cir. 2003)) ("[P]rison staff argued that when both an injunction and money damages are awarded that the prisoner can never receive more than 150% of the monetary judgment."). Eisinger points out that "[i]n rejecting this argument, the Ninth Circuit stated '[n]othing in the text or history of the PLRA supports a rule that would impose such a Hobson's choice on prison inmates.'" *Id.*

C. Public Policy Implications and Collateral Effects

The potential deleterious effects of placing a fee cap on appellate work completed on behalf of inmates who bring the rare meritorious claims which succeed at the trial court level are alarming. As the Ninth Circuit pointed out, once a prisoner has proceeded past the mountain of preliminary hurdles imposed by the PLRA and garnered a favorable judgment, it is unlikely that the claim lacks any merit.[142] Imposing the PLRA's attorney's fee limitation at the appellate level would thus act as an unintended deterrent for attorneys defending meritorious prisoner claims that can potentially have a great impact on raising the level of care at prisons and holding prison officials accountable for flagrant violations.

The Ninth Circuit's rationale is also persuasive when viewing the attorney's fee limitation in context with the numerous additional restrictions the PLRA places on inmates, discussed above.[143] For example, "[w]hile it is true that the fee cap provision does not make it impossible in all cases for a prisoner to obtain legal services, the provision does destroy a critical incentive for lawyers to take on prisoner constitutional tort cases, thereby creating an additional impediment on the prisoner . . . ."[144]

For those attorneys who persevere despite the knowledge of the limit on the fees they will recover, the limitation is also likely to diminish the strength of representation because of the decreased motivation knowing no (or very limited) fees will be accrued regardless of the outcome of the case.[145]

When attorneys refrain from representing inmates in connection with their constitutional claims, the repercussions are discouraging. One potential consequence is that the grievance goes unaddressed when an inmate decides not to file the complaint without counsel.[146] "While this may seem to be exactly what Congress desired in enacting the PLRA, Congress's express intention was to limit the amount of frivolous lawsuits while leaving the courts open to prisoners with sincere allegations of constitutional violations."[147] At the other end of the spectrum, rather than

142. *See Woods*, 722 F.3d at 1182; *see also* Schlanger, *supra* note 3, at 1697 ("Whether by legislation or by other court policy, it would be a very useful change to have many more lawyers in the component of the inmate docket that survives summary judgment. This would tend to increase the settlement rate (reducing the litigation burden) and also make the trials far more accurate adjudicatory events.").

143. *See supra* Part III.

144. Cohn, *supra* note 23, at 326–27.

145. *Id.* at 327.

146. *See id.* at 327.

147. *Id.* (citations omitted).

failing to file claims altogether, more persistent inmates will likely proceed with lawsuits *pro se*.[148] "While pro se plaintiffs are held to less demanding pleading standards and do occasionally achieve success, the vast majority of pro se lawsuits fail."[149] Unsurprisingly, prisoners have historically had much greater success with the representation of counsel, underscoring the severity of the potential deterrent effect of limiting attorney's fees.[150]

Though one of the primary goals of the PLRA and the attorney's fee provision was to free up the courts from painstaking and protracted litigation, the rise in the number of *pro se* litigants achieves the opposite effect:[151] "If without counsel, [prisoners] litigate untrained in procedure and suspicious of the judicial system."[152] Also, "[p]rison administrators, the usual defendants in these actions, are often too busy keeping a lid on their underfinanced and volatile institutions to litigate responsively to court deadlines."[153] Thus, while limiting attorney's fees is meant to sustain judicial economy, the PLRA provision creates additional burdens on the court and prison officials alike. This situation also highlights the power imbalance in inmate litigation when plaintiffs proceed *pro se* against the government.[154] "[Prison officials] are represented by attorneys general who may defend through 'papering' the plaintiff and the court with motions. The burden of sorting through the unprofessional pleadings of the plaintiff and the dilatory pleadings of the defendant falls upon the court, slowing the litigation process to a halt."[155] Ironically, rather than freeing the courts from the barrage of prisoner complaints in order to allocate resources elsewhere, the fee cap motivates tactical procedures which are just as likely to obstruct the court system.[156]

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148. *See id.* at 327–28.

149. *Id.* (citing Boivin v. Black, 225 F.3d 36, 43 (1st Cir. 2000)) ("While pro se litigants are not exempt from procedural rules, courts are solicitous of the obstacles that they face. Consequently, courts hold pro se pleadings to less demanding standards than those drafted by lawyers.").

150. *Id.* at 327–28.

151. *See id.* at 328 ("Lawsuits brought pro se are not, and should not be, a preferred method of litigating constitutional violations, particularly as pro se litigation has the effect of substantially slowing the litigation process.").

152. *Id.* (quoting Herbert Eastman, *Draining the Swamp: An Examination of Judicial and Congressional Policies to Limit Prisoner Litigation*, 20 COLUM. HUM. RTS. L. REV. 64, 70–71 (1988)).

153. *Id.* (quoting Eastman, *supra* note 152).

154. *See id.*

155. *Id.* (quoting Eastman, *supra* note 152).

156. *See id.* at 327–28.

VI. CONCLUSION

It may be difficult to sympathize with attorneys who are unable to collect higher fees or feel compassion for the inmate population. Thus, at first glance, the PLRA's limitation on attorney's fees to 150 percent of a monetary judgment secured on behalf of a prisoner may not garner much attention. However, in the larger scheme of the PLRA, there is much to worry about.

The prisoner complaints highlighted prior to the enactment of the PLRA included a lengthy list of the most frivolous actions, and rallying support for legislation that would seemingly free the court system from a shower of unmeritorious lawsuits was not very difficult. Underscoring the extremely frivolous cases in which inmates cried wolf, legislators were of the opinion that the court should no longer listen. With the support of the media's attention on the most ridiculous claims, Congress swiftly passed the PLRA with little consideration of its future implications. While on its own the fee limitation provision may seem inconsequential, given the totality of the restrictions placed on prisoners by way of the exhaustion requirement and the physical injury requirement, the limitation on attorney's fees becomes increasingly important to an inmate population which already faces a mountain of hurdles in order to have its grievances heard.

The recent circuit split between the Sixth Circuit and the Ninth Circuit is thus one with enormous import. When an inmate is defending a judgment on appeal, the claim cannot reasonably be referred to as frivolous any longer. In fact, those claims are the few meritorious cases in which the fee limitation was never meant to apply. Thus, by taking the position of the Ninth Circuit and eliminating the restriction on appellate attorney's fees, courts will more effectively balance the competing interests of inmates with legitimate grievances and the judiciary's interest in eliminating needless litigation motivated by the quality of prison meals and brands of tennis shoes.

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