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The Proportionality Test in Section 1988 Fee Awards

Edward T. Stein*
Linda E. Fisher**

INTRODUCTION

The Civil Rights Attorney's Fees Awards Act of 19761 was enacted to attract competent legal counsel for those individuals and groups seeking redress in federal and state courts for violations of their civil rights.2 The need for the Fees Act was clearly demonstrated by the United States Supreme Court's historic decision in Alyeska Pipeline Service Co. v. Wilderness Society.3 In Alyeska, the Supreme Court disallowed an award of fees to the plaintiffs' attorneys,4 rejected the developing equitable doctrine of private attorneys general5 and reaffirmed the established American Rule that parties are to bear their own legal expenses.6 The

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1. 42 U.S.C. § 1988 (Supp. IV 1980) [referred to herein as the Fees Act or § 1988]. The Act provides in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 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." Id.


4. The attorneys for the environmental groups had logged 4,455 hours during the course of the litigation which began in 1970. 421 U.S. at 245 n.13.

5. Id. at 245. The appellate court, however, had accepted the concept of private attorneys general and had made the following comment: "Recognizing their broad equitable power, some courts have concluded that the interests of justice require fee shifting in a third class of cases where the plaintiff acted as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." Wilderness Society v. Morton, 495 F.2d 1026, 1029 (D.C. Cir. 1974) (citation omitted).

Court reasoned that, without statutory authorization and guidelines, the problems in implementing the judgemade equitable doctrine were too great.\(^7\) A close reading of Justice White's majority opinion in \textit{Alyeska}, however, indicates that the Court was critical of the American Rule as well. The Court recognized that "under some, if not most, of the statutes providing the allowance of reasonable fees, Congress has opted to rely heavily on \textit{private} enforcement to implement public policy and to allow counsel fees so as to \textit{encourage} private litigation."\(^8\)

In keeping with this attitude, Congress passed section 1988 (or the \textit{Fees Act})\(^9\) specifically to provide statutory authorization for attorney's fees.\(^10\) Although a considerable amount of civil rights litigation has ensued since the effective date of the Fees Act,\(^11\) a consistent body of law providing for the objective and uniform measurement of fees has not developed among, or even within, the circuits.\(^12\) In determining what fees are reasonable, certain federal circuits have borrowed standards previously used in employment discrimination and antitrust cases,\(^13\) while others have derived their own "reasonable fee" test from a variety of sources.\(^14\)

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\(^7\) \textit{421 U.S.} at 263-64.
\(^8\) \textit{Id.} at 263 (emphasis added).
\(^10\) \textit{S. Rep. No. 1011, 94th Cong., 2d Sess.} (1976) [hereinafter cited as Senate Report], reprinted in \textit{1976 U.S. Code Cong. & Ad. News} 5908. Section 1988 authorizes fees to prevailing defendants; however, such fees are available only when plaintiffs' claims are meritless or frivolous. See \textit{infra} text accompanying notes 59-62. This article is directed to the recovery of fees by prevailing plaintiffs.
\(^12\) See \textit{infra} notes 13-19 and accompanying text. See also Leubsdorf, \textit{The Contingency Factor in Attorney Fee Awards}, \textit{90 Yale L.J.} 473, 503 (1981).
\(^14\) See e.g., \textit{Mid-Hudson Legal Serv., Inc. v. G & U Inc.}, \textit{578 F.2d} 34 (2d Cir. 1978), following the Third Circuit's \textit{Lindy Bros.} antitrust calculation. The \textit{Lindy Bros.} test, or lodestar formula, arrives at the award by multiplying the hours expended by a "community"
In addition, some circuits have failed to follow one standard exclusively. The Seventh Circuit, for instance, employed one formula in *Waters v. Wisconsin Steel Works*\(^{15}\) which multiplied the attorney’s billing rate by the time or labor expended and adjusted the figure to account for certain factors, such as the customary fee billing rate. The lodestar figure is narrowly adjusted (usually up if at all) by contingency and/or quality factors. Cf. Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978), which borrowed the Fifth Circuit’s employment discrimination factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). See infra note 15 for a description of that test. See generally E. Larson, *Federal Court Awards of Attorney’s Fees* (1981).

The Sixth Circuit, relying on the *Lindy Bros.* formula, ultimately adopted a strict market rate times hours formula. See *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). The only variation in the Sixth Circuit’s formula was the provision for a contingent factor of up to 10%. *See also* Comment, *Flexibility and Fairness—Sixth Circuit Jurisprudence Under the Civil Rights Attorney’s Fees Awards Act*, 12 Toledo L. Rev. 623 (1981).


1. The time and labor required;
2. The novelty and difficulty of the questions presented;
3. The skill required to perform the legal services;
4. The preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee in the community;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or circumstances;
8. The amount involved and the results obtained;
9. The experience, reputation and ability of the attorney;
10. The undesirability of the case;
11. The nature and length of the professional relationship with the client;
12. Awards in similar cases.

488 F.2d at 717-19. In *Muscare v. Quinn*, 614 F.2d 577, 579-80 (7th Cir. 1980), however, the court used the *Waters* factors, derived from the ABA Model Code of Professional Responsibility, as a substitute for the *Johnson* factors. The relevant rule reads as follows:

Factors to be considered as guides in determining the reasonableness of a fee include the following: 1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; 2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) The fee customarily charged in the locality for similar legal services; 4) The amount involved and the results obtained; 5) The time limitations imposed by the client or by the circumstances; 6) The nature and length of the professional relationship with the client; 7) The experience, reputation and ability of the lawyer or lawyers performing the services; 8) Whether the fee is fixed or contingent.

*Waters*, 502 F.2d at 1322. The ABA standards begin with the lodestar formula set forth by the Third Circuit in *Lindy Bros.*, see supra note 14. Practically speaking, it may make little difference which set of factors is used because the lists are “practically identical.”
in the locality, the amount involved and the results obtained. Six years later in Muscare v. Quinn, the Seventh Circuit adopted a proportionality test under which attorney’s fees can be awarded only for specific claims on which the plaintiff actually prevails. All other attorney time, including that spent pursuing claims which seemed substantial and meritorious when brought, is discounted and is not compensable. The Seventh Circuit’s recent decision in Syvock v. Milwaukee Boiler Manufacturing Co., however, left open the question of whether the court may apply both tests in a single case. Such an approach would permit a double reduction of fees and would, therefore, discourage attorneys from participating in civil rights litigation, in contravention of the clear intent of Congress.

This article analyzes the congressional intent underlying section 1988 which the authors believe demands that fees be awarded for all time reasonably spent, regardless of the plaintiff’s failure to prevail on certain issues or claims. The article will examine the legislative and case history of section 1988, particularly the development of the Seventh Circuit’s proportionality test. In addition, we will consider Hensley v. Eckerhart, currently pending before

Entertainment Concepts v. Maciejewski, 631 F.2d at 508; In re Folding Carton Antitrust Litig., 84 F.R.D. at 259.
17. 614 F.2d 577 (7th Cir. 1980).
18. 665 F.2d 149 (7th Cir. 1981).
19. In applying the Waters standards, the district court had reduced the hours by half. The court then reduced the remaining hours by 65% based on its interpretation of Muscare. Syvock, 665 F.2d at 162. See infra text accompanying notes 118-31 for a discussion of the Syvock case.
20. Congress’ initial intent was in part to bridge the gap between too few civil rights attorneys and too many citizens whose rights had been violated. 122 Cong. Rec. 31,472, 33,312 (1976).
21. Lawyers are bound to represent their clients zealously and to avoid possible conflicts of interest. However, conflicts do arise when the questions of relief on the merits of a case and attorney’s fees are negotiated concurrently. The attorney is then placed on the proverbial horns of a dilemma. The attorney becomes both an advocate for his/her client and for himself or herself. More important is the fact that attorneys are bound to “vigorous advocacy.” This necessarily requires creativity, expanding new areas of law, and bringing new theories and approaches to the court. The proportionality test (see infra text accompanying notes 88-96) penalizes these good faith efforts. Certainty in assessment of fees and the expectation of receiving all fees reasonably due reduces the breadth of negotiability on these issues, relieving the attorney of most of the potential conflict. See N.Y.C. Bar Ass’n on Settlement offers in Public Interest Litigation Conditioned on Waiver of Statutory Fees, Op. 80-94 (1981).
the Supreme Court, which presents the Court with its first oppor-
tunity to decide the propriety of the proportionality calculus under
section 1988. Although the facts in Hensley differ significantly
from those in Syvock, the Court’s upcoming decision could shed
some light on the problems addressed in this article by establish-
ing an objective measure for fee awards.

THE LEGISLATIVE AND CASE HISTORY OF SECTION 1988

The language of section 1988 provides less than complete direc-
tion as to when, how and in what amount fees are to be awarded:
"In any action or proceeding to enforce a provision of [sections
1981-1983, 1985, 1986]... the court, in its discretion, may allow the
prevailing party a reasonable attorney's fee. . . ."23 To ascertain
the appropriate manner of awarding fees, therefore, it becomes
necessary to look beyond the statute itself. One source of assist-
ance is the legislative history of the provision, evidencing a clear
congressional intent to ensure access to federal courts to citizens
who claim civil rights violations; another is judicial interpretations
of similar legislation. Both will be considered in this section.

Legislative History

Prior to the enactment of section 1988, there were over fifty fed-
eral statutes which authorized an award of attorney's fees to pre-
vailing parties.24 These statutes generally followed one of three
approaches: some granted mandatory fees to prevailing plain-
tiffs,25 others were discretionary but limited fee awards to certain
parties,26 and numerous other statutes allowed a court, in its dis-
cretion, to award fees to either prevailing plaintiffs or defend-
ants.27 Section 1988 falls into the latter category. Its language
tracks closely that of section 706(k) of Title VII of the Civil Rights
Act of 196428 and section 2000(a)-3(b) of Title II of that Act.29 These

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24. Presently, there are more than 100 such statutes. See 5 FED. ATTORNEY FEE AWARDS RPR 2, 3 (June, 1982).
three provisions have been construed together and held to require that fees be paid to prevailing parties.\textsuperscript{30}

When first enacted, however, the civil rights statutes giving rise to section 1988 did not allow attorney's fees.\textsuperscript{31} Although some of these statutes were later amended to provide for fees, many were not. Consequently, most of the federal civil rights litigation since the mid-1960's was filed under one of the civil rights statutes which had no provision for attorney's fees.\textsuperscript{32} Lacking statutory authority in \textit{Alyeska}, the Supreme Court had little choice but to deny plaintiffs' request for fees.\textsuperscript{33}

Congress' response to \textit{Alyeska} was to pass the Fees Act. In so doing, Congress acknowledged that "[T]he effective implementation of civil rights laws by all citizens" was dependent upon the awarding of fees to prevailing plaintiffs.\textsuperscript{34} Unless fees were granted the civil rights laws would become "mere hollow pronouncements which the average citizen [could not] enforce."\textsuperscript{35} Moreover, unless the average citizen did enforce the civil rights laws, the Senate noted, the financial and administrative burden of enforcement would devolve upon the federal or state government with a resultant increase in prosecuting attorneys.\textsuperscript{36} Fee shifting provisions, however, would enable "vigorous enforcement of modern civil rights legislation, [and] at the same time [limit] the growth of the enforcement bureaucracy."\textsuperscript{37} Ideally, then, the important principles enunciated in the civil rights acts would be furthered without cost to federal or state government.

\textsuperscript{30} See infra text accompanying notes 55-75. See also Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (Title II standards equally applicable to Title VII); Hughes v. Rowe, 449 U.S. 5 (1980) (Christiansburg's Title VII standard applied to § 1988). In addition, the Senate Report on § 1988 states: "It is intended that the standard for awarding fees be generally the same as under the fee provision of the 1964 Civil Rights Act." Senate Report, supra note 10, at 3, \textit{reprinted in} 1976 \textit{U.S. CODE CONG. & AD. NEWS} 5908.

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} "The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights." Senate Report, supra note 10, at 3, \textit{reprinted in} 1976 \textit{U.S. CODE CONG. & AD. NEWS} 5908, 5911.


\textsuperscript{34} Custom v. Quern, 482 F. Supp. 1000, 1003 (N.D. Ill. 1980).

\textsuperscript{35} Senate Report, supra note 10, at 6, \textit{reprinted in} 1976 \textit{U.S. CODE CONG. & AD. NEWS} 5908, 5913. Congresswoman Holtzman said, "The act will help to assure that all Americans can have access to the court to obtain the protection against discrimination contained in our laws and the Constitution." 122 \textit{CONG. REC} 35,127 (1976).


\textsuperscript{37} \textit{Id.}
Additionally, Congress indicated that section 1988 was designed so as to allow plaintiffs to seek counsel of their choice through the same or similar mechanisms that businesses or wealthy individuals use. This goal could be accomplished only if the "reasonable" fee award was based on the same standards used to award fees in commercial, antitrust, class action and other federal litigation.\textsuperscript{38} Thus, the Senate Report advised that awards be made "as is traditional with attorneys compensated by a fee-paying client,"\textsuperscript{39} that is, according to a retainer or hourly rate schedule.\textsuperscript{40} It is clear from the Senate debates that contingent fees were not considered among the "traditional" payment methods.\textsuperscript{41}

The best interpretation of the Senate's intent, given the cases cited in the Senate Report,\textsuperscript{42} is that fees should reflect the amount of work actually performed. In other words, a proper calculation would multiply the attorney's hourly rate by the number of hours expended, with appropriate adjustment for certain variables.\textsuperscript{43} In this way awards in civil rights cases would follow the same standards utilized "in other types of equally complex Federal litigation, . . . and not be reduced because the rights involved may be nonpecuniary in nature."\textsuperscript{44} Such an application of the Fees Act does not provide a windfall to attorneys, but rather compensates them for services rendered.\textsuperscript{45}

\textsuperscript{38} "In computing the fees, counsel for prevailing parties should be paid as is traditional with attorneys compensated by a fee paying client, 'for all time reasonably expended on a matter.'" Id. at 6, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913 (citing Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974) and Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974)).

\textsuperscript{39} 122 CONG. REC. 33, 313 (1976).

\textsuperscript{40} The fee arrangement that counsel has with a client should be of no concern to the court in assessing fees. In Sargeant v. Sharpe, 579 F.2d 645, 649 (1st Cir. 1978), the court said: "[W]e reiterate that a fee agreement is irrelevant to the issue of entitlement and should not enter into a determination of the amount of a reasonable fee." Under the Waters or Johnson factors, the fee agreement would only be relevant to whether or not the fees are contingent. If the attorney is being paid by the hour at his or her regular rates, the contingency factor is irrelevant in awarding fees. It should be considered only in determining whether a bonus is appropriate. See also Sanchez v. Schwartz, No. 81-2509, slip op. at 4 (7th Cir. Sept. 13, 1982).

\textsuperscript{41} See 122 CONG. REC. 33,314 (1976).

\textsuperscript{42} See Senate Report, supra note 10, at 6, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913.

\textsuperscript{43} See supra note 15. If the attorney does not have a "normal" hourly rate then the court should determine the appropriate rate within the district.

\textsuperscript{44} Senate Report, supra note 10, at 6, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913.

\textsuperscript{45} 122 CONG. REC. 33,314 (1976).
In order to attract competent legal counsel to participate in civil rights litigation, the Fees Act promised an award of reasonable fees. The purpose behind the promise was to afford citizens the legal “resources” with which to gain access to the courts. Senator Tunney, a co-sponsor of the Senate Bill, pointed out that “[i]f the citizen does not have the resources, his day in court is denied him; the Congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers. . .”46 Congressman Drinan, a co-sponsor of the House bill, echoed Senator Tunney’s sentiments and added that “all incidental and necessary expenses incurred in furnishing effective and competent representation” should be included in an award as well.47

As the legislative history indicates, Congress recognized that the plaintiff’s attorney in a civil rights case serves as a private attorney general.48 Congress clearly intended that neither the prevailing plaintiff nor his or her attorney should bear the cost of vindicating federal rights against violators of federal law.49 Its purpose in enacting the civil rights laws would remain unfulfilled unless the means for taking advantage of such laws were also provided. Since competent “legal resources” are assured only through payment of reasonable fees, promise of payment was a necessary precondition to effective private enforcement of the civil rights laws. Congress therefore concluded that all plaintiff attorney time should be compensated unless it is duplicative or spent on frivolous or meritless claims or issues.50

In sum, the legislative history espouses the policy that attorneys should be paid a reasonable fee and should know with certainty that their good faith efforts will be rewarded fairly.51 Civil rights plaintiffs and their attorneys are, after all, the chosen instrument of Congress and a prevailing plaintiff is a vindicator of federally created rights.52 In order to give full meaning to the Fees Act,

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46. Id. at 33,313 (emphasis added).
47. Id. at 35,123.
50. “[T]he term ‘meritless’ is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case.” Christiansburg, 434 U.S. at 421.
52. See infra text accompanying notes 57-62.
however, the concepts of prevailing party and "all time reasonably spent" must be liberally construed. Thus far, the Supreme Court has not addressed the question of what fee is reasonable. It has, however, examined and liberally construed the definition of a prevailing party and the circumstances under which fees may be awarded.

**Supreme Court Cases**

The Supreme Court has rendered several decisions under various civil rights statutes which address the broad question of who is a "prevailing party," and which apply to section 1988 awards. The earliest relevant case on the subject, *Newman v. Piggie Park Enterprises* announced that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Prevailing defendants, however, have not received the same treatment. In *Christiansburg Garment Co. v. EEOC*, the Equal Employment Opportunity Commission (EEOC) sued the defendant company on behalf of an individual complainant. The defendant moved for and was granted summary judgment on the ground that the suit had not been "pending" at the time the amendments to Title VII, which allowed the EEOC to represent complainants in "pending" cases, took effect. The lower court denied the prevailing defendant attorney's fees, however, because the EEOC's action was not meritless. The Supreme Court approved this result.

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53. See *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5047 (C.D. Cal. 1974). See also the Northcross opinion which declared: "We know of no 'traditional' method of billing whereby an attorney offers a discount based upon his or her failure to prevail on 'issues or parts of issues.' Furthermore, it would hardly further our mandate to use the 'broadest and most flexible remedies available' to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous position on their client's behalf that is possible in good faith."

54. See infra text accompanying notes 132-50 for a discussion of Hensley, now pending before the Court, which presents one aspect of the reasonable fee question.


56. 390 U.S. at 402. Fee awards may also be made against a state, as the eleventh amendment is not bar. *Hutto v. Finney*, 437 U.S. 678 (1978).


58. Id. at 422.
After analyzing the legislative history underlying the civil rights statutes involved, the Court held that prevailing defendants were not entitled to fees on the same basis as prevailing plaintiffs. Congress intended that a prevailing defendant would recover only if the plaintiff’s cause was “unfounded, meritless, frivolous or vexatiously brought.” In justifying this double standard, the Court noted that “there are at least two strong equitable considerations” which apply when making an award to a prevailing plaintiff that are wholly absent when making an award to a prevailing defendant. First, the purpose of the civil rights statutes was to give plaintiffs an opportunity to vindicate violations of their civil rights; and second, an award to a prevailing plaintiff was an “award against a violator of federal law.” The thrust of fees awards statutes in the civil rights area was thus aimed at benefiting prevailing plaintiffs.

In *Maher v. Gagne*, the Court was called upon to determine the meaning of “prevailed” under section 1988. The plaintiff, an AFDC recipient, brought a section 1983 action against the state of Connecticut, alleging that certain of its welfare regulations violated the Social Security Act and the fourteenth amendment. The parties thereafter entered into a consent decree which required Connecticut to amend its regulations. The district court, nevertheless, awarded attorney’s fees to the plaintiff, and the award was affirmed on appeal. The state sought and was granted certiorari in the Supreme Court. Relying on the Senate Report’s statement that “for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief,” the Court held that a “prevailing party” under the Fees Act included plaintiffs whose rights were secured when their case was settled. Thus,

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59. *Id.*
60. *Id.* at 421.
61. *Id.* at 418.
62. *Id.*
63. Prevailing defendants are allowed fee awards under § 1988 if the plaintiff’s action is frivolous, unreasonable or groundless.
64. 448 U.S. 122 (1980).
65. *Id.* at 129 (quoting Senate Report, supra note 10, at 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912). That fees are awardable when a case is mooted or settled before trial was approved in *Regaldo v. Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978), where plaintiffs sued for prompt replacement of lost unemployment compensation checks. After several years of litigation (which was commenced before § 1988 was enacted) the parties
although the plaintiff in *Maher* had not prevailed “in every particular,” she had won “substantially all of the relief originally sought” and was, therefore, the prevailing party.66

The Court has also examined what claims may give rise to a fees award. In *Maher*, the Court stated that “[T]he extent a plaintiff joins a claim under one of the statutes enumerated in [section 1988] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.”67 Even where the claim with fees involved a constitutional question and the non-fee, nonconstitutional claim was dispositive, the court could decline to reach the constitutional issue and still award fees to the plaintiff so long as he prevailed on the non-fee claim.68 Although the Court did not decide whether fees could be awarded for time spent on both claims, such awards would be fully in keeping with the tenor of the legislative history as a whole, as well as its requirement that section 1988 fees be awarded in the traditional manner.69

In addition, the Court has held that section 1988 fees may be awarded in purely statutory actions under section 1983, whether brought in federal or state court,70 as well as for administrative and state judicial proceedings which are required by federal statute as a precondition to gaining access to the federal courts.71 More recently, the Court addressed the issue of whether a request for attorney’s fees under section 1988 is subject to Federal Rule of Civil Procedure 59(e), as a motion to alter or amend the judgment. If so, a request for fees would have to be filed within ten days of entry of judgment.72 The Court determined, in *White v. New...*
Hampshire Department of Social Security,\textsuperscript{73} that such a requirement was neither "necessary [nor] desirable to promote finality, judicial economy or fairness."\textsuperscript{74}

The preceding discussion has demonstrated how the Court, in construing the Fees Act, has sought to implement the congressional intent to encourage and facilitate the private enforcement of civil rights laws. Prevailing party has been broadly defined, as have the actions and proceedings in which fees are awardable under the Act. When considering how to measure the statutorily mandated reasonable fee, the same general standard should be applied to make "it easier for a plaintiff of limited means to bring a meritorious suit."\textsuperscript{75} That general standard has not been uniformly followed by the circuits, however, and a great disparity in the ultimate awards for fees has resulted.

**THE PROPORTIONALITY TEST**

Given the posture of the Supreme Court, the statutory framework and the congressional directive to award fees in the same manner as fee-paying clients compensate their attorneys, awards under section 1988 should be made to prevailing parties for all time spent on reasonably colorable claims whether or not those claims ultimately succeed.\textsuperscript{76} Fees should not be awarded, however, for time spent on meritless claims, which have been judicially defined as groundless or without foundation.\textsuperscript{77} Thus, the plaintiff's failure to prevail on a claim does not render the claim meritless. Once the plaintiff is the adjudicated prevailing party, there should be no diminution of fees. Rather, fees should be disallowed only when

\textsuperscript{73} 102 S. Ct. 1162 (1982).

\textsuperscript{74} Id. at 4257. The Court ruled that Fed. R. Civ. P. 54(d) applies. That rule contains no time limitations for when the "prevailing party" must file his or her application for costs. Many districts provide that costs applications must be filed within a time certain. For example, rule 45 of the General Rules of the Northern District of Illinois requires the "bill of costs to be filed" within ten days of the entry of a judgment allowing costs. The Seventh Circuit has recently decided that the time limitation contained in local rule 45 "has nothing whatsoever to do with a motion for attorneys fees under Section 1988." Gautreaux v. C.H.A., No. 81-2223, slip op. at 18-19 (7th Cir. Aug. 30, 1982). See also Metcalf v. Borba, 51 U.S.L.W. 2081 (U.S. Aug. 22, 1982).

\textsuperscript{75} Carey, 447 U.S. at 63 (quoting Christiansburg, 443 U.S. at 420).

\textsuperscript{76} This assumes that the plaintiff has prevailed on at least one claim and that "special circumstances" do not exist to deny fees. See e.g., Seigal v. Merrick, 619 F.2d 160 (2d Cir. 1980); Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978); Berger, supra note 6, at 320. See also infra note 78.

\textsuperscript{77} Christiansburg, 434 U.S. at 421.
special circumstances, such as bad faith, frivolous claims, or vexatious litigation, warrant it. By not discouraging litigation, this framework effectuates Congress' intent that civil rights plaintiffs act as private attorneys general.

The goal of advancing the underlying litigation has been used by several circuits as a rationale for awarding fees in cases where plaintiffs have not prevailed on all claims brought or litigated, provided that the claims were not frivolous. In Brown v. Bathke, for example, the plaintiff prevailed on her procedural due process claim, but the court did not reach her substantive claims. Nevertheless, the Eighth Circuit found that the hours spent by her attorney on substantive issues were compensable because to otherwise would deter plaintiffs from bringing civil rights actions and would reduce fees below the level of the requisite "reasonable fee." The Eighth Circuit has continued to follow this standard.


The Davis court awarded fees for a "certain limited amount of time [spent] pursuing certain issues of fact and law [unidentified by the court] that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail," on the basis that "all time reasonably expended in pursuit of the ultimate result achieved should be compensated in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." 8 Empl. Prac. Dec (CCH), at 5049.

In Stanford Daily, plaintiffs successfully argued that they were entitled to attorney's fees for time spent litigating a motion for a preliminary injunction that was denied. In its analysis of the fees issue, the court stated that fees should only be "den[ied] for clearly meritless claims but grant[ed] . . . for legal work reasonably calculated to advance [the party's] [client's] interests . . . [C]ourts should not require attorneys (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief." 64 F.R.D. at 684. In support of this conclusion, the court cited Locklin v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir. 1970)(attorney's fees for legal services which appeared unnecessary in hindsight, but which were clearly not manufactured, were allowed).

80. 588 F.2d 634 (8th Cir. 1978).
81. Id. at 637.
82. See, e.g., Reproductive Health Serv. v. Freeman, 614 F.2d 585 (8th Cir. 1980), vacated and remanded on other grounds, 449 U.S. 809 (1980). See also Crain v. City of Mountain Home, 611 F.2d 726 (8th Cir. 1979); Cleverly v. Western Elec., 594 F.2d 638 (8th Cir. 1979). In Reproductive Health Serv., plaintiffs prevailed on their claim that a Missouri regulation
In *Northcross v. Board of Education*, an Eighth Circuit case, plaintiffs sought fees for their work in a Memphis school desegregation case which had been litigated continuously for nineteen years. During this time, several variations of desegregation plans had been adopted. The district court awarded only partial fees on the ground that the scope of the plans ultimately adopted was not as broad as that originally sought by plaintiffs. The court of appeals reversed, holding that all attorney time was compensable even though the plaintiffs did not prevail in every respect.

In *Rivera v. City of Riverside*, a police misconduct suit involving both federal civil rights and pendent state claims, the amount of attorney’s fees awarded by the district court greatly exceeded the amount of damages awarded the prevailing plaintiffs. On appeal the defendants sought to reduce the fees, relying in part on the contention that the plaintiffs had succeeded on less than all of their claims and against less than all of the defendants. The Ninth Circuit rejected this argument and noted that to rule otherwise would discourage innovative litigation.

Unlike the Sixth, Eighth and Ninth Circuits, other federal cir-

violated a governing federal statute (although the scope of relief was restricted), but did not prevail on their substantive constitutional claim in the district court. They were nevertheless awarded fees for all time expended under the *Brown* principle. The Eighth Circuit found no abuse of discretion in this award. *Reproductive Health Serv.* is a stronger case than *Brown* because one can argue that plaintiff Brown was a catalyst in defendants’ abandonment of the allegedly unconstitutional statute under which she was fired, and the court had previously indicated that the circumstances surrounding Brown’s discharge “implicate[d] substantive due process considerations.” *Brown*, 588 F.2d at 636. In *Reproductive Health Serv.*, plaintiffs unequivocally failed to prevail on their constitutional issue in the district court. But see *Seigal v. Merrick*, 619 F.2d 160 (2d Cir. 1980), a stockholder’s derivative action, in which time spent on “unfruitful legal theories” (in this case a claim that information on “Star Wars” was not made available) was compensable.

83. 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).
84. *Id.* at 636. See also infra notes 132-50 and accompanying text.
85. 679 F.2d 795 (9th Cir. 1982).
86. The jury awarded the plaintiffs $33,350 in damages, and the court awarded them $243,343.75 for attorneys’ fees and $2,112.50 in law clerk’s fees. *Id.* at 796.
87. *Id.* at 797. The court noted that all of plaintiffs’ claims, lost or won, were related and that plaintiffs had obtained the ultimate goal of their suit, damages. It was therefore improper to fractionalize the case. The court recognized the *Northcross* argument, however, and stated: “[T]raditional methods of attorney compensation based on fee-paying clients do not differentiate between successful and unsuccessful claims.” *Id.* Such methods do not contemplate rebates to clients for lost claims. Nevertheless, the court was unconvinced by defendants’ argument that the fees awarded were disproportionate to the result obtained. Congress, after all, had not put a ceiling on the amount of fees awardable. In fact, fees may be awarded even where no damages are contemplated. The amount of the award is, therefore, within the sound discretion of the district court. *Id.* at 798.
cuits have decided that under section 1988 fees are awardable only for certain parts of a case. These courts have proceeded on the assumption that the fees awarded should be proportional to the number of claims, issues, or causes of action actually won. In applying a proportionality test, however, the courts have had difficulty defining exactly where to draw the line between compensable and noncompensable categories of claims.

In Gurule v. Wilson, the Tenth Circuit stated that "A technical dissection of the course of litigation and a mechanical proportionate reduction of the total fee is not in keeping with either the express intent of Congress or the broad remedial purpose of the Civil Rights Acts." Yet the court on rehearing retreated from this position, asserting that a court may proportionately reduce a requested fee "for time spent on substantially separate issues which a plaintiff raises but on which he does not prevail." An opposite equivocation occurred in Jones v. Diamond, where the Fifth Circuit initially adopted a proportionality test but in a modified opinion awarded fees for all attorney time expended. The court explained that the plaintiff's failure to obtain a judgment on every issue or claim asserted should not automatically require a denial of attorney's fees for time spent pursuing such claims.

The Gurule and Jones decisions demonstrate the difficulty of developing a court-created rule that is easily applied and that awards "reasonable" fees in a manner that the statute intends.

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88. See, e.g., Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980); Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir. 1979). These cases disallowed fees where there was a "truly fractionable claim" on which the plaintiff did not prevail. Compare the "related claims" standard of Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982) with Miller v. Carson, 628 F.2d 346 (5th Cir. 1980) (apportionment of fees is proper only when the plaintiff has several "distinct causes of action" and has succeeded on some). See also Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981), holding that if the plaintiff prevailed on the overall claim, "issue parcels" on which the plaintiff did not prevail were compensable. However, fees may not be awarded on "unmeritorious claims" (determined by hindsight).

89. 635 F.2d 782 (10th Cir.), on reh'g, 635 F.2d 794 (10th Cir. 1980).
90. Id. at 793-94.
91. Id. at 794.
92. 594 F.2d 997 (5th Cir. 1979), modified, 636 F.2d 1364 (5th Cir. 1981).
93. 636 F.2d at 1382.
94. Id.
95. The statutory language mandates a "reasonable fee" and the legislative history approves the application of the Johnson factors when applied as a set. However, courts have focused on the eighth Johnson factor, the amount involved and the results obtained, and have neglected to consider the set of factors as a whole. Thus, fees are generally not awarded in the same manner as fee-paying clients are billed. See Wheeler v. Durham City Bd. of Educ., 88 F.R.D. 27, 32 (W.D.N.C. 1980).
Application of the proportionality test in complex civil rights cases has been so confused as to engender further litigation on the same claims. The Third Circuit, in an attempt to avoid such confusion, has employed a proportionality test which analyzes the question of who is the "prevailing party" separately with respect to each claim. Fees are then awarded only for each claim on which the party prevails. Such a test, one might argue, undermines the intent of Congress to award prevailing plaintiffs' attorneys "reasonable" fees and discourages the private enforcement of civil rights violations.

In contrast, the Sixth Circuit test first identifies the prevailing party and then establishes "all time reasonably spent" as well as fees traditionally paid by a "fee-paying client." This method of calculation insures that private attorneys general receive a marketplace return on their good faith efforts. The result is not left to guesswork or unnecessary further litigation, and better promotes the purposes underlying section 1988 awards.

THE SEVENTH CIRCUIT APPROACH

Despite apparent difficulties, the Seventh Circuit has adopted a proportionality test to determine fee awards in civil rights cases.

96. See Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978). In Wheeler the district court recognized the confusion inherent in applying the Hughes analysis:

As Judge Peck recognized in Northcross, it is apparent that there is some confusion in the cases between the idea of prevailing on issues in order to be a "prevailing party" and entitled to attorney's fees at all, and the idea that the award should be proportionate to the extent of the recovery.

Id. at 36.

97. See supra notes 83-84 and accompanying text. This assumes that fees should not be awarded for frivolous or groundless claims. See, e.g., Swanson v. American Consumer Indus., 517 F.2d 555 (7th Cir. 1975) (district court did not abuse its discretion by denying compensation for collateral and pendent claims which were "unfounded and extravagant").

98. Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981); Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980); Batiste v. Furnco Constr. Co., 503 F.2d 447 (7th Cir. 1974); Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974). See infra notes 99-110 and accompanying text for a discussion of Muscare and notes 114-17 and accompanying text for a discussion of Busche. Batiste and Williams, two earlier Title VII cases, are not cited in any of the subsequent § 1988 cases. These cases followed the general rule that "the amount of an award of attorney's fees should be proportionate to the extent to which the plaintiff prevailed in the suit." Williams, 492 F.2d at 409. It is not clear whether this rule refers to the amount of money recovered or whether it refers to the number of issues or claims on which plaintiff prevailed.

The Seventh Circuit recognized the basic principle of § 1988 to compensate plaintiffs' attorneys for all reasonable time in an analogous context in Bond v. Stanton, 630 F.2d 1231, 1236 (7th Cir. 1980)(Bond IV), where fees were awarded for appellate work and time spent litigating the fee issue:

[I]nherent in the policy of the Fees Act is a congressional judgment that
encouragement of civil rights claims and actions through fee awards to prevailing plaintiffs and the consequent deterrence of civil rights violations presumably fostered by these actions are of greater weight than the hypothetical reluctance of defendants to pursue potentially meritorious objections (to fee awards) for fear of having to pay additional attorney's fees in the event their arguments prove unsuccessful.”

Indeed, it is plaintiff, acting as a private attorney general, who is deterred from bringing “potentially meritorious” claims if time spent on those which are ultimately unsuccessful is not compensable.

Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979), held that a party need not win “on all the contested issues to be considered a 'prevailing party.'” Id. at 79. The Dawson court, citing with approval Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970), determined that the plaintiffs in Dawson were a “catalyst” prompting the defendants to institute fair employment practices, and reaffirmed the spirit of the Fees Act that fees should be awarded “almost as a matter of course.” 600 F.2d at 79. In addition, in Davis v. Murphy, 587 F.2d 362 (7th Cir. 1978), the court confirmed that under the Act fees should be awarded for appellate work as well as for trial work. Id. at 364-65.

The cases cited above indicate the broad scope which the Seventh Circuit has accorded the Fees Act in its decisions except for, and in stark contrast to, those which have employed the proportionality test.

The first case decided by the Seventh Circuit under the Fees Act was Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977) (Bond III), which was remanded by the Supreme Court on the question of fees in light of the then just enacted Fees Act. Bond v. Stanton (Bond II), 528 F.2d 688 (7th Cir.), vacated and remanded for further consideration, 429 U.S. 973 (1976). Bond III held that the eleventh amendment is no bar to an award of fees and that the Act, as provided for in the legislative history, is applicable to a pending case, even one which has disposed of all issues except fees. 555 F.2d at 174. See also Gautreaux v. C.H.A., No. 81-2223, slip op. (7th Cir. Aug. 30,1982). The Seventh Circuit had originally affirmed the district court's award of fees against state officials in their capacity on the basis of bad faith. The constitutional issue raised by the defendants was that the eleventh amendment immunized these officials from the fee award. The Seventh Circuit held that the Fees Act was enacted pursuant to the "enforcement provisions" of section 5 of the fourteenth amendment, thereby overriding any state sovereignty restrictions. This interpretation was later confirmed by the Supreme Court in Hutto v. Finney, 437 U.S. 678 (1978).

The Senate Report, citing Newman with approval, provides in substance that once a plaintiff is determined to have prevailed, fees shall not be denied unless special circumstances exist. Senate Report, supra note 10, at 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912. The Seventh Circuit has ruled that a unit of local government is not exempt from an award of fees as a special circumstance, Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497, 507 (7th Cir. 1980); neither are attorneys who are employed by legal services or non-profit public interest firms or agencies. Custom v. Quern, 482 F. Supp. 1000 (N.D. Ill. 1980); Lackey v. Bowling, 476 F. Supp. 1111 (N.D. Ill. 1979). The defendants' good faith is not a ground to deny fees. Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980). See also E. LARSON, supra note 13, at 46. The size of the award is not necessarily determinative of whether or what fees shall be awarded. Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982); Milwe v. Caruoto, 653 F.2d 80 (2d Cir. 1981); Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1981); Coop v. City of South Bend, 635 F.2d 652 (7th Cir. 1980). That a plaintiff may prevail only on his statutory pendent claims is not a circumstance to deny fees. Sethy v. Alameda County Water Dist., 602 F.2d 894 (9th Cir. 1979); Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977). See also Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977); Harradine v. Board of Supervisors, 425 N.Y.S.2d 182 (App. Div. 1980). But see
evolved from *Muscare v. Quinn,* which addressed two claims: first, that a Chicago Fire Department grooming regulation was unconstitutional, and second, that the plaintiff was denied procedural due process after he was charged with violating the regulation. The Supreme Court had granted certiorari on the claim involving the substantive violation, but later dismissed the petition because the defendant had changed its regulation and because of an intervening Supreme Court opinion adversely affecting the

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In *Konczak v. Tyrrell,* 603 F.2d 13 (7th Cir. 1979), the Seventh Circuit awarded attorney’s fees under the Fees Act even though damages were recovered. *Id. at* 18. The circuits seem to have split on this question. The Second Circuit in *Zarcone v. Perry,* 581 F.2d 1039 (2d Cir. 1978) (cf. *Milwe v. Caruoto,* 653 F.2d 80 (2d Cir. 1981)) and the Ninth Circuit in *Buxton v. Patel,* 595 F.2d 1182 (9th Cir. 1979) (cf. *Rivera v. City of Riverside,* 679 F.2d 795 (9th Cir. 1982)) have denied fees where damages have been awarded. These courts reason that fee generating cases render one Fees Act policy, providing adequate representation to the poor, irrelevant. This is sometimes referred to as the “bright prospects” standard. The First Circuit in *Sargeant v. Sharp,* 579 F.2d 645 (1st Cir. 1978), and the Fifth Circuit in *Gibbs v. Frisco City,* 626 F.2d 1218 (5th Cir. 1980), have rejected this reasoning. Although the Seventh Circuit in *Konczak* and *Busche v. Burkee,* 649 F.2d 509 (7th Cir. 1981), implied strongly that § 1988 fees should not be denied when damages are recovered, the Seventh Circuit put the issue to rest recently in *Sanchez v. Schwartz,* No. 81-2509, slip op. at 3 (7th Cir. Sept. 13, 1982). The *Sanchez* court also resolved, for the Seventh Circuit, whether a contingent fee agreement sets “an automatic ceiling on the amount of a statutory award” by stating: “We also decline to hold that where a contingent fee contract has been executed, it serves as an automatic ceiling on the amount of a statutory award. Such a rule is less rigid than the ‘bright prospects’ standard, and it does not so persistently undercompensate civil rights plaintiffs. But it is equally unsupported in the legislative history.” *Id. at* 4. *Zarcone* and *Buxton* are likewise at odds with the legislative history and rely on hindsight to determine the merits of a fee award. Both cases, however, have been narrowed by their respective circuits in later decisions.

The ability of the defendant or plaintiff to pay fees provides no special circumstances justifying the denial or reduction of fees. *Entertainment Concepts,* 631 F.2d at 507 (ability of defendants to pay); *Milwe v. Caruoto,* 653 F.2d 80 (2d Cir. 1981); *ISKCON v. Collins,* 609 F.2d 151 (5th Cir. 1980) (ability of plaintiffs to pay). Likewise, the resources of the law firm representing the prevailing plaintiff are not a special circumstance for denying fees. *Witherspoon v. Sielaff,* 507 F. Supp. 667 (N.D. Ill. 1981). However, the Seventh Circuit has denied fees to an attorney who submitted a grossly inflated bill. *Brown v. Stackler,* 612 F.2d 1057 (7th Cir. 1980). Since a court has supervisory responsibility over attorneys practicing before it, the fees denied in *Brown* could be seen as a sanction against the attorney without reference to the Fees Act or special circumstances. Generally, courts agree that reasonable fees should be awarded at the prevailing or market rate for the work performed. *Copeland v. Marshall,* 641 F.2d 880 (D.C. Cir. 1980)(en banc); *In re Folding Carton Antitrust Litig.* 84 F.R.D. 246 (N.D. Ill. 1979).

In *Balark v. Curtin,* 655 F.2d 798 (7th Cir. 1981), the Seventh Circuit extended the principle first enunciated in *Bond IV* that fees are recoverable for litigating fees:

- We find this case indistinguishable in principle from Bond. Plaintiff seeks fees for her efforts to collect the judgment awarded her in her successful action under the civil rights laws. Congress has determined that attorneys’ fees are necessary to fulfill the purposes of the civil rights laws by transferring the costs of litigation
Muscare subsequently prevailed on his procedural due process claim in the district court and was awarded fees accordingly. The court, however, denied fees for the time spent on the substantive claim.

The Seventh Circuit affirmed, holding that fees should be awarded only for the procedural due process claim. In its analysis, the court discussed *Roesel v. Joliet Wrought Washer Co.*, a Seventh Circuit Title VII case, in which the plaintiff established sex discrimination in salary level and recovered backpay.

The compensatory goals of the civil rights laws would thus be undermined if fees were not also available when defendants oppose the collection of civil rights judgments. An award of compensation for injuries sustained as a result of unconstitutional state action would be "diluted" if fees were denied to plaintiffs required to contest substantial efforts to resist or obstruct the collection of civil rights judgments. The victory would be hollow if plaintiffs were left with a paper judgment not negotiable into cash except by undertaking burdensome and uncompensated litigation.

The court's heavy reliance on the legislative history is apparent from other fee decisions as well. Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1981); Coop v. City of South Bend, 635 F.2d 652 (7th Cir. 1980); Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980). The award should be made at current rather than historic rates, thus accounting for inflation and other market increases or decreases. Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981). This approach avoids the necessity of time consuming and complicated calculations and also serves to stabilize and regularize fee awards.

Other issues include: a) availability of a bonus or multiplier: Mills v. Eltra Corp. (Appeal of Mozart Ratner), 663 F.2d 760 (7th Cir. 1981); Kamberos v. G.T.E. Automatic Elec., Inc., 603 F.2d 598 (7th Cir. 1979); Strama v. Peterson, 541 F. Supp. 75 (N.D. Ill. 1982); b) what costs or expenses should be awarded: Northcross v. Bd. of Educ., 611 F.2d 624 (6th Cir. 1979); Konczak v. Tyrrell, 603 F.2d 13 (7th Cir. 1979); c) what role the attorney's contract plays in the awarding of fees: Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978). See also Sanchez v. Schwartz, No. 81-2509, slip op. (7th Cir. Sept. 13, 1982).

99. 614 F.2d 577 (7th Cir. 1980).

100. Cf. Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980), a case similar to this one in many respects. Plaintiffs in *Gurule* succeeded during settlement negotiations in convincing the defendant prison administrators to adopt a new procedural manual. Before the final disposition, however, three intervening Supreme Court cases held that it was not constitutionally necessary to adopt the new procedures. Nonetheless, defendants retained the procedures. When determining the availability of attorney's fees, the Tenth Circuit decided that the plaintiffs had prevailed on this issue because they were catalysts for the defendant's adoption of the manual. In *Muscare*, the Chicago Fire Department changed its regulations and represented to the Supreme Court that it was "very doubtful" it would discard the new procedures even if Muscare did not prevail. *Id.* at 578. It would seem that Muscare should also have been considered a catalyst. See also Harrington v. DeVito, 656 F.2d 264 (7th Cir. 1981), *cert. denied sub nom.* DeVito v. Harrington, 102 S. Ct. 1621 (1982), for the Seventh Circuit's use of the "catalyst" test.

101. 596 F.2d 183 (7th Cir. 1979).

102. *Id.* at 187.
defendant, at the same time, succeeded in defeating the plaintiff’s additional claim that her replacement and demotion were discriminatory. The Seventh Circuit considered the case a “draw,” reasoning that the defendant’s defeat of plaintiff’s second claim was equivalent to plaintiff’s victory on the first. The court ruled that the plaintiff’s victory was, therefore, cancelled for the purpose of a fee award. Although the Muscare court declined to follow Roe’s “cancellation” approach, it reached the same result. The court compared the procedural claim that Muscare won with the substantive claim lost and concluded that the procedural victory was not the “main part” of the case. Thus, the plaintiff was not awarded full fees because he had not prevailed on his substantive claim, notwithstanding that under applicable precedent and legislative history he was the prevailing party.

The Muscare decision established what has become accepted law in the Seventh Circuit. Attorney’s fees are awarded only on

103. The court’s reasoning was erroneous because, under the proper statutory analysis, once the plaintiff is determined to have succeeded on a significant issue, and thus to be the prevailing party, fees are to be awarded regardless of whether the defendant succeeded in defeating another of plaintiff’s claims. See Dawson v. Pastrick, 600 F.2d 70, 79 (7th Cir. 1979), where it was held that when the plaintiff prevailed “in a practical sense” as a “catalyst prompting the defendants to institute fair employment practices” fees were awardable.

104. No cases were cited in support of this proposition, however, nor is there any support for such a position in the legislative history. According to relevant precedent, then, the plaintiff should have been deemed the prevailing party because she “essentially succeeded” on a significant issue in the litigation, and should have received fees for both claims. See supra notes 64-69 and accompanying text.

105. Muscare, 614 F.2d at 580. This narrow view of the “public benefit factor,” listed both in Waters and Johnson, directly conflicts with the whole notion of the private attorney general theory and the mandate of Congress to provide access to resources to aggrieved plaintiffs. See supra text accompanying notes 46-50. Therefore, this factor should not be used at all. Since these cases are already brought in the public interest, a further determination on the issue is irrelevant, except perhaps on the question of a multiplier.

Moreover, the Supreme Court in deciding Carey v. Piphus, 435 U.S. 247 (1978), had affirmed the intrinsic value of procedural due process, the deprivation of which itself justifies a damage award. In the absence of actual damages to a plaintiff as a result of the deprivation, nominal damages are awardable. Thus, the court could not have declared Muscare a draw, as it did in Roe’sel (see supra text accompanying notes 101-04), because Carey had emphasized the inherent value of procedural due process rights. By analyzing Muscare the way it did, the court created a dangerous precedent which was later broadened to encompass cases where the difference between winning and losing claims was not so great.

the plaintiff's successful claims, and not on unsuccessful though meritorious claims. In determining the number of compensable hours, each claim, as that term is defined in rule 10(b) of the Federal Rules of Civil Procedure, is to be analyzed separately. If the petitioner "essentially succeeded" on a claim, fees are awardable for that claim only. To the extent that a petitioner has been unsuccessful on a claim, he is not a prevailing party.

The year following Muscare a different panel of the Seventh Circuit took a distinctly different approach in analyzing the availability of fees. The plaintiff in Sherkow v. Wisconsin prevailed at trial on her Title VII claims of sex discrimination for failure to promote and for unlawful retaliation. On appeal, the Seventh Circuit upheld the decision relative to substantive issues, but reversed on the manner in which plaintiff's personnel records were to be expunged. In light of this partial reversal, the defendant requested that plaintiff's fees award be reduced. The court denied the request, relying on the Sixth Circuit's Northcross decision which com-

107. Muscare, 614 F.2d at 580. Cited in support of this proposition was Dillon v. AFBIC Dev. Corp., 597 F.2d 556 (5th Cir. 1979), where fees were awarded to plaintiffs for prevailing on their individual claim, but denied for "efforts on behalf of the class they represented," because the defendant "had committed no class violations." Id. at 564. Dillon represents a situation where the statutory language itself required the result that obtained. The statute mandates that fees be awarded to a "prevailing party." If there are multiple parties, only one of whom prevailed, it would distort the statutory language to award fees to completely different parties who did not prevail. That situation differs markedly from the one present in Muscare, where there was only one party involved. When only one of many parties receives a fee award, the nonprevailing parties who do not receive awards are not penalized. Muscare, however, as the prevailing party, was nonetheless uncompensated for having pursued his legal rights.

Also cited in Muscare was EEOC v. Safeway Stores, 597 F.2d 251 (10th Cir. 1979). The court, without any analysis, upheld the district court's award and stated that the amount to be awarded "depends upon the extent to which the plaintiff himself prevailed." Id. at 253. See Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978), where plaintiffs prevailed on their discrimination claim, but lost on several other claims and "on their contention that the attorney's fees issue was for the jury." Id. at 486.

108. Rule 10(b) provides as follows:

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

109. Hughes, 578 F.2d at 487.
110. Id.
110.1 630 F.2d 498 (7th Cir. 1980).
pensated all plaintiff's attorney's time whether ultimately productive or nonproductive.\textsuperscript{112} Thus, the \textit{Sherkow} court abandoned its own circuit's approach as defined in \textit{Muscare} and adopted one which would produce results more in keeping with the congressional purpose behind section 1988.\textsuperscript{113}

In 1980, the Seventh Circuit confronted this same issue in \textit{Busche v. Burkee}.\textsuperscript{114} The plaintiff in \textit{Busche} was awarded substantial compensatory damages on his procedural due process claim that the defendant had denied him a pretermination hearing. All his other claims failed. The Seventh Circuit nevertheless held that Busche was the prevailing party because he had succeeded on a significant issue.\textsuperscript{115}

The court refused, however, to award fees for all attorney time as the trial court had done. Instead, the court specifically rejected the \textit{Northcross} rule of full compensation because it conflicted with \textit{Muscare}. The court declared that the "amount of attorneys fees [prevailing plaintiffs] receive should be based on the work performed on the issues in which they were successful."\textsuperscript{116} Although \textit{Sherkow} was not mentioned in \textit{Busche} and therefore not expressly overruled, its reasoning appears completely discredited by \textit{Busche}'s explicit disapproval of \textit{Northcross}.\textsuperscript{117}

In \textit{Syvock v. Milwaukee Boiler Mfg. Co.},\textsuperscript{118} the Seventh Circuit attempted to reconcile \textit{Muscare}, \textit{Sherkow} and \textit{Busche}. Syvock brought his action under the \textit{Age Discrimination in Employment Act}\textsuperscript{119} alleging that his layoff and his employer's failure to rehire him were discriminatory. The jury found a willful violation of the Act. The district court refused to award fees for all time expended, however, reasoning that it must first apply the objective factors set

\begin{itemize}
  \item[112.] The \textit{Northcross} court explained: "We know of no traditional method of billing whereby an attorney offers a discount based upon his or her failure to prevail on issues or parts of issues." \textit{Id.} at 636.
  \item[113.] \textit{See supra} text accompanying notes 23-54.
  \item[114.] 649 F.2d 509 (7th Cir. 1981).
  \item[115.] \textit{Id.} at 521. The court adopted the First Circuit's definition of "prevailing party" as set forth in \textit{Nadeau v. Helgemoe}, 581 F.2d 275 (1st Cir. 1978): "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." \textit{Id.} at 278-79.
  \item[116.] 649 F.2d at 522 (quoting \textit{Nadeau}, 581 F.2d at 279).
  \item[117.] \textit{Busche} recognized, however, that overlap problems can develop. The plaintiff should get fees for services related to winning claims. \textit{See also Jones v. Diamond}, 594 F.2d 997 (5th Cir. 1979).
  \item[118.] 665 F.2d 149 (7th Cir. 1981).
\end{itemize}
forth in Waters v. Wisconsin Steel Works\textsuperscript{120} and then apply the proportionality test approved in Muscare.\textsuperscript{121} Consequently, the compensable hours were cut in half under the Waters factors, and then further reduced under Muscare because the plaintiff had not prevailed on certain aspects of his claim.\textsuperscript{122} The court of appeals reversed the reduction based on Muscare, stating that Muscare had brought two independent claims whereas Syvock "has presented only one claim: that Milwaukee Boiler discriminated against him because of age. Syvock prevailed on this claim and therefore is entitled to his reasonable attorney's fees. . . ."\textsuperscript{123}

The court attempted to reconcile the cases on the ground that the fees in each case were awarded for claims on which the plaintiff prevailed.\textsuperscript{124} In Muscare the plaintiff prevailed on a "minor" procedural due process claim, while in Sherkow the plaintiff won both of her substantive claims and was reversed on a minor procedural matter.\textsuperscript{125} In Busche the plaintiff brought three claims and only succeeded in proving one, for which he was awarded fees.\textsuperscript{126} From the foregoing facts the Seventh Circuit derived the rule that fees can be denied for failure to prevail on a separate claim, but must be awarded under section 1988 if the plaintiff fails to prevail merely on an "aspect" of a larger claim.\textsuperscript{127}

The reconciliation of cases in Syvock, though factually sound, is incomplete in that the court never adequately addressed the rule of law announced in Northcross and followed in Sherkow.\textsuperscript{128} By assuming that the question of fees should be handled by ascertaining the "prevailing party" on a claim by claim basis, the court has sidestepped the legislative purpose of section 1988. The Syvock rule requires a court to decide which claims are compensable through

\textsuperscript{120} 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). See supra text accompanying notes 15-17.
\textsuperscript{121} See supra text accompanying notes 17-19.
\textsuperscript{122} 665 F.2d at 162.
\textsuperscript{123} Id. at 163. Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978), was used to buttress the court's position. Syvock had essentially succeeded just as the plaintiffs in Hughes had.
\textsuperscript{124} 665 F.2d at 164. The court also attempted to reconcile Northcross and Muscare by reasoning that the plaintiff in Northcross had lost on the issue of the scope of the remedy rather than on a completely separate claim, and thus Northcross did not explicitly prohibit a proportional approach. Id. at 165 n.23.
\textsuperscript{125} See supra text accompanying notes 99-105, 111-13.
\textsuperscript{126} The Syvock court never mentioned that the claim on which Busche prevailed also involved substantial compensatory damages, which had underscored the fee award in that case. Busche, 649 F.2d at 519, 521.
\textsuperscript{127} 665 F.2d at 165.
\textsuperscript{128} See supra text accompanying notes 83-84.
post hoc reasoning and hindsight. A claim colorable when brought may ultimately fail due to unforeseen contingencies. By denying fees for such claims, the rule penalizes plaintiffs' attorneys for vigorously promoting their clients' rights and bringing claims which may be somewhat risky, but nonetheless valid.

Policy matters aside, the practical application of Syvock in later cases may prove difficult. Most courts that employ a proportionality test presently rely on the eighth factor outlined in Johnson, the amount involved and the result obtained, to the exclusion of other relevant factors. The Seventh Circuit seems to have approved a two-step proportionality test in Syvock, condoning the application of both Waters and Johnson factors to reduce compensable fees as well as the prevailing claim standard of Muscare. This may presage the eventual formulation of a strict two-step process, and a consequent double reduction of fees. Finally, Syvock is troubling because it attempts to reconcile the facts of previous Seventh Circuit cases without addressing whether the law expounded in all of these cases is reconcilable.

Under the proportionality test of Syvock, then, a civil rights suit involving multiple constitutional claims, substantial and meritorious when brought but not equally successful, could compel a double reduction of fees. The court would first consider the results obtained, among other factors, to reduce the award and then further reduce fees to reflect the plaintiff's failure to prevail on all claims. The attorney, who could have expended more time on the losing than the winning claim, would not recover anything for pursuing the unsuccessful claim. Thus, under the present state of the law in the Seventh Circuit, a civil rights attorney, in order to receive reasonable fees, might better frame his case around one large claim that is likely to succeed and subsume all other "issues" under it.

**Hensley v. Eckerhart**

In 1982, the Supreme Court granted certiorari in Hensley v. Eckerhart, the disposition of which should resolve some of the prob-

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129. Cf. Locklin v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir. 1970), where the Seventh Circuit disapproved such post hoc reasoning.
130. See supra notes 15, 98.
131. For a description of Waters and Johnson factors, see supra note 15.
132. 102 S. Ct. 1610 (1982).
lems presented by the proportionality test. In *Eckerhart v. Hensley*, the plaintiffs filed a class action challenging the constitutionality under the eighth and fourteenth amendments of the program of care and treatment provided to patients in a state hospital's forensic unit. The district court found that a constitutional right to treatment does exist, but that such a right encompasses only treatment "minimally adequate to provide [the patient] a reasonable opportunity to be cured or to improve his mental condition." Several aspects of the physical environment did not meet this standard. The court found that staffing procedures and individual treatment plans were minimally adequate, but held that delay in preparation of the plans created constitutional inadequacy. Certain conditions of a patient's confinement were held violative of due process, as were certain visitation and telephone policies. Hospital practices which involved secluding patients and physically restraining them were also held constitutionally inadequate.

A consent decree was entered to correct the lack of due process in the manner in which patients were placed within the forensic unit. In addition, while the case was pending, the defendants modified certain aspects of their policies. The plaintiffs, however, failed to receive court ordered relief on some aspects of their claims. The defendants contended, therefore, that any fees awarded should be proportional to the extent the plaintiffs had prevailed and that the time spent on losing issues should not be compensated. The district court rejected this argument in reliance on *Brown v. Bathke*: "Under [defendants' suggested] method no consideration is given for the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues." Instead, fees

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134. Id. at 915.
135. Items such as inadequate climate control, bathrooms, dormitories, and furnishings were among those that were inadequate. Id. at 917-19.
136. Id. at 920, 922.
137. Id. at 922-25.
138. Id. at 926-28.
139. Brief for the Respondents at 2-3 (June 1982).
141. 588 F.2d 634 (8th Cir. 1978). See supra text accompanying notes 80-82.
142. Eckerhart, No. 75-Cr-87-C, slip op. at 7.
were awarded for virtually all time spent, a decision which the Eighth Circuit affirmed in a per curiam unreported decision.

In their brief to the Supreme Court, the petitioners have argued that the Eighth Circuit should be reversed because "[t]he unsuccessful claims were fractionable from those claims on which Plaintiffs partially prevailed. . . . Consistent with sound public policy attorneys for Plaintiffs should not be compensated for all time expended on a case of multiple constitutional claims when they prevailed only to an extremely limited degree." The petitioners advocated that this policy be followed to avoid windfalls to plaintiffs and unnecessary overpleading. Furthermore, the petitioners argued that unsuccessful research on alternative legal theories supportive "of a specific claim for relief" should be compensated only if the plaintiffs succeed on their underlying claim. For petitioners to prevail on this argument, however, they must distinguish Brown. They attempt to do so by arguing that Brown involved separate legal theories, not claims. Yet Brown did involve separate claims of the same nature as those in Muscare: a due process claim challenging inadequate procedures and a substantive constitutional claim challenging a refusal to renew a contract.

Respondents, on the other hand, have sought to characterize Hensley as a case in which the plaintiffs actually did prevail on virtually all claims and in which claims were inextricably interwoven. Thus, they have argued that the case does not present the issue of whether fees should be proportioned to the extent the plaintiffs prevailed. Although the respondents have argued that their claims are not fractionable, the Court must nevertheless consider whether the proportionality test should be the measure of compensation. In response to this issue, the Court should focus on who the prevailing party is, rather than the extent to which he or she has prevailed. Once the prevailing party is determined, fees should be awarded for all meritorious and nonfrivolous claims as the legislative intent and Supreme Court precedent require.

143. The only exception was that the court reduced the fees of an inexperienced plaintiffs attorney because he had failed to keep contemporaneous time records. Id. at 13-14.
145. Brief for the Petitioners at 22 (May, 1982).
146. Id. at 32.
147. See supra text accompanying notes 80-82, 99-100.
148. Brief for the Respondents at 17-32 (June, 1982).
149. Id. at 32-46. In other respects, their argument is similar to that presented in this article.
150. See supra text accompanying notes 23-54.
CONCLUSION

Vigorous advocacy and commitment to the redress of civil rights violations are hallmarks of the legal profession. Paramount to all our interests is the protection of our constitutional democracy. These objectives are hindered by court decisions that decline to compensate the good faith and meritorious efforts of attorneys in their role as private attorneys general.

In enacting section 1988, Congress directed that attorneys who expend time and effort prosecuting alleged federal law breakers be reasonably compensated. Congress could have imposed limitations on fee awards other than those specified in section 1988.151 The congressional intent on this point is clearly stated in the Senate Report: “In computing the fee, counsel for prevailing parties should be paid as is traditional with attorneys compensated by a fee-paying client, ‘for all time reasonably expended on a matter.’”152 Fee paying clients “traditionally” do not pay in proportion to what is won or lost. Thus, it appears a “public interest discount”153 has crept into the analysis of those cases failing to award fees for valid, though unsuccessful, claims.

The proper approach for the courts to take in awarding reasonable fees is to decide whether the plaintiff is the prevailing party and then to determine whether special circumstances exist to deny or reduce fees. The analysis should not be encumbered thereafter by a proportionality test. Rather, the same standard applied by Justice Stewart in Christiansburg for awarding fees to prevailing defendants in a Title VII case should be applied to section 1988 awards:

[I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail,

151. Recently, for instance, Congress amended 28 U.S.C. § 2412 (1976) to provide for an award of fees “against the United States or any agency thereof.” Equal Access to Justice Act, 28 U.S.C. § 2412(a), (d)(1)(A) (1976 & Supp. III 1979). The statute is quite specific as to the limitations on the award of fees. Fees are awardable only to the prevailing party other than the United States. If the court finds that the government’s position was substantially justified, fees will be denied. Id. § 2412 (d)(1)(A). A party is defined as someone whose net worth is less than $1,000,000. Id. § 2412 (d)(2)(B). Congress limited the rate of compensation to no more than $75 per hour (id. § 2412 (d)(2)(A)) and provided that fees can be denied if “special circumstances [exist to] make an award unjust.” Id. § 2412 (d)(1)(A).


153. Berger, supra note 6, at 311.
his action must have been unreasonable or without founda-
tion. This kind of hindsight logic could discourage all but
the most airtight claims, for seldom can a prospective
plaintiff be sure of ultimate success. No matter how honest
one’s belief that he has been the victim of discrimination,
no matter how meritorious one’s claim may appear at the
outset, the course of litigation is rarely predictable. Decisive
facts may not emerge until discovery or trial. The law may
change or clarify in the midst of litigation. Even when the
law or the facts appear questionable or unfavorable at the
outset, a party may have an entirely reasonable ground for
brining suit.154

Following this standard would not, as Senator Kennedy pointed
out during the Senate debates, result in a windfall for plaintiffs’
lawyers.155 First, compensating those whose best efforts are used
to vindicate constitutional rights cannot be considered a windfall.
Congress and the courts have found civil rights sufficiently impor-
tant to impose damages for their violation. Surely it is equally
important to compensate plaintiffs’ representatives adequately for
their time.

Second, the existence of the “nonfrivolous claim” standard is
adequate to protect defendants against avaricious attorneys who
would manipulate disinterested plaintiffs into bringing suit. A
standard that looks to the prevailing party and his or her meritor-

154. 434 U.S. 412, 421-22 (1978). The authorization of interim fees or fees pendente lite
suggests strongly that any proportionality test is unjustified and contravenes the legislative
intent. The Senate Report specifically approves fees pendente lite, Senate Report, supra note
10, at 5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912, as does the House Report,
H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8. The Court approved in principle the awarding of
pendente lite would be ‘especially appropriate where a party has prevailed on an important
matter in the course of litigation, even when he ultimately does not prevail on all issues.’”
Id. at 757-58.

¶ 7842 (5th Cir. 1977) stated:
There is a danger that litigants will be discouraged from bringing such suits
because of the risks of protracted litigation and the extended financial drain
represented by such a risk. An award of interim fees will prevent extreme cash-
flow problems for plaintiffs and their attorneys . . . . Otherwise, the danger exists
that defendants in Title VII suits may be tempted to seek victory through an
economic war of attrition against the plaintiff.
Id. at 6199. Logically, there is no difference in the policy of awarding interim fees and
awarding fees for all time reasonably spent on a matter. Thus, plaintiffs’ attorneys’ good
faith efforts even on issues or parts of issues lost should be fairly compensated.

155. See supra text accompanying note 45.
ious claims is not only well-established and relatively clear but objective. It compensates for all time reasonably expended on an entire case, provided the plaintiff prevails. The "temptation to engage in post hoc reasoning" is thus avoided. Moreover, this standard is ascertainable in advance of litigation, affording attorneys reasonable certainty that their good faith efforts will be rewarded fairly.

*Hensley v. Eckerhart*, now before the Court, provides the vehicle through which the Court can reaffirm its longstanding commitment to the private enforcement of civil rights. By affirming the Eighth Circuit and conclusively rejecting a proportionality test, the Court would be rejecting a highly discretionary formula in favor of an objective measure for awarding fees under section 1988.