Court Awarded Attorneys' Fees in Title VII Actions and the Public Defendant

Congress enacted Title VII[1] of the 1964 Civil Rights Act to eliminate employment discrimination based on "race, color, religion, sex, or national origin."[2] Effective enforcement of the Act depends heavily upon private plaintiffs. Recognizing that governmental resources are inadequate for effective public enforcement,[3] Congress provided an incentive for private enforcement.[4] A provision of the Act allows federal courts to award reasonable attorneys' fees to the prevailing party in a Title VII action.[5] The United States District Court of Minnesota exercised this authority when it awarded $1,950,000 in attorneys' fees and costs to the prevailing class action plaintiffs in *Rajender v. University of Minnesota*, 546 F. Supp. 158 (D. Minn. 1982).[6]

The attorneys' fees award in *Rajender* represented a near record for a civil rights case[7] and was possibly the largest award ever granted in a Title VII proceeding. The size of the award resulted principally from the triple multiplier used to calculate the fees.[8] The court ordered the losing

---

1. 42 U.S.C. § 2000e-1 to 17 (1976).
2. 42 U.S.C. § 2000e-2 (1976).
3. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).
4. 42 U.S.C. § 2000e-5(k) (1976).
5. *Id.*
6. Initially, the Board of Regents of the University of Minnesota decided to appeal the decision, but in December, 1982, they decided instead to pursue a settlement. The University and the plaintiffs' attorneys subsequently agreed to a settlement in January, 1983. The initial district court decision required payment of $1,950,000, plus interest, to be paid over a two year period. The interest increased the University's actual monetary liability to $2,400,000. The settlement required the University to pay $1,475,000 immediately. Minn. Daily, Jan. 26, 1983, at 1, col. 1.
7. *See* Keith v. Volpe, 86 F.R.D. 565, 568 (C.D. Cal. 1980) (an award of $2,200,000 which may be the highest yet in a civil rights case) [hereinafter cited as *Kieth*].
8. *Id.* at 575. A multiplier of 3.5 was used in *Keith*. The higher multipler resulted in part from two factors not present in *Rajender*. First, the *Rajender* court awarded fees at current hourly rates rather than historic rates. The *Keith* court awarded fees based on historic rates. It applied a different rate for each of the nine years of the litigation. Therefore, a high multiplier compensated for the inflationary impact of non-payment over an extended period of time. *Id.* at 577. Since the *Rajender* court based the fees entirely on hourly rates current at the end of the litigation, no inflationary adjustment was required. *See infra* notes 130-92 and accompanying text.

Second, the higher fees in *Keith* resulted in part from the equitable common fund or common benefit doctrine. 86 F.R.D. at 572-73. *See infra* notes 34-41 and accompanying

defendant University to pay the plaintiffs' attorneys a rate of compensation that was three times their normal rate.[9] Courts frequently award attorneys increased rates of compensation as an incentive to other attorneys to represent civil rights clients.[10] Nevertheless, multipliers as large as three are rare in Title VII actions and other civil rights suits. Multipliers are usually less than two.[11] In contrast, courts regularly triple the attorneys' fees in commercial litigation.[12] This inequity persists despite the similar purpose of all fee-shifting statutes: to encourage private enforcement of congressional policies.[13]

Although Title VII, like other fee-shifting statutes, provides for reasonable attorneys' fees, Congress has never clearly defined the term

---

text. The class benefited in *Keith* was sizeable and benefits conferred considerable. 86 F.R.D. at 572. In this case, a consent decree resulted in the stoppage of a major California freeway project. *Id.* at 568. The class benefited was the "State of California and its inhabitants," *id.* at 572, and the benefits included, among other things, a $250,000,000 housing project. *Id.* at 572.

9. *Rajender*, 546 F. Supp. at 162.

10. *See infra* note 46.

11. Courts increase attorneys' fees by as much as four times in antitrust actions. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"*, 126 U. Pa. L. Rev. 281, 290 (1977). A 1975 study found that the mean hourly rate for attorneys in antitrust cases was $181 compared with only $40 for civil rights cases. *Id.* at 310 & n. 124. A more recent study of fifty civil rights cases indicated the hourly rate of recovery (after a multiplier adjustment) ranged from $3 to $137.50. Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Award Act of 1976*, 13 J. Mar. L. Rev. 331, 378 n.234 (1980). A recent survey of attorneys' fees awards in 186 antitrust and securities class actions found an average of $213.37 per hour. *Attorney Fee Awards in Antitrust and Securities Class Actions*, 6 Class Action Reports 82, 129 (1980). In one compilation of fifteen fee awards decisions under the antitrust securities acts, only one awarded a multiplier of less than two. Two cases used a multiplier of four, seven cases used a multiplier of three, and five cases used a multiplier of two. Brown, *Calculation of Attorneys' Fees: Franchise and Antitrust Relief*, 2 W. New Eng. L. Rev. 297, 305 n.44 (1979). On the other hand, a survey of cases in one federal court district found a multiplier used in only three of sixteen civil rights cases. The highest multiplier awarded was 1.2. Garrison, *Attorneys' Fees Under Fee-Shifting Statutes*, 56 Conn. B.J. 66, 77-81 (1982). A triple multiplier as awarded in *Rajender* is rare. Only one other reported civil rights decision awarded a higher multiplier. *Keith*, 86 F.R.D. at 577 (3.5 multiplier). Although the federal courts have become more generous in civil rights cases, no other reported opinion awarded a multiplier greater than two. *See infra* note 242. *See also* Ruiz v. Estelle, 553 F. Supp. 567 (S.D. Tex. 1982) (multiplier of two resulted in a fees award of $1,700,000 in a prisoner rights suit).

12. *See supra* note 11.

13. The attorneys' fees provision for Title VII is representative of the various federal fee-shifting statutes. The Title VII provision as amended by the Equal Opportunity Act of 1972 provides:

> In any action or proceeding under . . . [Title VII] the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (1976).

"reasonable."[14] The courts have struggled to develop a uniform standard that is understandable, fair, and capable of encouraging private enforcement of Title VII and other civil rights laws.[15] The result has been wide acceptance by the federal appellate courts of the "adjusted lodestar" standard,[16] the standard used by the *Rajender* court.[17]

Because the *Rajender* court dealt with most of the critical issues regarding fee awards in civil rights litigation, its opinion provides a useful basis for examining these issues. This note first examines whether the adjusted lodestar standard is an improvement over previous standards. It then examines the courts' apparent bias in awarding smaller fees to civil rights litigants than to other litigants. Additionally, it examines whether public institutions deserve deferential treatment when assessed attorneys' fees as losing defendants. Finally, it examines legislative attempts to resolve these problems.

Dr. Shymala Rajender filed a class-action employment discrimination complaint against the University of Minnesota in 1973.[18] Her complaint alleged that the University denied her a permanent appointment to the Chemistry Department because of her sex and national origin.[19] Class action certification followed in 1978[20] and settlement by consent decree occurred in February 1980.[21] The decree awarded Dr.

---

14. The Congress missed an opportunity to adopt a specific formula defining "reasonable" attorneys' fees when it passed the Fees Awards Act in 1976. However, it did require the same standard for both civil rights cases and antitrust cases. The Senate Report provided:

> It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases. . . .

S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). The House Report contained similar language:

> Of course, it should be noted the mere recovery of damages should not preclude the awarding of counsel fees. Under the antitrust laws, for example, a plaintiff may recover treble damages and still the court is required to award attorney fees. The same principle should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8, 9 (1976).

15. *See infra* notes 55-96 and accompanying text. *See also* E. Larson, Federal Court Awards of Attorney's Fees (1981). This comprehensive work provides a detailed analysis of the state of the law regarding court awarded attorneys' fees. The author focuses particularly on fees awards in civil rights cases and provides a separate analysis of the standards applied by each of the federal courts of appeals.

16. *See infra* notes 26-29 and accompanying text.

17. *Rajender*, 546 F. Supp. at 165, 168.

18. *Id.* at 160.

19. *Id.*

20. *Id.* at 160-61.

21. *Id.* at 161, 170-71.

Rajender $100,000 in compensatory damages[22] and required the University to establish new hiring and promotion procedures.[23] The district court awarded attorneys' fees and costs in July 1982.[24]

The court held that the appropriate standard for calculating reasonable attorneys' fees is a "hybrid" of the adjusted lodestar standard.[25] The Court of Appeals for the Third Circuit developed the adjusted lodestar standard in an antitrust case, *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.* (*Lindy*).[26] *Lindy* requires a three-step calculation. First, the trial court must multiply the number of hours spent representing the client times the attorney's normal billing rate. The result is the lodestar figure. Second, the court may adjust the lodestar figure to reflect the initial probability of success, described by the *Lindy* court as the contingent nature of success. Third, the court may further adjust the lodestar figure to reflect the quality of the attorney's work.[27] The *Rajender* court awarded a one hundred percent upward adjustment for the contingent nature of success[28] and an additional one hundred percent adjustment for the quality of the attorneys' work.[29] The two adjustments had the effect of tripling the lodestar figure.

The University requested a ten percent downward adjustment based on its status as a public institution. The court denied the University's request, holding that the nature of the defendant was irrelevant to an attorneys' fees award.[30]

I. Background

Title VII's fee-shifting provision is an exception to the "American

---

22. *Id.* at 170.

23. *Id.* at 170-71. Among other things, the consent decree requires that the University of Minnesota establish a temporary hiring quota for the Chemistry Department, undertake a University-wide affirmative action program in employment with respect to women, appoint a committee to review policies and practices which may result in discrimination against women, and establish a procedure to resolve other claims of sex discrimination.

24. *Id.* at 158.

25. *Id.* at 163-64.

26. 487 F.2d 161, 167-68 (3d Cir. 1973) [hereinafter cited as *Lindy I*]. The court in *Lindy I* remanded the case for a recalculation of the fees. On subsequent appeal, the court of appeals affirmed its opinion in *Lindy I* and provided additional criteria for applying its standard. Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 540 F.2d 102, 116-18 (3d Cir. 1976) [hereinafter cited as *Lindy II*].

27. *Lindy I*, 487 F.2d at 167-68.

28. *Rajender*, 546 F. Supp. at 170.

29. *Id.* at 172.

30. *Id.* at 173-74.

Rule" which requires all parties to a lawsuit to pay their own legal fees.[31] Major exceptions to the American Rule developed only in the past twenty years.[32] Prior to that time, the courts created two significant exceptions to the rule. First, using their equity power they assessed attorneys' fees when the losing party exhibited "bad faith during the course of the litigation."[33] Second, they assessed attorneys' fees when the litigation resulted in the creation of a "common fund" to benefit third parties;[34] the prevailing plaintiff collected fees from that common fund.

Congress created exceptions to the American Rule when it granted courts the authority to assess fees as a remedy under certain statutes.[35] The 1964 Civil Rights Act was the first modern civil rights legislation to include a fee-shifting provision.[36] Subsequently, civil rights attorneys attempted to expand the use of fee-shifting by utilizing a third judicial exception, the "private attorney general" doctrine.[37] Under this doctrine, courts award fees to plaintiffs who prevail on issues which further congressional policy, even though the laws being enforced contain no

---

31. For a discussion of the "American Rule," its history and recent changes, see generally, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-19 (1967); Berger, *supra* note 11; Derfner, *The True "American Rule": Drafting Fee Legislation in the Public Interest*, 2 W. New Eng. L. Rev. 251, 251-54 (1979); Note, *Promoting the Vindication of Civil Rights Through the Attorney Fees Awards Act*, 80 Colum. L. Rev. 346, 347-50 (1980).

32. *See* Derfner, *supra* note 31, at 252 n.5.

33. Vaughn v. Atkinson, 369 U.S. 527 (1962).

34. Trustees v. Greenough, 105 U.S. 527 (1881); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

35. *See, e.g.*, Commodities Futures Trading Commission Act of 1974 § 106, 7 U.S.C. § 18(f), (g) (1976); Clayton Antitrust Act, 15 U.S.C. § 15 (Supp. V 1981); Public Utility Regulatory Policies Act of 1978 § 122, 16 U.S.C. § 2632 (a) (1) (Supp. V 1981); Fair Labor Standards Act Amendments of 1977 § 10, 29 U.S.C. § 216(b) (Supp. V 1981); Veterans' Benefits Act § 784(g), 38 U.S.C. § 784(g) (1976). While the above statutes have mandatory fees awards provisions, most fee-shifting provisions are discretionary. For example, Titles II and VII of the Civil Rights Act of 1964 and the Fees Awards Acts of 1976 grant courts only the authority to award fees. Therefore, the trial judge has the authority to deny fees altogether. *See, e.g.*, Freedom of Information Act § 1, 5 U.S.C. § § 552(a)(4)(E) (1976); Securities Exchange Act of 1933 § 206(e), 15 U.S.C. § 77k(3) (1976); Securities Exchange Act of 1934 § § 9(e), 18(a), 15 U.S.C. § § 78i(e), 78r(a) (1976); Endangered Species Act of 1973 § 11(g)(4), 16 U.S.C. § 1540(g)(4) (1976); Fair Housing Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1976). *See*, Berger, *supra* note 11, at 303-05; Note, *Awards of Attorney's Fees in the Federal Courts*, 56 St. John's L. Rev. 277, 320-24 (1982).

36. 42 U.S.C. § 2000e-5(k) (1976); 42 U.S.C. § 2000a-3(b) (1976).

37. Brewer v. School Bd., 456 F. 2d 943, 951 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972) [hereinafter cited as *Brewer*]. The "private attorney general" doctrine was an extension of the "common benefit" exception to the 'American Rule' as developed in a stockholder's derivative action. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). *See generally*, Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849 (1975).

authorization for fee-shifting.[38] Plaintiffs successfully employed the "private attorney general" doctrine in several areas of public interest litigation. For example, attempts were successful in school desegregation[39] and environmental suits.[40] However, the doctrine was severely curtailed by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*.[41] In *Alyeska* the Court held that Congress, not the courts, should decide which policies require fee-shifting as an incentive to private enforcement.[42]

Congress quickly responded to the *Alyeska* decision. In 1976 it passed the Civil Rights Attorneys' Fees Awards Act,[43] the first congressional act which exclusively addressed the subject of fee-shifting.[44] In the Act, Congress identified seven civil rights statutes requiring fee-shifting for effective private enforcement.[45]

The 1976 Fees Awards Act generated considerable litigation which affected all fee-shifting statutes, including Title VII.[46] The Supreme Court

---

38. *See infra* notes 39-41.

39. *Brewer*, 456 F.2d at 945.

40. Natural Resources Defense Council, Inc. v. E.P.A., 484 F.2d 1231 (1st Cir. 1973).

41. 421 U.S. 240 (1975).

42. *Id.* at 269-71.

43. The 1976 Fees Awards Act provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this Title, Title IX of . . . [20 U.S.C. 1681 *et seq.*], or Title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1976 & Supp. V 1981), *amended by* Equal Access to Justice Act, 5 U.S.C. § 500, 504 (Supp. V 1981).

44. Between the enactment of the 1964 Civil Rights Act and the 1976 Fees Awards Act, fee-shifting provisions appeared in other civil rights legislation. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c) (1976); Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. V 1981) (repealed 1978); Voting Rights Act Extension of 1975, 42 U.S.C. § 1973(c) (1976 & Supp. V 1981); Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(b) (1976 & Supp. V 1981).

45. The statutes referred to in § 1988 are: 42 U.S.C. § 1981 (1976) (racial discrimination in employment and contracts); 42 U.S.C. § 1982 (1976 & Supp. V 1981) (racial discrimination in property transactions); 42 U.S.C. § 1983 (1976 & Supp. V 1981) (violations of federal constitutional and statutory rights by state and local officials); 42 U.S.C. § 1985 (1976 & Supp. V 1981) (anti-civil rights conspiracies); 42 U.S.C. § 1986 (1976) (official toleration of anti-civil rights conspiracies); 20 U.S.C. §§ 1681-1686 (1976) (Title IX) (discrimination based on sex or visual impairment in federally assisted education programs); and 42 U.S.C. § 2000d (1976 & Supp. V 1981) (Title VI) (racial discrimination in federally assisted programs).

46. *See generally*, Note, *supra* note 35, at 277; Comment, *Computing Reasonable Attorneys' Fees: The Copeland v. Marshall Trilogy*, 19 Hous. L. Rev. 339 (1982); Comment, *The Scope of the Civil Rights Attorneys' Fees Awards Act After Maine v. Thiboutot, Maher v. Gagne, and Supreme Court of Virginia v. Consumers Union*, 66 Iowa

interpreted major aspects of the Act in a number of decisions. The Court established a dual standard for prevailing plaintiffs and prevailing defendants. Courts must award fees to the prevailing plaintiff unless special circumstances exist.[47] However, courts must deny fees to the prevailing defendant unless the plaintiff's action was frivolous, unreasonable, or without foundation.[48] Additionally, a party can prevail for

---

L. Rev. 1301 (1981); Note, *supra* note 31, at 346; Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 47 U. Chi. L. Rev. 332 (1980) [hereinafter cited as *Attorney's Fees in Damage Actions*]; Comment, *supra* note 11, at 331; Lipson, *Beyond Alyeska—Judicial Response to the Civil Rights Attorneys' Fees Awards Act of 1976*, 22 St. Louis U.L.J. 243 (1978); Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976*, 21 St. Louis U.L.J. 441 (1977); Berger, *supra* note 11.

47. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (interpretation of Title II of the Civil Rights Act of 1964). The Court in *Newman* said that a prevailing party seeking to enforce Title II of the Civil Rights Act of 1964 "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402. The Court later adopted the same standard for Title VII actions in Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975), and Congress adopted the standard in the 1976 Fees Awards Act. S. Rep. No. 1011, 94th Cong. 2d Sess. 4 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 6 (1976). "Special circumstances" are rare. They generally involve the "plaintiff's reprehensible conduct." *See* Note, *supra* note 35, at 327. Courts have defined what are *not* "special circumstances." The following are a few of the examples found by one writer:

> 1. The plaintiff's judgment advances his cause only and not that of others. Perez v. University of P.R., 600 F.2d 1, 2 (1st Cir. 1979). 2. Only nominal damages were awarded to plaintiff. *Id.* 3. An award of attorneys fees would be an undeserved windfall for plaintiff. Sethy v. Alameda County Water Dist., 602 F.2d 894 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980) 4. Plaintiff was only partially successful on the merits. *Id.* 5. Plaintiff was awarded money damages. *Id.* 6. Defendants believed the challenged statute was constitutional. Johnson v. Miss., 606 F.2d 635, 637 (5th Cir. 1979). 7. Defendants acted in good faith. Seattle School Dist. No. 1 v. Wash., 633 F.2d 1338 (9th Cir. 1980). 8. Defendant's conduct was required by the state legislature. *Id.* 9. The case did not involve "invidious discrimination." *Id.* 10. Plaintiff is financially able to pay its own attorneys' fees. Bills v. Hodges, 628 F.2d 844, 847 (4th Cir. 1980).

Witt, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 13 Urb. Law. 589, 603-04 (1981). *See also* Note, *supra* note 35, at 324-30.

The Second and Ninth Circuits treat the *Newman* standard differently and deny fees where an individual plaintiff seeks money damages and "the prospects for recovery are such that a competent attorney is willing to represent the plaintiff on a contingent fee basis." Zarcone v. Perry, 581 F.2d 1039, 1043-44 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). *Zarcone* involved a private action brought under § 1983. *Accord*, Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979). Other courts of appeals have yet to follow these decisions. *See*, Comment, *Attorney's Fees in Damage Actions*, *supra* note 46, at 332.

48. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 418-19 (1978) (Title VII action). One commentator suggests that courts are now less reluctant to award fees to the prevailing defendant. The commentator supports the *Christianburg* standard and urges an amendment to the 1976 Fees Award Act requiring "frivolous, unreasonable, or without foundation" behavior by the plaintiff before awarding fees to a prevailing defendant. Note,

fee-shifting purposes even if the parties reach an out of court settlement.[49]

The Supreme Court also expanded the kinds of suits subject to fee-shifting. The Court permitted the award of fees for successful suits brought against state[50] and local governments.[51] It also permitted fee-shifting against a state when statutory claims not specifically included in

---

Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement, 60 Wash. U.L.Q. 75 (1982).

49. Maher v. Gagne, 448 U.S. 122 (1980).

50. Suits against state governments may be barred by the eleventh amendment, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

Unless eleventh amendment barriers can be overcome, no fee awards are available. A series of cases have eroded this obstacle. In *Ex Parte* Young, 209 U.S. 123 (1907), the court enjoined the attorney general of Minnesota from enforcing an unconstitutional act and held "the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.* at 159-60. The Court, however, limited its holding to injuctive relief. Under most circumstances states are not liable for monetary damages. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 577 (1946). The Court permitted a limited form of monetary damages in Edelman v. Jordan, 415 U.S. 651 (1974). Damages assessed against the state for purposes of providing prospective injunctive relief were held constitutional because they had only an "ancillary effect on the state treasury." *Id.* at 668.

With respect to Title VII actions the Court permits money damages as well as injunctive relief. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In *Fitzpatrick* the Court held that since Congress enacted Title VII pursuant to fourteenth amendment authority, eleventh amendment restrictions do not prohibit either monetary damages or an award of fees. *Id.* at 456.

The Court held that the 1976 Fees Awards Act applied to state governments in Hutto v. Finney, 437 U.S. 678 (1978). *See* Note, *supra* note 35, at 356-60; Comment, *Suits Against State Officials: Attorney's Fees and the Eleventh Amendment*, 53 Tex. L. Rev. 85 (1974).

51. Municipal governments are liable for civil rights violations under § 1983 as a result of recent Supreme Court decisions. The Court held in Monell v. Department of Social Services, 436 U.S. 658 (1978), that local governments, municipal corporations, and school boards were "persons" subject to § 1983. *Id.* at 658-59. The Court held in Owen v. City of Independence, 445 U.S. 622 (1980), that a "good faith" defense is not available to cities in § 1983 actions. Since § 1983 comes under the 1976 Fees Awards Act, municipal governments now have increased liability for attorneys' fees.

Because of the very broad coverage of section 1983 every conceivable civil rights violation comes under this statute. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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,

the Fees Awards Act are joined with section 1983 constitutional issues substantial enough to support federal court jurisdiction.[52] The Court expanded the use of Title VII's fee-shifting remedy when it held that fees are available for services provided before a state administrative agency.[53]

Most recently, the Court addresed the question of whether a fee award may include compensation for time spent on unsuccessful claims. It held in *Hensley v. Eckerhart* (*Hensley*) that district courts may deny fees for hours spent on unsuccessful claims which are unrelated to claims on which the plaintiff prevailed.[54]

II. Acceptance of the Adjusted Lodestar Formula

The appropriate framework for calculating fee awards remains the most confused and least resolved issue. In dicta, the *Hensley* Court discussed some aspects of fee awards calculation but further confused the issue by recommending elements of two differing approaches.[55]

---

suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976 & Supp. V 1981). *See Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on The Judiciary*, 97th Cong. 1st Sess. (1981). *See also* Peters, *Municipal Liability after Owen v. City of Independence and Maine v. Thiboutot*, 13 Urb. Law. 407 (1981).

52. Maher v. Gagne, 448 U.S. 122 (1980). *See also* Maine v. Thiboutot, 448 U.S. 1 (1980) (plaintiffs prevailed in the Maine state courts on a Social Security Act claim brought under 42 U.S.C. § 1983. The court held that statutory claims can be brought under § 1983 and therefore attorneys' fees are available. Section 1983 protects rights secured by the Constitution and is covered by the Fees Awards Act). *See*, Comment, *The Scope of the Civil Rights Attorneys' Fees Awards Act After Maine v. Thiboutot, Maher v. Gagne, and Supreme Court of Virginia v. Consumers Union*, 66 Iowa L. Rev. 1301 (1981); Comment, *Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Federal Statutory Grounds*, 130 U. Pa. L. Rev. 488 (1981).

53. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

54. 103 S.Ct. 1933 (1983) [hereinafter cited as *Hensley*]. *See infra* notes 115-22 and accompanying text.

55. *Id.* at 1939-40. Although the calculation formula was not in dispute in *Hensley*, the Court took the opportunity to express its views on the subject. It recommended that a district court judge begin with the product of "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 1939. This calculation yields the lodestar amount set forth in *Lindy I*, 487 F.2d at 167-68. The Court stated, in a footnote, that the resulting product could be adjusted to account for one or more of the *Johnson* factors. *Hensley*, 103 S.Ct. at 1940 n. 9. *See infra* note 57 and accompanying text. However, in the same footnote the Court cited *Copeland*, 641 F.2d at 890. *Copeland* is one of the most persuasive appellate opinions favoring the adjusted lodestar formula. The *Copeland* court limited adjustments to the lodestar amount to the two factors first set forth in *Lindy I*, 487 F.2d at 168. It specifically rejected the *Johnson* approach. In short, the Court says a district court may adjust the lodestar amount by one of the twelve *Johnson* factors but confuses the subject by citing an opinion that limits adjustments to the two factors set forth in *Lindy I*. *See infra* text accompanying notes 136-77.

The Court of Appeals for the Fifth Circuit developed one of the two approaches cited in *Hensley*. In *Johnson v. Georgia Highway, Inc.* (*Johnson*),[56] a Title VII case, the court listed twelve factors that a federal district court judge must consider in awarding reasonable fees. The factors listed were:

> (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.[57]

Although Congress adopted no specific standard when it passed the 1976 Fees Awards Act, it cited the *Johnson* approach with approval and clearly indicated its intention that courts use the same approach in all types of federal litigation.[58] In addition, many courts followed *Johnson*, particularly in Title VII suits.[59] Nevertheless, the Fifth Circuit's approach received considerable criticism for a number of practical reasons. Foremost is the lack of an analytical framework. *Johnson* requires a district court to assess each factor, but mandates no further analysis.[60] As one commentator observed:

> Trial court opinions under *Johnson* typically consist of listing all or some of the twelve factors, accompanied by a few conclusory observations regarding each factor, and culminating in a flat dollar award, no part of which is specifically attributable to any one factor.[61]

---

56. 488 F.2d 714 (5th Cir. 1974). *See Hensley*, 103 S.Ct. at 1940 n.9.

57. *Id.* at 717-19. The *Johnson* factors closely parallel the factors for assessing client fees set out by the American Bar Association in Disciplinary Rule 2-106(B) of the Code of Professional Responsibility. For a factor-by-factor analysis of the *Johnson* factors, *see* Comment, *supra* note 11, at 346-76.

58. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976). *See supra* note 14.

59. King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978); Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977).

60. 488 F.2d at 717-19.

61. Ramey, *Calculation of Attorneys' Fees Awards in Title VII Actions Against Private Defendants*, 58 U. Det. J. Urb. L. 609, 625 (1982). Similarly, another commentator noted:

> The fundamental problems with an approach that does no more than assure

Johnson provides no indication of the relative importance of each factor. Factors (1), the time and labor required; (5), the customary fee; and (8), the amount involved and the results obtained hint at a formula which uses an attorney's hourly rate and hours expended, but the other nine factors do not. No guidance is provided as to either the importance of each factor or its relationship to the other factors.

Courts using the *Johnson* standard must also struggle with overlapping factors.[62] For example, factor (3), the skill requisite to perform the legal services properly, relates closely to factor (9), the experience, reputation and ability of the attorneys. Similarly, factor (10), the undesirability of the case, may result from factor (2), the novelty and difficulty of the question.[63] Also, factor (1), the time and labor required, will largely determine factor (5), the customary fee. *Johnson* does not explain how courts should interpret the relationships among factors. This contributes to lack of uniformity in attorneys' fees awards.

Because *Johnson* only requires a recitation of the factors and a discussion of their application, trial judges are free to subjectively analyze each factor and arbitrarily award whatever amount they think reasonable. Not surprisingly, one survey of cases found a 684% variance in the rates of compensation awarded.[64] This unpredictability discourages attorneys from representing clients who rely on attorneys' fees awards.[65]

Courts using the *Johnson* approach often award lower fees to civil rights attorneys than they award to attorneys in other federal suits. Moreover, the fees are often less than the amount the same attorneys ordinarily receive from their fee-paying clients.[66] Commentators suggest

---

> the lower courts will consider a plethora of conflicting and at least partially redundant factors is that it provides no analytical framework for their application. It offers no guidance on the relative importance of each factor, whether they are to applied differently in different contexts, or indeed, how they are to be applied at all.

Berger, *supra* note 11, at 286-87.

62. *See, e.g.*, Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979) [hereinafter cited as *Northcross*].

63. Copeland v. Marshall, 641 F.2d 880, 890 (D.C. Cir. 1980) [hereinafter cited as *Copeland*].

64. Comment, *supra* note 11, at 378, n. 234.

65. The size of an award should provide the incentive for attorneys to represent clients in civil rights actions. Ideally, the standards for determining the amount of the fees awarded should provide an adequate incentive without granting a windfall to the attorneys. One commentator noted:

> [T]he tool [fee-shifting] is only effective when the award granted by the court covers the expenses of litigation and returns to the attorney a profit equivalent to that which he would have earned in his normal practice.

Note, *supra* note 31, at 372.

66. *See supra* note 11. Since the *Johnson* formula focuses on the establishment of a basic hourly rate, a court does not consider multipliers or bonuses. As one report indicated:

that the subjective, unstructured nature of the *Johnson* approach too easily allows trial courts to express their own prejudices against public interest litigants.[67] One commentator finds this result particularly harsh for Title VII litigants:

> First, as an overwhelmingly white, male, middle-class group, federal district court judges are often unfamiliar with or unsympathetic toward the interests represented by Title VII attorneys, their clients and their cases. . . . A second judicial prejudice which is relatively uncontrolled in fee decisions under *Johnson* is a perception of Title VII litigators as zealots who do not expect or deserve to be compensated comparably with their more affluent equals in the commercial bar.[68]

Whether or not prejudice enters the calculation, *Johnson* allows trial judges to make too many subjective determinations.

Johnson's inherent problems led to the widespread acceptance of an alternative approach. In *Lindy*,[69] the Third Circuit used the adjusted lodestar standard to award attorneys' fees to the plaintiff's attorneys in an antitrust case. *Lindy* requires the court to first calculate a lodestar figure by multiplying a reasonable hourly rate times the number of hours expended representing the client. If justified, the court next adjusts the lodestar figure to account for one or both of two factors: the contingent nature of success and the quality of the attorney's work.[70]

Other federal courts of appeals follow the *Lindy* standard in various forms. The Second Circuit adopted the *Lindy* standard in *City of Detroit v. Grinnell Corp.* (*Grinnell*).[71] The District of Columbia Circuit adopted it in *Copeland v. Marshall* (*Copeland*).[72] The First,[73] Fourth,[74] Fifth,[75]

> In commercial cases, it has been the courts' willingness to enhance a lodestar, rather than the hourly rates awarded, which has resulted in large fees. Until recently, however, it was a major victory for public interest plaintiffs to obtain an hourly rate which was truly reasonable; the application of a "bonus" or "multiplier" to increase a lodestar in public interest litigation was extremely rare.

The Lawyers' Committee for Civil Rights Under Law, Comm. Report No. 39, (Oct. 1980) [hereinafter cited as Lawyers' Committee Report]. *See also Copeland*, 641 F.2d 880, 890 (D.C. Cir. 1980).

67. Ramey, *supra* note 61, at 626.

68. *Id.*

69. 487 F.2d at 161.

70. *Id.* at 167-68.

71. 495 F.2d 448 (2d Cir. 1974).

72. 641 F.2d 880 (D.C. Cir. 1980) (Title VII suit brought against the federal government). *See* discussion of the three *Copeland* opinions in Comment, *Computing "Reasonable" Attorneys' Fees: The Copeland v. Marshall Trilogy*, 19 Hous. L. Rev. 339 (1982). For more recent elaborations of the *Copeland* opinion, see Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982); Environmental Defense Fund v. E.P.A., 672 F.2d 42 (D.C. Cir. 1982); National Treasury Employees Union v. United States Dep't of Treasury,

Sixth,[76] Seventh,[77] Eighth,[78] and Ninth[79] Circuits also utilize parts of the *Lindy* analysis although not all cases directly mention *Lindy*. Only the Tenth Circuit[80] relies exclusively on *Johnson*, although it has never addressed the question of an alternative standard. The new Eleventh Circuit has yet to adopt a standard, but one district court in the circuit followed the adjusted lodestar formula.[81]

The approach taken by the Eighth Circuit is typical of the approach taken by other federal courts of appeals. The court uses both the *Johnson* factors and the *Lindy* formula. The trial court in *Rajender* cited three recent Eighth Circuit opinions which illustrate this confusion.[82] In *Jorstad v. IDS Realty Trust*,[83] the court stated that it followed the *Lindy* formula,[84] while in *Ladier Center, Nebraska, Inc. v. Thone*[85] it stated that it had "expressly adopted the guidelines for attorney fees set forth by the Fifth Circuit" in *Johnson*.[86] In *Robinson v. Moreland*[87] the Eighth

---

656 F.2d 848 (D.C. Cir. 1980). *See also* Delta Air Lines, Inc. v. August, 450 U.S. 346, 365 n.3 (1981) (recognized *Lindy* as appropriate for Title VII actions).

73. Miles v. Sampson, 675 F.2d 5 (1st Cir. 1982); Furtado v. Bishop, 635 F.2d 914 (1st Cir. 1980).

74. Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981) (allows use of any *Johnson* factor to adjust the lodestar figure). *See* Espinoza v. Hillwood Square Mut. Ass'n, 532 F.Supp. 440, 450 (E.D.Va. 1982) (interprets the Fourth Circuit standard as authorizing use of contingency adjustment).

75. Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981); Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980); One observer argues that the Fifth Circuit approach is close to the *Lindy* standard in spite of the fact it authored the *Johnson* guidelines. Note, *supra* note 35, at 342 n. 291.

76. *Northcross*, 611 F.2d at 624.

77. Chrapliwy v. Uniroyal, 670 F.2d 760 (7th Cir. 1982); State of Illinois v. Sangaro Construction, 657 F.2d 858 (7th Cir. 1981).

78. Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981); International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir. 1980), *cert denied*, 449 U.S. 1063 (1980); Cleverly v. Western Electric Co., 594 F.2d 638 (8th Cir. 1979); Zoll v. Eastern Allamakee Community Schhool Dist., 588 F.2d 246 (8th Cir. 1978).

79. Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977) (both *Lindy* and *Grinnell* cited for support); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (approval of both *Johnson* and *Lindy*). *See* Manhart v. City of Los Angeles Dep't of Water and Power, 652 F.2d 904, 908 (9th Cir. 1981) (uses lodestar calculation but does not specify reason for adjustment of 75%, citing *Copeland* for support).

80. *In re* Permian Anchor Services, Inc., 649 F.2d 763 (10th Cir. 1981); Salone v. U.S., 645 F.2d 875 (10th Cir. 1981); Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980); Butler v. Anderson, 614 F.2d 251 (10th Cir. 1980).

81. Dowdell v. City of Apopka, 521 F. Supp. 297, 299 (M.D. Fla. 1981).

82. 546 F. Supp. 164-65.

83. 643 F.2d 1305 (8th Cir. 1981).

84. *Id.* at 1312-13.

85. 645 F.2d 645 (8th Cir. 1981).

86. *Id.* at 647.

87. 655 F.2d 887 (8th Cir. 1981).

Circuit in effect combined the two. *Robinson* required a calculation of the number of hours expended times a reasonable hourly rate but permitted "a lesser award appropriate under the factors listed" in *Johnson*.[88] The *Rajender* court described the Eighth Circuit approach as the "hybrid analysis."[89] Regardless of the name attached, *Rajender* strictly followed the *Lindy* formula.

Since *Johnson* is actually more an approach than a formula, some courts follow the *Lindy* formula without rejecting *Johnson* entirely. Courts accomplish this in two ways. Some courts simply subsume the individual *Johnson* factors into the *Lindy* framework.[90] As pointed out by the Fifth Circuit itself in *Copper Liquor, Inc. v. Adolph Coors Co.*,[91] courts may apply the *Johnson* factors in determining individual components of the *Lindy* formula.[92] In *Hensley*, the Supreme Court suggests using the *Johnson* factors to increase or decrease the lodestar figure.[93] The vagueness of the *Johnson* factors makes it possible for courts to easily adopt either approach. This is particularly true where courts, such as the Eighth Circuit, accept both approaches.[94]

Merging the *Lindy* formula and the *Johnson* approach is an improvement over applying only the *Johnson* factors, but adopting the

---

88. *Id.* at 891. *See* Zoll v. Eastern Allamakee Community School Dist., 588 F.2d 246, 252 (8th Cir. 1978) (*Johnson* factors used to increase the lodestar figure).

89. 546 F. Supp. at 163-64.

90. As one commentator observed:

> The *Johnson* approach, it needs to be emphasized, is not in conflict with the lodestar method. Both the *Johnson* approach and the lodestar method utilize virtually the same factors. The lodestar method simply goes a step further and explains *how* the factors are to be used. As the court in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), observed, the lodestar method simply provides "a procedure for ordering the examination of factors. It thereby complements the discussion offered in *Johnson*." 64 F.R.D. at 682.

E. Larson, *supra* note 15, at 136 (emphasis in original).

91. 624 F.2d 575 (5th Cir. 1980), *reh'g granted*, 684 F.2d 1087 (5th Cir. 1982) (affirmed in part, but remanded on other issues).

92. 624 F.2d at 583 n.15.

93. 103 S.Ct. at 1940 n.9. *See supra* note 55. *See also supra* text accompanying notes 87-89.

94. *See supra* notes 82-89 and accompanying text. The court of appeals subsumes the *Johnson* factors into the *Lindy* formula using both approaches:

> The number of hours of work will automatically reflect the 'time and labor involved,' 'the novelty and difficulty of the question,' and 'preclusion of other employment.' The attorney's normal hourly billing rate will reflect 'the skill requisite to perform the legal service properly,' 'the customary fee,' and the 'experience, reputation and ability of the attorney.' Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations, and the 'undesirability' of the case.

Northcross, 611 F.2d at 624, 642-43.

Lindy formula by itself is an even greater improvement. The *Lindy* formula limits the factors to a workable number and organizes them into an understandable formula. The first part of the calculation, multiplying hours times hourly rates to arrive at a lodestar figure, helps assure that awards are based on actual effort and not results.[95] *Lindy* ignores the type of suit or the amount of the damages in calculating the lodestar figure.[96]

However, the second half of the *Lindy* formula, multiplying the lodestar figure to adjust for risk and quality of work, resurrects problems first encountered with *Johnson*. First, it places no limits on the size of the adjustments. Second, an adjustment based on the risk of nonrecovery is necessarily arbitrary and reveals a judge's personal prejudices. Third, the quality of work adjustment is too vague and tends to reward results rather than input.

III. The Components of the Calculation

An analysis of the *Rajender* opinion serves to illustrate both the advantages and disadvantages of the *Lindy* formula. The following analysis examines each component of the formula, its function, and the standards which govern its application. It will be useful throughout to keep in mind the congressional policy behind awarding attorneys' fees in civil rights actions. Effective enforcement of civil rights acts depends on private action.[97] Civil rights plaintiffs often have little or no money to secure legal assistance[98] so fees must be adequate to attract competent counsel.[99]

A. Hours Expended

The *Rajender* opinion began with an analysis of the hours submitted by the plaintiff's attorneys. The defendants contested the plaintiff's attorneys' submission of 5,000 hours[100] on several grounds:

> Attorney time charges for clerical or paralegal tasks, time charges where the chronological summary is blank except for the number of hours charged, tasks unrelated to merits or fees, communication with counsel handling other discrimination cases, duplication caused by multiple substitutions of counsel in this case and by performing the same task on more than one occasion.[101]

---

95. *See infra* note 121 and accompanying text.

96. *Lindy I*, 487 F.2d at 166-68.

97. S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976).

98. *Id.*

99. *Id.* at 6.

100. *Rajender*, 546 F. Supp. at 162.

101. Defendants Pre-hearing Memorandum Re Fee Application Proceeding at 35, Rajender v. University of Minn., 546 F. Supp. 158 (D. Minn. 1982).

Defendants also contested the inclusion of hours spent on post-settlement administration and in preparing the fee application.[102] The court accepted all hours as legitimate except those spent on nonlegal tasks such as filing and photocopying.[103] The court approved the time spent on post-settlement administration and the fee application but removed those hours from the lodestar figure. It treated them as separate costs, costs not subject to post-lodestar adjustment.[104]

Unfortunately, *Lindy* provided no specific criteria for deciding which tasks required compensation. In *Lindy*, the Third Circuit said only that a court must determine "how many hours were spent in what manner by which attorneys."[105] This, of course, contributed very little to an understanding of the proper criteria. The Senate Report on the 1976 Fees Awards Act directed that attorneys receive compensation "as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' "[106] In *Copeland*, the Court of Appeals for the District of Columbia limited the term *reasonable* when it held that *reasonable* hours are not the same as *actual* hours.[107] The *Copeland* court reasoned that attorneys often decline to bill their clients for all hours expended, but instead only bill their clients for a reasonable number of hours.[108] For example, in dicta, the *Copeland* court suggested excluding hours for nonproductive time or duplication of effort.[109] The Supreme Court recently recognized *Copeland*'s "billing judgment" approach as appropriate in determining the number of hours reasonably expended on a case.[110]

Disputes regarding compensable hours usually arise from one or more of three issues. First, defendants often challenge the inclusion of hours spent applying for the fees. A clear majority of the federal appellate courts permits the inclusion of all hours spent on a fees application.[111] They reason it would be anomolous to permit an award of fees but not include hours spent applying for the fees.[112] *Rajender* followed the majority view.

---

102. *Id.* at 39.

103. *Rajender*, 546 F. Supp. at 165-66.

104. *Id.* at 166.

105. *Lindy I*, 487 F.2d at 167.

106. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976) (quoting from Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974)).

107. 641 F.2d at 891.

108. *Id.*

109. *Id.*

110. *Hensley*, 103 S.Ct. at 1939-40.

111. Lund v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978); Prandini v. National Tea Co., 585 F.2d 47, 53-54 (3d Cir. 1978); *contra*, E.E.O.C. v. Union Camp. Corp., 536 F. Supp. 64 (W.D. Mich. 1982).

112. *See Lund*, 587 F.2d at 77.

Second, defendants frequently allege that the plaintiff's attorneys duplicated their effort. For example, defendants allege that more attorneys than necessary participated in pretrial conferences. Courts are not consistent in their approach to this issue. Some courts closely scrutinize for duplication of effort.[113] Other courts, such as the *Rajender* court, adopt the approach that such close scrutiny is an inappropriate intrusion into a party's strategy.[114]

Third, defendants seek to exclude hours for time spent on unsuccessful issues or claims. While this problem was not at issue in *Rajender*, it is frequently an issue in fee awards litigation. In *Hensley*, the Supreme Court sought to provide guidance on the issue when it held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees."[115] Although the Court admitted it could not specify a precise rule or formula,[116] it held that district courts must deny fees for unsuccessful claims which are unrelated to the "ultimate result."[117] The Court described related claims as those based on either a common core of facts or related legal theories.[118] Meeting the relatedness threshold, however, does not assure full compensation for all reasonable hours expended. The Court also held that "partial or limited success" justifies a reduced fee even though all claims relate to each other.[119] On the other hand, the Court stated that an attorney who achieves "excellent results" should recover a fully compensatory fee.[120]

As the *Hensley* opinion illustrates, requiring courts to make difficult, qualitative judgments regarding degree of success means that compensable hours cannot be fairly determined under any simple standard. Furthermore, allowing judges to assess the degree of excellence or degree of success achieved in a suit ignores the clear congressional mandate that attorneys representing prevailing plaintiffs receive full compensation regardless of the kind of relief achieved.[121] Absent

---

113. *See* Palmigiano v. Garrahy, 466 F. Supp. 732, 744 (D.R.I. 1979), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Northcross*, 611 F.2d at 641 (a percentage reduction for duplication).

114. 546 F. Supp. at 166.

115. *Hensley*, 103 S.Ct. at 1943.

116. *Id.* at 1941.

117. *Id.* at 1940.

118. *Id.*

119. *Id.* at 1941.

120. *Id.* at 1940.

121. S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976). *See Hensley*, 103 S.Ct. at 1947 (Brennan, J., dissenting). For a discussion of the concept of awarding fees for input rather than results, see Ramey, *supra* note 61 at 630-32 (contends that *Lindy* formula is preferable because it bases fees on input rather than on results or on the amount of damages).

evidence of bad faith, clear padding, or obvious inefficient use of time, courts should take a liberal approach toward accepting all hours submitted. Otherwise, courts will face the inappropriate task of second-guessing plaintiffs' strategy. A liberal approach also reduces the opportunity for judicial bias to affect the result. This does not suggest that courts should not carefully review all hours submitted. Courts should require the detailed, regular reports described in *Hensley*.[122]

B. Hourly Rates

Rajender turned next to the second step in the *Lindy* formula, the determination of reasonable hourly rates. As with the hours determination, courts follow varied criteria. *Lindy* held that the "value of an attorney's time generally is reflected in his normal billing rate."[123] The "normal billing" rate derives from the attorney's legal reputation and status.[124] In *Grinnell*, the Second Circuit interpreted *Lindy*'s "normal billing" rate to mean the "hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work."[125] In *Copeland*, the District of Columbia Circuit ignored the "normal billing" rate in favor of a "market value" rate.[126] As defined by the *Copeland* court, the "market value rate" does not necessarily conflict with the first approach but rather supplements it. It focuses on the prevailing rate "in the community for similar work."[127] Although the attorney's reputation is a factor, the rate charged by others in the community receives primary emphasis. The dispositive question for the *Copeland* court is not what the attorney normally charges other clients, but rather what other attorneys in the community charge for similar work.

Ordinarily, the "normal billing" rate and the "market value" rate produce the same result, but for public interest practitioners the result may be far different. Public interest attorneys often work for organizations which pay low salaries.[128] The public interest attorney who

122. *Hensley*, 103 S.Ct. at 1943 (Burger, J., concurring).

123. *Id.* at 167.

124. *Id.*

125. 495 F.2d 448, 471 (2d Cir. 1974).

126. 641 F.2d at 892.

127. *Id.*

128. *Id.* at 898. The Supreme Court recently granted certiorari to consider the question of the appropriate hourly rate for attorneys who work for nonprofit organizations *Stenson v. Blum*, 512 F. Supp. 680 (S.D.N.Y.), *aff'd*, 671 F.2d 493 (2nd Cir. 1981), *cert. granted sub nom., Blum v. Stenson*, 103 S.Ct. 2426 (1983). In *Stenson* the State of New York is appealing a decision ordering it to pay $118,968 in fees to the Legal Aid Society. The Society represented the prevailing plaintiffs in a class action suit involving Medicaid benefit termination. The district court awarded rates averaging $100 per hour. *Stenson*, 512 F. Supp. at 682.

represented the Title VII plaintiff in *Copeland* worked for such an organization. The "normal billing" rate will reflect the low salary and produce an hourly rate much lower than the "market value" rate. Since Title VII plaintiffs are often represented by low-salaried public interest attorneys, using the "normal billing" rate allows courts to award fees at undesirably low rates. The *Copeland* court asserted that such reduced rates do not accomplish Congress' intent to encourage the private enforcement of Title VII. As the court observed:

> While some lawyers would assist in the private enforcement of Title VII for a reduced fee, Congress has recognized that payment of full fees will provide greater enforcement incentives.[129]

The *Copeland* "market value" rate treats the low paid legal assistance attorney the same as the high paid private attorney, assuming both have equal experience and skill.

Notwithstanding the need to compensate public interest attorneys at "market value" rates, the "market value" approach has a disadvantage which is clear in the *Rajender* opinion: it is administratively cumbersome. In *Rajender*, the court examined numerous affidavits and heard extensive testimony from local attorneys in order to determine the rates charged by other firms in the Minneapolis area.[130] The defendants argued that the rates requested were excessive for Title VII cases and not reflective of awards given in other recent fee-shifting cases by the same court.[131] The court chose not to address either argument but rather focused on the rate charged in all types of litigation.[132] This approach has the advantage of treating Title VII litigators the same as other litigators but requires considerable time, expense, and effort on the part of all parties.

The "normal billing" rate approach offers two advantages. First, it is administratively less cumbersome. Requiring affidavits from the attorneys regarding the rates charged their own clients is far simpler than surveying the local bar. Additionally, the "normal billing" rate might attract experienced higher paid attorneys who would suffer if compensated at a "market value" rate which is lower than their usual rate.

---

129. *Id. Copeland* holds that lawyers who work for public interest organizations deserve compensation at a rate comparable to the rate they would receive if they worked in the private sector and not at a rate based on their salaries. 641 F.2d at 899-900. *Accord*, Steward v. Rhodes, 656 F.2d 1216 (6th Cir. 1981); Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980); Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980); Glover v. Johnson, 531 F. Supp. 1036 (E.D. Mich. 1982); *contra*, Alsager v. District Court, 447 F. Supp. 572 (S.D. Iowa 1977) (fees based on legal services attorneys' salary).

130. 546 F. Supp. at 166-68.

131. Defendant's Brief at 55, Rajender v. University of Minn., 546 F. Supp. 158 (D. Minn. 1982).

132. *Rajender*, 546 F. Supp. at 166-68.

One commentator suggests two alternative solutions.[133] The first requires the court to consider the rates charged by the defendant's counsel.[134] The second calls for an annual district-wide survey of hourly rates with the aim of establishing lower and upper limits.[135] Both proposals are administratively feasible and treat all attorneys alike whether representing Title VII clients or commercial clients. Both proposals also accommodate the organizationally funded public interest attorney without discouraging higher paid attorneys.

C. Contingent Nature of Success Adjustment

The *Lindy* formula next requires the trial court to consider adjustments to the lodestar figure, focusing first on the "contingent nature of success."[136] The adjustment provides a means to compensate for the risk undertaken in representing clients on a contingent basis.[137] It accounts for the risk of nonrecovery of fees.[138] The court may increase the lodestar figure based on the odds of success as viewed at the time the case began.[139] As explained in *Lindy*, this adjustment requires the court to evaluate the following factors: (1) "analysis of the plaintiff's burden," which considers the complexity of the case, the probability of defendant's liability, and whether the claims would be easy to prove; (2) risks "assumed in developing the case," which considers hours risked without guarantee of remuneration and out-of-pocket expenses advanced; and (3) "the delay in receipt of payment for services rendered."[140]

The *Rajender* opinion relied on each of the three factors in awarding an adjustment of one hundred percent.[141] Citing the numerous unsuccessful Title VII claims brought against other colleges and universities, the court found the plaintiffs faced a difficult task in proving their claims.[142] The court recognized the many hours plaintiffs' attorneys invested with no assurance of compensation.[143] The court also noted the eight year period of litigation during which counsel received no payment for services.[144]

Policy arguments strongly support an increase in fees to account for the risk of nonrecovery. For Title VII claimants, financial resources to

133. *See* Ramey, *supra* note 61, at 640-41.
134. *Id.*
135. *Id.* at 641.
136. *Lindy I*, 487 F.2d at 168.
137. *Id.*
138. *Lindy II*, 540 F.2d at 117 (further defines the post-lodestar adjustments).
139. *Copeland*, 641 F.2d at 893.
140. *Lindy II*, 540 F.2d at 117.
141. 546 F. Supp. at 169-70.
142. *Id.*
143. *Id.* at 170.
144. *Id.*

secure legal representation are scarce. Frequently they cannot afford to hire counsel from their own funds. One survey covering a five year period found that over fifty percent of the Title VII suits in one federal court district required legal assistance from legal aid societies or other public sources.[145] Therefore, many attorneys representing Title VII plaintiffs know that compensation is unavailable for a losing claim. Since it is often difficult to succeed with Title VII claims,[146] little incentive exists to attract competent counsel. The contingency factor provides that incentive.

Nevertheless, application of the contingency factor is arbitrary. For example, the court in *Rajender* made strong arguments for increasing the lodestar figure due to the risks involved but made no justification for the amount of the adjustment.[147] The opinion indicated no apparent reason why the increase was one hundred percent instead of fifty percent or two hundred percent or some other figure. Without more, the contingency factor suffers from the same deficiencies as the *Johnson* factors.[148] It is vague and easily subject to arbitrary manipulation. Unless the formula requires a closer connection between the amount of the adjustment and the risk involved, judges will apply their own subjective criteria. As a consequence, the size of fee awards will vary according to the subjective criteria applied. Attorneys will be reluctant to represent clients in lengthy, difficult cases where the amount of compensation is so uncertain.

One commentator suggests criteria for applying the contingency factor.[149] His proposed formula allows increases based on the odds of success. For example, he would allow an increase of one hundred percent

---

145. Chatty, *The Question of Job Bias*, San Francisco Examiner & Chron., Nov. 18, 1979, (California Living Magazine), at 7, cited in Ramey, *supra* note 61, at 615 n.37, 628-29 n.98. The Senate Report to the 1976 Fees Awards Act states:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976). The Report also states:

> Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). *See* Lawyers' Committee Report, *supra* note 66, at 6 (study indicates that major firms in Washington, D.C. are unwilling to accept lower rates of compensation compared with fees charged to fee-paying clients).

146. *See infra* notes 193-97 and accompanying text.

147. 546 F. Supp. at 170.

148. *See supra* notes 56-68 and accompanying text.

149. Berger, *supra* note 11, at 326.

if the initial odds of success are even because an attorney working on a contingency fee basis must pursue two cases of equal value to be assured of compensation for at least one. The adjustment increases or decreases depending on the odds of success up to a maximum of triple the lodestar figure.[150]

Using mathematical odds reduces vagueness but does not remove possibilities for judicial bias. If trial judges are truly good predictors of a suit's success, the risk factor they determine should be included in the *Lindy* formula. However, given the unknown variables at the outset of a trial, it is doubtful that anyone can accurately predict the likelihood of success. Much will depend upon the facts presented and the strategies chosen as the trial progresses. There is nothing to indicate that judges are good oddsmakers.

Critics contend that the contingency factor is not appropriate because it tends to punish the less serious violator more than the willful violator.[151] As one commentator observed:

> [A] defendant who egregiously denies a plaintiff his civil rights presents a case with a low contingency factor and is "rewarded" by incurring a low fee. By contrast, a defendant who may not realize he is committing a constitutional violation presents a close case—one with a high contingency factor—and must pay higher fees.[152]

This result is particularly likely in Title VII suits. The most difficult cases to prove often involve institutionalized discrimination. An example is the corporation that feels it is an equal opportunity employer because in good faith it appoints a few women to high level positions. Nevertheless, deeply imbedded discrimination continues at all levels of the corporation. A complaint in such a case is obviously more difficult to prove than a complaint against a corporation which has a clear record of willful discrimination. Therefore, the less willful violator pays larger attorneys' fees than the more willful violator. While the above results appear inequitable, the criticism does not focus on the major purpose of fee-shifting statutes. Congress did not intend for courts to assess attorneys' fees as a punitive remedy. Congress intended fee awards to encourage private enforcement by attracting legal representation.[153]

---

150. *Id.*

151. *See* Note, *Promoting the Vindication of Civil Rights*, *supra* note 31, at 375 (urges the elimination of the contingency factor).

152. *Id.*

153. The Senate Report declares:

> All of these civil rights laws (including Title VII) depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976).

The principle of rewarding attorneys for the risk of nonrecovery is sensible, but remains subject to abuse if applied arbitrarily. Trial courts need clearer standards. Congress might consider the use of a flat adjustment for all cases that exceed a specific period of time without compensation. For example, fees for suits completed in less than year would receive a ten percent adjustment with an additional ten percent for each extra year up to a maximum of one hundred percent. The increases would apply to the lodestar figure calculated at the end of the litigation.

An objective standard of this sort reflects, to a limited degree, the factors which are the basis of the contingency adjustment.[154] It directly reflects "the delay in receipt of payment for services rendered."[155] It also reflects the risks "assumed in developing the case"[156] to the extent that lengthy litigation indicates many "hours risked without guarantee of remuneration."[157] However, it does not necessarily reflect a heavy burden of proof. While a mandatory percentage adjustment does not perfectly reflect the actual risk of nonrecovery, it is more predictable and less arbitrary than the current standards.

Alternatively, federal courts of appeals might fashion a standard for determining a fair adjustment. Appellate courts could set lower and upper limits on the size of the lodestar adjustment. Within that range, trial judges would rely on the factors outlined in *Lindy*.[158] If the plaintiff's burden of proof is minimal, and the claim is settled quickly, the court would award no increase. In contrast, if the suit is complex and extends for several years, the court would double the lodestar amount. For cases in between, the trial judge would have the discretion to award an increase based specifically on the considerations suggested by *Lindy*: the burden of proof, risks assumed, and delay in payment.[159] While it may not totally eliminate the subjective nature of the contingency adjustment, setting upper and lower limits should reduce the wide variation currently found in attorneys' fees decisions.[160] Additionally, trial judges would retain the flexibility to consider the individual aspects of each case.

D. Quality of Work Adjustment

The final component in the *Lindy* formula requires the trial judge to further adjust the lodestar figure to reflect the attorney's "quality of

154. *See supra* notes 136-40 and accompanying text.
155. *Lindy II*, 540 F.2d at 117.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *See supra* note 11 and accompanying text.

work."[161] *Lindy* allows either an increase or a decrease[162] for "exceptional services only."[163] Courts which support the quality of work adjustment limit its application to cases where the attorney was unusually bad or good in relation to what is expected of an attorney at the hourly rate awarded in the lodestar figure.[164] *Lindy* identifies two factors which may justify an adjustment of fees based on quality of work: (1) the importance and extent of the judgment or settlement, and (2) the valuation of professional skills.[165]

In applying these considerations, *Rajender* focused first on the economic benefit to the class to show the importance of the case.[166] Plaintiffs submitted evidence which claimed the benefits had a value of $40,000,000.[167] The court cited the "persistence," "thoroughness," "innovative prosecution," and "professional conduct of the plaintiff's attorneys" as evidence of their professional skills.[168] Based on these considerations the court arbitrarily awarded another one hundred percent adjustment to the lodestar figure.[169]

The quality of work adjustment is more vague than any other component of the *Lindy* formula. For each of the three components previously discussed, standards are available which help avoid totally arbitrary determinations. Mathematical precision may not be possible, but at least objective criteria are available. By contrast, no apparent objective criteria exist for measuring "quality of work."

Even if courts devised a method for measuring quality representation, applying it would not further Congress' intent to encourage private enforcement of the laws.[170] It is difficult to believe that attorneys will have a greater incentive to represent civil rights claimants if rewards exist for exceptional skills. Public policy should encourage skillful representation,

---

161. *Lindy II*, 540 F.2d at 117.

162. *Id.*

163. *Id.*

164. *Copeland*, 641 F.2d at 893. While the District of Columbia Circuit strongly supports the *Lindy* formula, it urges caution when using the quality of work adjustment. In a recent opinion it stressed:

> [An] adjustment for the quality of representation should not be routinely awarded but only awarded in exceptional cases. An adjustment should not be made out of sympathy for claimant's cause or to mollify counsel because the lodestar figure claimed was reduced.

National Ass'n of Concerned Vets v. Secretary of Defense, 675 F.2d 1319, 1329 (D.C. 1982).

165. *Lindy II*, 540 F.2d at 117.

166. 546 F. Supp. at 171-72.

167. *Id.*

168. *Id.* at 172.

169. *Id.*

170. *See supra* note 153.

but the hourly rate awarded by the court more properly reflects that goal.

The *Lindy* formula also allows the court to assess the importance of the results obtained as an element of quality representation.[171] The *Lindy* court observed that the amount of the recovery "may be the only means by which the quality of an attorney's performance can be judged where a suit is settled before any significant in-court proceedings."[172] The results may also reflect the importance of a judgment to others not a party to the suit. For example, in *Rajender*, the court cited the $40,000,000 benefit to present and future third party beneficiaries as a justification for higher fees.[173] However, the results obtained may involve either minimal monetary damages or insignificant benefits to third parties. For instance, a Title VII claimant who alleges discrimination in promotion may receive a minimal damage award, but receive the actual promotion. In this situation, given the minimal damages, courts which consider the results obtained in assessing fee awards may limit fees rather than raise them. This result now appears sanctioned by the *Hensley* requirement that a district court consider the extent of the results obtained in calculating an appropriate fee award.[174] Thus, in a suit in which little or no monetary relief is requested, the Court's holding may conflict with Congress' directive that fees awards not be reduced because damages are "non-pecuniary."[175]

The underlying principle of the *Lindy* formula is compensation based on input rather than results.[176] It is a principle consistent with the Congressional intent that civil rights attorneys be compensated for all reasonable time expended on a case.[177] In contrast, both *Lindy*'s quality of work adjustment and *Hensley*'s results obtained factor are inconsistent with the principle of compensation based on input.

IV. Unequal Treatment of Fee Awards in Civil Rights Litigation

The most unusual aspect of the *Rajender* decision is undoubtedly the award of fees triple the lodestar amount.[178] This resulted from the one

171. *Lindy I*, 487 F.2d at 168.

172. *Id.*

173. *See supra* notes 166-67 and accompanying text.

174. 103 S.Ct. at 1940. *See supra* notes 115-22 and accompanying text.

175. S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976); Nanty v. Burrows, 660 F.2d 1327 (9th Cir. 1982); Salone v. United States, 645 F.2d 875 (10th Cir.) *cert. denied*, 454 U.S. 894 (1981); Milwe v. Cauvota, 653 F.2d 80 (2d Cir. 1981); Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980).

176. *Lindy I*, 487 F.2d at 168.

177. *See supra* note 121 and accompanying text.

178. *See supra* notes 7-9 and accompanying text. The Supreme Court recently agreed to consider the appropriateness of a 50% bonus based on the same two adjustments. *See supra* note 128.

hundred percent adjustment for the risk of nonrecovery and the one hundred percent adjustment for quality representation.[179] While *Rajender* may indicate a change in judicial attitudes toward Title VII litigation,[180] Title VII litigators rarely receive such generous fees awards.[181] Although the differential may be narrowing, surveys indicate that courts are consistently more generous when awarding fees in commercial cases.[182]

This differential exists despite congressional intent and the nearly identical language used in all federal fee-shifting statutes. The Senate report to the 1976 Fees Awards Act unambiguously states:

> It is intended that the amounts of fees awarded under S. 2278 [1976 Fees Awards Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.[183]

Nevertheless, multipliers rarely exceed two in civil rights cases,[184] but are as high as four in antitrust[185] and securities cases.[186]

As previously discussed, the differential may result from the vagueness of the *Johnson* approach which easily allows judicial bias to enter the calculation.[187] However, as more and more courts adopt the *Lindy* formula, they continue to award larger fees to commercial litigators,[188] suggesting that the *Lindy* formula is also susceptible to arbitrary manipulation.

Other explanations may account for the more generous awards in commercial suits. First, commercial suits often result in sizeable damage awards. Second, courts view commercial suits as complex and difficult to pursue. Third, some courts may desire to discourage civil rights litigation.

Sizeable damage awards are common in antitrust litigation because the treble damage provision allows courts to triple damages as a punitive remedy. Treble damages provide a convenient reason to triple the attorney's fees as well. No similar justification exists, however, to support the tripling of fees in other commercial suits where treble

---

179. *Id.*

180. *See supra* note 11; *infra* note 242.

181. *See* Ramey, *supra* note 61, at 610 n.8-9.

182. *See supra* note 11.

183. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). The *Hensley* court apparently ignored this language. *See* 103 S.Ct. at 1941.

184. *See supra* note 11.

185. 15 U.S.C. § 15h (Supp. V 1981); *see supra* note 11.

186. *See* 15 U.S.C. § 77k(c) 78r(a) (1976); *see supra* note 11.

187. *See supra* note 66 and accompanying text.

188. *See supra* note 11.

damages are not available. Nevertheless, courts regularly triple fees in these suits as well. Furthermore, the federal appellate courts repeatedly hold that trial courts may not consider the amount of damages when awarding attorneys' fees.[189]

Another explanation for the differential is the judicial attitude that commercial cases are more complex than other civil litigation.[190] Antitrust suits require extensive discovery and the proof of complicated economic theories. Therefore, litigation often extends over a lengthy period, putting the attorneys at extended risk of not being compensated.[191] In such cases courts award large adjustments to account for the risk of nonrecovery.[192]

For these reasons, Title VII litigators deserve larger adjustments. Title VII litigation is also complex, lengthy, and subject to costly discovery.[193] A Title VII action requires initial litigation at the administrative level before the action can be brought in federal courts.[194] Class certification is difficult.[195] Extensive discovery is necessary given the heavy burdens of proof.[196] Plaintiffs must also contend with frequent changes in the substantive law.[197] An attorney who recognizes these obstacles is not likely to represent a Title VII plaintiff unless adequate financial incentives exist.

Finally, the difference may be a result of judicial prejudice. Courts may wish to discourage civil rights litigation; they may view civil rights suits as a nuisance. The difference may also reflect a judicial attitude that some civil rights laws deserve less than vigorous enforcement. Given Congress' clear intent that courts use the same standards for fee awards in all litigation, one must conclude that judicial bias affects the results. As one critic noted:

> This extraordinary differential persists . . . in defiance of the equally strong public policy considerations which underlie fee awards in both commercial and civil rights spheres.[198]

---

189. *See supra* note 175.

190. *Attorney Fee Awards in Antitrust and Securities Class Actions*, 6 Class Action Reports, 82, 133-34 (1980).

191. *Id.*

192. *See supra* note 11.

193. M. Berger, Litigation on Behalf of Women (1980). The *Rajender* litigation is a prime example. The suit extended over a period of eight years during which the attorneys faced the possibility of no financial recovery for the thousands of hours expended. *Rajender*, 546 F. Supp. at 158. For a discussion of the complexity of Title VII litigation *see* Ramey, *supra* note 61 at 615-17.

194. Ramey, *supra* note 61, at 615-17.

195. *Id.* at 615.

196. *Id.*

197. *Id.* at 616-17.

198. *Id.* at 610.

Unfortunately, the Supreme Court's opinion in *Hensley* is apt to further widen the differential by imposing a more restrictive standard for compensable hours in civil rights litigation.[199] The Court's opinion thus makes it easier for judges to arbitrarily decide that some federal laws deserve strong support while others do not.

V. Fee Awards Against State and Local Governments

The significant number of cases brought against state and local governments offer another explanation for courts' reluctance to apply larger adjustments in civil rights litigation.[200] As public officials, trial judges are sensitive to the concerns of the taxpayer who must ultimately pay the fee awards. However, this rationale has limited validity and does not account for the less favorable treatment also accorded civil rights attorneys in cases brought against private violators.

The few courts which have addressed the issue disagree on how to appropriately treat state and local governments as losing defendants. Some consider the public nature of the defendant as a rationale to reduce the amount of attorneys' fees.[201] Others consider the defendant's status irrelevant.[202]

The defendants in *Rajender* argued that government violators deserve deferential treatment.[203] They requested a ten percent reduction in the lodestar figure based on their status as a public institution.[204] The court rejected their argument and denied their request.[205]

The defendants in *Rajender* relied on *Ingram v. Madison Square Garden Center*[206] and *Rios v. Enterprise Association Steamfitters Local 648*.[207] The courts in both cases held that the defendants' status as

---

199. *See supra* notes 115-22 and accompanying text. Justice Powell indicates in a footnote that the *Hensley* standards are "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'." 103 S.Ct. at 1939 n.7. "Prevailing party" suggests that *Hensley* only applies to fee award statutes that use such language. Whereas all civil rights fee award statutes include such language, others do not. For example, the Clayton Antitrust Act specifies that federal district courts may award fees to "any person who shall be injured." 15 U.S.C. § 15 (Supp. V 1981). Whether an "injured person" is synonymous with a "prevailing party" is an issue the Court did not address.

200. *See* 128 Cong. Rec. S4876, S4877 (May 11, 1982) (remarks by Senator Hatch) (an estimate that 23,000 § 1983 suits were brought against state and local governments in 1981).

201. *See infra* notes 206-208, 212-19 and accompanying text.

202. *See infra* notes 209-11, 217 and accompanying text.

203. 546 F. Supp. at 173-74.

204. *Id.*

205. *Id.*

206. 482 F. Supp. 918 (S.D.N.Y. 1979).

207. 400 F. Supp. 988 (S.D.N.Y. 1975), *aff'd sub. nom.*, EEOC v. Enterprises, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

nonprofit organizations was a relevant factor justifying reduced attorneys' fees.[208]

Government and nonprofit organizations share similar characteristics. Neither seek to make profit, both receive deferential tax treatment, and both are exempted from various commercial laws such as antitrust and securities regulations. However, there is one major distinction. Unlike nonprofit organizations, government depends on funding from a theoretically unlimited source. Government, therefore, has a greater ability to pay attorneys' fees. Nevertheless, nothing in Title VII or any other civil rights law gives nonprofit organizations or government special immunity for civil rights violations. If liability exists, reducing fees for either would weaken enforcement of these statutes.

The court in *Copeland* held the identity of the losing party was irrelevant when determining fee awards.[209] Congress specifically recognized state and local governments as potential defendants in civil rights litigation.[210] The Senate Report to the 1976 Fees Awards Act stated: "It is intended that the attorneys' fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency under his control, or from state or local government.[211]

Other courts argue that this approach unfairly penalizes taxpayers for acts beyond their control.[212] In *Henderson v. Fort Worth School District*,[213] the court noted that the "financial burden of a fee award in this case would fall on people who participated in no discriminatory act, the taxpayers in the Fort Worth School District."[214] While this may be true, it is also true that government officials swear to uphold the laws. The *Henderson* logic suggests a governmental immunity from civil rights violations. No such immunity exists, and correspondingly, there is no immunity from fee awards. No doubt taxpayers will feel burdened but such burdens will result in pressure for public agencies to comply with the law.

In *Oliver v. Kalamazoo Board of Education*,[215] the Sixth Circuit advanced a novel argument for reducing fees. It held that a substantial fee award against a public school was counterproductive because it reduced the resources available to remedy the violation.[216] In *Oliver*, a desegregation case, the court ordered the busing of school children. Although

208. *Ingram*, 482 F.Supp. at 928; *Rios*, 400 F.Supp. at 991-92.
209. 641 F.2d at 894.
210. S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976).
211. *Id.*
212. *See* Keyes v. School Dist. No. 1, 439 F. Supp. 393 (D. Colo. 1977).
213. 574 F.2d 1210, 1213 (5th Cir. 1978).
214. *Id.*
215. 576 F.2d 714 (6th Cir. 1978).
216. *Id.*

the reduction of the funds available to remedy the violation is unfortunate, Congress intended that all defendants receive equal treatment.[217]

The Supreme Court has given some support to deferential treatment for governmental institutions. In *Hutto v. Finney*,[218] the Court said that "although the Eleventh Amendment does not prohibit attorneys' fees awards for bad faith, it may counsel moderation in determining the size of the award or in giving the state time to adjust its budget."[219] Taxpayer burdens are real but consumer burdens also result from successful Title VII litigation in the private sector. Every major corporation found guilty of sex discrimination ultimately passes on its costs to its customers, just as the Kalamazoo Board of Education passes on its costs to the local taxpayer.

VI. Proposed Legislation

The Reagan administration and key congressional leaders support efforts to amend the standards governing attorneys' fees awards in Title VII and other civil rights cases. They aim to restrict rather than expand or even maintain the effectiveness of attorneys' fees awards. Their proposals would restrict private enforcement by limiting fee awards in both general civil rights litigation and litigation brought against government.[220]

Draft legislation circulated by the Office of Management and Budget (OMB) seeks to strictly limit the government's liability for attorneys' fees awards.[221] The bill affects fee awards in two categories of litigation. First, it affects all suits brought against the federal government. Second, it affects all suits brought to enforce a civil right protected by statutes included in the 1976 Fees Awards Act.[222]

The OMB bill proposes several limitations. First, it limits the hourly rate of compensation to the highest hourly rate plus benefits payable to government attorneys in the civil service.[223] A similar standard

---

217. *See* Rodriquez v. Taylor, 569 F.2d 1231, 1249 n.32 (3d cir. 1977); Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Reed v. Rhodes, 516 F. Supp. 561, 569 (N.D. Ohio 1981).

218. 437 U.S. 678 (1978).

219. *Id.* at 692 n.18.

220. *See infra* notes 222-40 and accompanying text.

221. Unpublished draft of proposal yet to receive final approval by President Reagan, prepared by Michael Horowitz of the Office of Management and Budget. *See also Limiting Lawyer Fees*, N.Y. Times, Aug. 24, 1982, at 10, col. 1.

222. OMB Bill, § 2.

223. OMB Bill, § 3(a)-(b). Congress recently enacted legislation which establishes an hourly rate limitation of $75 for fees in suits where the federal government is a party. 5 U.S.C. § 504 (b) (1) (A) (Supp. V 1981). The Equal Access to Justice Act permits the award of attorney fees to the prevailing party in all actions against the federal government not covered by previous statutes. The purpose of the Act is to alleviate the burden on small businesses and non-wealthy individuals who choose to contest the application of federal

applies to rates for state or municipal attorneys.[224] Second, it prohibits all adjustments to the lodestar amount thereby eliminating contingency and quality of work factors as permitted by *Lindy*.[225] Third, fees may only be paid if they exceed twenty-five percent of the size of the judgment where monetary damages are part of the final judgment.[226] Fourth, fees must bear a reasonable relationship to the damages awarded.[227] Fifth, attorneys who work for organizations funded in any part by a government grant are ineligible for attorneys' fees awards.[228]

Rather than attempt to equalize the size of fee awards for all litigation, the OMB bill would widen the current inequities. Attorneys would have much less incentive to represent Title VII clients with complaints against the federal government, making it more difficult for government employees to vindicate their rights under Title VII. Similarly, it would adversely affect those seeking to enforce rights against both private and public violators.

A similar proposal passed the United States Senate Judiciary Subcommittee on the Constitution in the 97th Congress.[229] Sponsors reintroduced it in January, 1983 at the beginning of the 98th Congress.[230]

---

laws and regulations. H. R. Rep. No. 1418, 96th Cong. 2d Sess. 5-6 (1980). There is language in the legislative history of the Act to suggest the $75 limitation does not apply to other fee-shifting statutes. 125 Cong. Rec. 21444-45 (1979) (remarks of Senator Kennedy). But it would not be surprising if courts attempt to apply the limitation by analogy to litigation where the defendant is state or local government. If Dr. Rajender brought her suit today the University attorneys might argue the Act's limitation should apply. This would reduce the fees from $1,950,000 to $375,000.

The Act does not specifically provide support for post-lodestar adjustments as allowed by *Lindy*. The University might argue, therefore, that multipliers are improper against government defendants. One reported opinion said in dicta that the *Lindy* formula applied to the new Act but no other court has yet to follow its opinion. Constantino v. United States, 536 F. Supp. 60, 64 (E.D. Pa. 1981).

See generally Dods & Kennedy, *The Equal Access to Justice Act*, 50 UMKC L. Rev. 48 (1981); Note, *Will the Sun Rise Again for the Equal Access to Justice Act?*, 48 Brooklyn L. Rev. 265 (1982); Note, *supra* note 35, at 351-56; Note, *The Equal Access to Justice Act: How to Recover Attorneys' Fees and Litigation Expenses from the United States*, 13 U. Tol. L. Rev. 149 (1981).

224. OMB Bill, § 3(a)-(b).

225. OMB Bill, § 3(a) (fees shall not exceed lower of actual costs of government rate figure).

226. OMB Bill, § 4(a).

227. OMB Bill, § 6.

228. OMB Bill, § 7.

229. S. 585, 97th Cong., 2d Sess. (1982) (passed the Subcommittee on the Constitution of the Senate Judiciary Committee on April 15, 1982). *See* 128 Cong. Rec. S.4876 (daily ed. May 11, 1982) (remarks of Senator Hatch). *See also Attorneys Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

230. S. 585 was reintroduced as S. 141, 98th Cong., 1st Sess., 129 Cong. Rec. S628-36 (1983).

While the OMB bill affects all federal litigation, the Senate bill focuses exclusively on civil rights statutes included in the Fees Awards Act.[231]

The Senate bill contains limitations similar to the OMB proposal. For example, it prohibits adjustments to the lodestar amount.[232] It does not, however, attempt to limit the hourly rates as severely as the OMB proposal. Under the Senate bill, attorneys' fees are to be set by determining a "reasonable market rate."[233] described by the chief sponsor of the bill, Senator Hatch, as the "usual hourly rate."[234] Senator Hatch indicates that "[if] this is not appropriate, the market rate or a reasonable hourly rate for that type of litigation should be used."[235] Although the bill prohibits multipliers, Senator Hatch also indicated that the hourly rate may include "a limited—for example, 20 percent—factor to account for the contingent nature of success."[236] Unfortunately, this attempt to define a "market rate" is as vague as previous judicial attempts.[237] The proposal creates confusion because it prohibits adjustments to the lodestar amount, while its sponsors support adjustments of hourly rates to account for the contingent nature of success.

The effort to clarify the standard for setting hourly rates is commendable, but placing special limitations on fee awards further aggravates the less than equal treatment currently accorded civil rights litigants.[238] Both proposals widen rather than narrow the current inequities in the treatment of attorneys' fees between civil rights suits and commercial suits.

The authors of the Senate proposal admit they want to protect state and local governments. The sponsors included the amendment to the 1976 Fees Awards Act in separate legislation which seeks to limit the impact of recent Supreme Court decisions expanding the liability of state and local government for civil rights violations.[239] In the aftermath of

---

231. S. 585 amends 42 U.S.C. § 1988 (1976) by adding a new section, § 722A.

232. S. 585, § 722A(f).

233. 128 Cong. Rec. S. 4879 (daily ed. May 11, 1982) (remarks of Senator Hatch).

234. *Id.*

235. *Id.*

236. *Id.*

237. *See supra* notes 97-113 and accompanying text.

238. The Texas State Legislature attempted to resolve the problem by limiting the state's liability for attorney's fees under certain circumstances. H.B. 9, § 5, 67th Leg., 2d Called Sess. (Tex. 1982). The act was found invalid when a U.S. district court found "that the Supremacy Clause, Article VI, Clause 2, of the United States Constitution requires that federal court orders awarding fees under § 1988 prevail over any statutory limitation on such awards." Ruiz v. Estelle, 553 F. Supp. 567, 575 (S.D. Tex. 1982).

239. S. 585. *See supra* notes 229-31.

these decisions, the number of civil rights suits brought against state and local governments increased dramatically[240] causing attorneys' fees liability to increase simultaneously.[241] Nevertheless, critics of the Supreme Court's decisions should seek relief in substantive law rather than in the enforcement procedures.

VII. Conclusion

Both the Senate bill and the OMB proposal address the major issues involved in the *Rajender* attorneys' fees decision. Although each adopts a less vague standard than those currently employed, both proposals would increase the bias against civil rights litigation and grant deferential treatment to public violators. More disturbing is the recent *Hensley* decision which adds to the vagueness of current standards and will surely increase bias against civil rights litigation.

Congress should recognize the utility of fee awards and adopt workable standards rather than seek to eliminate their effectiveness. The *Lindy* formula does not provide the final answer. The quality of work adjustment is vague and lacks sufficient public policy support. Although the contingent nature of success adjustment supports the sound policy of rewarding attorneys for the risk of nonrecovery, Congress or the courts need to fashion less arbitrary standards. Establishing flat increases based on the length of litigation or permitting judicial flexibility within lower and upper limits are two suggestions.

There are indications that courts are beginning to treat civil rights cases more generously.[242] Concurrently, public institutions are finding themselves liable for a greater number of civil rights violations. As a result, public criticism will surely increase. If Congress responds, it should not ignore the underlying rationale for requiring the losing defendant to pay the prevailing plaintiff's attorney's fees. Without the availability of adequate compensation, civil rights litigants will be unable to attract competent counsel. Congress should recognize that severe restrictions will require the federal government to choose between more costly public enforcement or nonenforcement. As the executive branch

240. *See supra* note 51.

241. *See Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

242. Lawyers' Committee Report at 1, 5 (listing of recent cases where attorneys' fees awards are more generous than in the past; a 50% increase in the lodestar figure appears common).

continues to reduce its efforts at public enforcement,[243] incentives for private enforcement become more essential.

Robert Miller*

---

243. *See Reagan is Rebuked by 33 State Heads of Rights Panels*, N.Y. Times, Sept. 12, 1982, at 1, col. 3 (indicates that the Justice Department has reduced efforts for enforcement of civil rights laws). *See also Rights Unit Charges Reagan Officials Impede Law*, N.Y. Times, Mar. 20, 1983, at 1, col. 3 (members of the U.S. Civil Rights Commission allege that high U.S. officials impede efforts to obtain data regarding the appointment of minorities and women to federal jobs); E. Mincberg, *A Retreat on Rights*, N.Y. Times, Aug. 21, 1983, at E17, col. 2 (describes the Reagan administration's record on civil rights as a wholesale retreat from enforcement).

* Robert Miller is a J.D. candidate at the University of Minnesota.