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Civil Rights Attorney's Fees: Hensley's Path to Confusion

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RECENT DEVELOPMENT

Civil Rights Attorney's Fees: *Hensley*'s Path to Confusion

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I. INTRODUCTION

Congress enacted the Civil Rights Attorney's Fees Act (Fees Act)[1] to promote more vigorous enforcement of the civil rights laws by attracting competent legal counsel to represent civil rights

1. 42 U.S.C. § 1988 (1982). The Fees Act provides in pertinent part:
In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
Id.

plaintiffs.[2] To achieve this goal the Fees Act allows courts to award attorney's fees to prevailing plaintiffs in civil rights cases.[3] The statute, however, entails an inherent tension: the Fees Act's primary aim of compensating prevailing plaintiffs' attorneys " 'for all time reasonably expended on a matter' "[4] conflicts with the desire to prevent windfalls to attorneys.[5] This conflict is especially keen when a civil rights plaintiff only partially prevails,[6] because the court then must determine whether a fees award should compensate for time spent on unsuccessful claims.

Courts initially addressing this issue developed three distinct standards. One line of cases held that attorneys should be compensated only for time spent pursuing successful claims.[7] Another group of courts held that attorneys should be compensated for

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2. The legislative history asserts that the civil rights laws "depend heavily on private enforcement," and refers to fees awards as "an essential remedy if private citizens are to have a meaningful opportunity to vindicate" congressional policies that underlie these laws. S. REP. No. 1011, 94th Cong., 2d Sess. 2 (1976) [hereinafter cited as SENATE REPORT]. A party seeking to enforce these rights, "if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *Id.* at 4 (quoting Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968)).

3. *See supra* note 1.

4. SENATE REPORT, *supra* note 2, at 6 (citations omitted).

5. *Id.* The Senate report states that prevailing plaintiffs should receive awards that are "adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Id.* One commentator refers to this concern as the fear of a "blank check." Interview with James Blumstein, Professor of Law at Vanderbilt University School of Law, in Nashville, Tennessee (Oct., 1984). Defendants fear that an attorney may write himself a blank check in a strong case by padding his bill with many hours that involve meritless or questionable claims. *Id.*

6. A "partially prevailing plaintiff" either does not succeed on all claims asserted or fails to receive all remedies sought. The legislative history indicates that the Fees Act still considers these parties as "prevailing" within the statutory definition:

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. . . . A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

H.R. REP. No. 1558, 94th Cong., 2d Sess. 7 (1976) (citations omitted) [hereinafter cited as HOUSE REPORT].

The Senate report states that an award may be appropriate if a party "has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." SENATE REPORT, *supra* note 2, at 5. The cases cited approvingly in the Senate report also support this broad definition of prevailing party. *See infra* notes 32-44 and accompanying text.

7. See cases cited *infra* note 46.

time expended on all nonfrivolous claims, regardless of whether the claims were successful at trial.[8] A third approach required courts to consider the relationship between the unsuccessful claims and the success achieved, and to reduce the fees award only when unsuccessful claims were truly distinct from the successful claim or claims.[9] In *Hensley v. Eckerhart*[10] the United State Supreme Court had the opportunity to resolve this dispute and to establish a standard for determining the fees award when a plaintiff prevails only partially.[11] The Court held that the proper determination of the fees award requires a court to examine the relationship between successful and unsuccessful claims.[12] The award should compensate for unsuccessful claims only if they share a "common core of facts or . . . related legal theories" with the successful claim.[13] Furthermore, the court should focus on the overall success achieved and grant an award that is reasonable in relation to the results obtained.[14]

Although the *Hensley* decision settled this issue to some extent by adopting a standard for determining fees awards for partially prevailing plaintiffs, the standard proved to be so flexible that *Hensley* has created more problems than the decision has resolved. The disparity among lower courts over whether to compensate for unsuccessful claims has continued, and courts rely on *Hensley* as support for completely divergent results in similar fact situations. The purpose of this Recent Development is to propose a procedure and standard that will resolve the Fees Act's conflict more effectively than the *Hensley* decision. Part II focuses on the legal background leading to *Hensley* and examines the *Hensley* opinion. Part III discusses the subsequent decisions that have attempted to apply the *Hensley* standard. Part IV analyzes *Hensley* and the subsequent decisions in light of the legislative history and purposes of the Fees Act. Part IV also suggests a procedure and standard that will resolve the problems that *Hensley* and the Fees Act present. Part V concludes that courts can best serve congressional intent by focusing on the legitimacy of the claims asserted

8. See cases cited *infra* note 56.

9. See cases cited *infra* note 65.

10. 461 U.S. 424 (1983).

11. *Id.* at 426. Plaintiffs prevailed on five of six claims asserted. *See infra* notes 81-84 and accompanying text.

12. 461 U.S. at 435.

13. *Id.*

14. *Id.*

and by compensating attorneys for all time reasonably expended in pursuing legitimate claims.

II. LEGAL BACKGROUND

A. *Legislative History of the Fees Act*

The catalyst of the Fees Act was the Supreme Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*,[15] which reaffirmed the "American Rule" on attorney's fees and held that only Congress can authorize exceptions that allow fee shifting among litigants.[16] Congress responded immediately.[17] In the area of civil rights, Congress recognized that a vast majority of plaintiffs cannot afford legal counsel.[18] By passing the Fees Act, Congress hoped to ensure effective access to the judicial system for all victims of civil rights violations.[19] Congress also realized that potential liability for attorney's fees might deter civil rights violations. The "private attorneys general" would enable vigorous enforcement of civil rights legislation.[20] Congress designed the Fees Act to prevent civil rights laws from becoming "mere hollow pronouncements."[21]

The legislative history provides guidelines for courts in awarding attorney's fees under the Fees Act. The Senate report stated that the fees award should be "adequate to attract competent counsel, but [should] not produce windfalls to attorneys."[22] In

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15. 421 U.S. 240 (1975).

16. *Id.* at 247, 263-64, 270-71. The Court reaffirmed the traditional "American Rule" that attorney's fees are not ordinarily recoverable by the prevailing litigant; only by "legislative guidance" may the judiciary "reallocate the burdens of litigation." *Id.* at 247.

17. The Senate report states that the purpose of the Fees Act "is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision" in *Alyeska Pipeline*. SENATE REPORT, *supra* note 2, at 1. These anomalous gaps made awards of fees "suddenly unavailable in the most fundamental civil rights cases." *Id.* at 4.

Congress authorized fee shifting in private suits under the Civil Rights Act of 1964. 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1982). Since 1964 "every major civil rights law . . . has included, or has been amended to include, one or more fee provisions." SENATE REPORT, *supra* note 2, at 3. Prior to the *Alyeska Pipeline* decision, lower courts "had drawn the obvious analogy between the Reconstruction Civil Rights Acts and these modern civil rights acts, and, following Congressional recognition . . . of the 'private attorney general' concept, were exercising their traditional equity powers to award attorneys' fees under early civil rights laws as well." *Id.* at 4 (footnote omitted). According to the Report, the Fees Act "is an appropriate response to the *Alyeska* decision." *Id.*

18. HOUSE REPORT, *supra* note 6, at 1.

19. *Id.*

20. SENATE REPORT, *supra* note 2, at 3-4.

21. *Id.* at 6; *see also* HOUSE REPORT, *supra* note 6, at 9.

22. SENATE REPORT, *supra* note 2, at 6.

computing the fee, courts should compensate prevailing parties' attorneys " 'for all time reasonably expended on a matter.' "[23] Beyond these general guidelines, the Senate report cited several cases in which courts had awarded attorney's fees pursuant to other fee shifting statutes. These cases were to govern the determination of fees awards under the Fees Act.[24]

Congress referred to *Johnson v. Georgia Highway Express, Inc.*[25] in the legislative history as the standard bearer for fee determinations.[26] In *Johnson* the United States Court of Appeals for the Fifth Circuit attempted to reverse a lower court trend of awarding nominal fees without explanation.[27] The fees question arose in a Title VII challenge to defendant's discharge of plaintiff-employee.[28] The Fifth Circuit enumerated twelve factors for lower courts to consider in determining fees awards.[29] Apart from emphasizing that the goal of fee shifting statutes is to provide litigants with competent counsel and not to profit attorneys,[30] the

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23. *Id.* (citations omitted).

24. *Id.* The report stated:

> It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975).

Id. The Senate cited these cases as governing because they resulted in fees awards that were "adequate to attract competent counsel, but which [did] not produce windfalls to attorneys." *Id.*

25. 488 F.2d 714 (5th Cir. 1974).

26. *See supra* note 24.

27. 488 F.2d at 717; *see* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 117 (1981).

28. Prior to passage of the Fees Act, the 1964 Civil Rights Act and other modern civil rights acts authorized fee shifting. *See supra* note 17.

29. 488 F.2d at 717-19. The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations that the client or circumstances impose; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.*

The *Johnson* court took these factors from the American Bar Association's Code of Professional Responsibility. *Id.* at 719. Attempting to aid appellate review, *see id.* at 717, the court declared that a failure to consider these factors would constitute an abuse of discretion, *id.* at 720.

30. *Id.* at 719. The *Johnson* court also called for attorneys to use their best efforts to settle a fee request. *Id.* at 720. "Ideally, of course, litigants will settle the amount of a fee."

Johnson court failed to explain the appropriate method of applying these twelve factors.

To provide guidelines for the proper application of the *Johnson* criteria, Congress cited in the legislative history three cases in which courts correctly applied these factors.[31] In *Stanford Daily v. Zurcher*[32] the court recognized the inherent tension in fee shifting statutes[33] and decided to apply the lodestar method of computation, which calls for the multiplication of the number of hours expended by the appropriate hourly fee.[34] The court found that this calculation provided an objective starting point for determining the proper fees award.[35] Turning to the issue of unsuccessful claims, the court refused to disallow hours spent pursuing the unsuccessful motion because plaintiffs' attorneys not only had obtained a significant concession, but also had not "manufactur[ed] legal services in constructing their . . . motion."[36] The attorneys had substantially advanced their clients' interests.[37]

In *Davis v. County of Los Angeles*[38] plaintiffs prevailed in requiring the Los Angeles Fire Department to undertake an affirma-

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Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

31. *See supra* note 24.

32. 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978). Plaintiffs, the primary student newspaper of Stanford University and members of its staff, filed suit requesting that the court declare illegal and unconstitutional a search of the newspaper's offices. *Id.* at 125-26. Plaintiffs obtained a declaratory judgment and moved for a preliminary injunction. *Id.* at 136. The court recognized that defendants were "respected members of the community [and] anticipate[d] that this decision [would] be honored and that an injunction [would be] unnecessary." *Id.* The court, therefore, refused to grant a preliminary injunction. *Id.* In a subsequent proceeding, Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), the court calculated the appropriate fee award. This subsequent proceeding is the case cited with approval in the legislative history. *See supra* note 24.

33. 64 F.R.D. at 681. The court stated that it must avoid "the Scylla of simply accepting the attorneys' account of the value" of legal services provided while also avoiding "the Charybdis of decreasing reasonable fees because the attorneys conducted the litigation more as an act pro bono publico than as an effort at securing a large monetary return." *Id.* (citations omitted).

34. *Id.* at 682-83, 684.

35. *Id.* The court cited Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), in which the United States Court of Appeals for the Third Circuit declared that this figure "provides the only reasonably objective basis for valuing an attorney's services." *Id.* at 167. Although the calculation of this figure does not end the inquiry, the figure does provide an objective starting point. *See id.*

36. *Stanford Daily*, 64 F.R.D. at 684.

37. *Id.*

38. 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974).

tive action program.[39] The plaintiffs, however, either were unsuccessful or did not litigate certain other issues.[40] The court held that neither the exclusion of nor a defeat on these issues was "legally relevant in determining the fees award."[41] The court did not exclude hours spent on these issues from the lodestar calculation and awarded fees "for all time reasonably expended in pursuit of the ultimate result achieved."[42] Similarly, in the school desegregation case of *Swann v. Charlotte-Mecklenburg Board of Education*,[43] the court awarded compensation for all hours expended, despite plaintiffs' losses on "certain minor contentions."[44]

B. *Pre*-Hensley *Interpretations of the Fees Act*

Prior to the *Hensley* decision, three different standards for determining the fee awards of partially prevailing plaintiffs emerged from the circuit courts.[45] One group of courts held that attorney's fees should be based only on work performed on successful claims.[46] In *Nadeau v. Helgemoe*[47] the United States Court of Ap-

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39. Davis v. County of Los Angeles, 7 Empl. Prac. Dec. (CCH) ¶ 9088 (C.D. Cal. 1973).

40. *Davis*, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5049. The court did not explain the content of these issues.

41. *Id.*

42. *Id.*

43. 66 F.R.D. 483 (W.D.N.C. 1975).

44. *Id.* at 484. The minor contentions regarded the adequacy of physical plants, the adequacy of equipment, and the quality of teachers. *Id.*

45. Hensley v. Eckerhart, 461 U.S. 424, 431-32 (1983). In addition to the split between circuit courts, disagreement sometimes arose from different panels of the same court. *Compare* Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) (basing award only on successful claims) *with* Lamphere v. Brown Univ., 610 F.2d 46 (1st Cir. 1979) (allowing fees award for unsuccessful attempt to broaden remedies) *and compare* Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980) (basing award only on successful claims) *with* Sherkow v. Wisconsin, 630 F.2d 498 (7th Cir. 1980) (basing award on all nonfrivolous claims). The United States Court of Appeals for the Seventh Circuit attempted to resolve the conflict between its panels in Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149 (7th Cir. 1981), ruling that a court should distinguish between unsuccessful issues that are merely aspects of a larger, successful claim and unsuccessful claims that are independent claims. *See infra* note 77 and accompanying text.

46. *See, e.g.*, Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982); Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981); Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980); Sethy v. Alameda County Water Dist., 602 F.2d 894 (9th Cir. 1979); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978); Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978).

47. 581 F.2d 275 (1st Cir. 1978). In the initial proceeding the court awarded plaintiffs, inmates being held at their own request in protective custody in the New Hampshire State Prison, additional access to the prison's library facilities, but denied plaintiffs relief on various other claims. Nadeau v. Helgemoe, 423 F. Supp. 1250 (D.N.H. 1976), *modified*, 561 F.2d 411 (1st Cir. 1977). Plaintiffs had asserted that the deprivation of privileges and the conditions of confinement subjected them to cruel and unusual punishment, that confinement under such disparate conditions violated plaintiffs' rights to equal protection of the law, and

peals for the First Circuit first considered whether a plaintiff who is not successful on every claim is a "prevailing party" entitled to an award under the Fees Act.[48] The court stated that a plaintiff is a prevailing party for the purposes of the Fees Act if the plaintiff succeeds on "any significant issue in litigation which achieves some benefit the part[y] sought."[49] This broad definition of prevailing party notwithstanding, the First Circuit maintained that the fees award should compensate only for work performed on issues in which the plaintiffs succeeded.[50] The United States Court of Appeals for the Third Circuit adopted a similar approach in *Hughes v. Repko*.[51] Recognizing that the lodestar method[52] is the proper first step in calculating the fees award, the court found the more important question to be what services a court should properly include in the lodestar calculation.[53] The Third Circuit maintained that a plaintiff is not a prevailing party to the extent that he has been unsuccessful.[54] Because the Fees Act provides for fees awards only for prevailing parties, the court concluded that it should include only hours "reasonably supportive" of successful claims in the lodestar calculation.[55]

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that defendants violated plaintiffs' rights to exercise their religion and to have access to the courts by unnecessarily restricting plaintiffs' access to religious services and the law library. 423 F. Supp. 1260. The First Circuit reversed in part, 561 F.2d 411 (1st Cir. 1977), and on remand, the parties entered into a consent decree that resulted in considerable improvement for the plaintiffs. 581 F.2d at 277.

48. 581 F.2d at 278.

49. *Id.* at 278-79. The court held that victory on the library access issue "was significant enough . . . for plaintiffs to be considered prevailing parties." *Id.* at 279. The First Circuit also recognized that the legislative history required a consideration of any vindication of rights through a consent decree even if plaintiffs failed to obtain formal relief. *Id.*; *see* SENATE REPORT, *supra* note 2, at 5. The district court had failed to consider plaintiffs' success in both instances. *Nadeau*, 581 F.2d at 280.

50. 581 F.2d at 279. In Sethy v. Alameda County Water Dist., 602 F.2d 894, 897-98 (9th Cir. 1979), the United States Court of Appeals for the Ninth Circuit adopted this same approach, quoting from *Nadeau*. *See also* Bartholomew v. Watson, 665 F.2d 910, 914 (9th Cir. 1982) (reaffirming the *Sethy* standard).

51. 578 F.2d 483 (3d Cir. 1978). Plaintiffs prevailed on their claim that because of their race defendant had not leased an apartment to them. The plaintiffs, however, failed on their claims of discrimination and conspiracy against defendant's husband, and failed to receive punitive damages. *Id.* at 485.

52. *See supra* text accompanying note 34.

53. 578 F.2d at 486.

54. *Id.* at 487. The court asserted: "Any other interpretation would run counter to the spirit of the [Fees] Act provision that attorney's fees should be awarded to the 'prevailing' party." *Id.*

55. *Id.* The court further limited the fees award by instructing the district court to consider "not only the number of hours actually devoted to the successful claims, but also whether it was reasonably necessary to spend that number of hours." *Id.*

A second line of cases held that the fees award for a partially prevailing plaintiff should be based on all nonfrivolous claims, regardless of whether these claims were successful.[56] In *Northcross v. Board of Education*[57] plaintiffs had prevailed only partially in their desegregation fight, and the district court had reduced the fees award to eliminate compensation for the matters on which plaintiffs did not prevail.[58] The United States Court of Appeals for the Sixth Circuit rejected this approach. The Sixth Circuit asserted that once the court has determined that plaintiffs are "prevailing parties," plaintiffs are entitled to recover fees for " 'all time reasonably spent on a matter.' "[59] The Sixth Circuit maintained that whether plaintiffs' attorneys spent time researching issues which were "ultimately unproductive, rejected by the court, or mooted by intervening events" was irrelevant. Furthermore, reducing awards for such time would discourage "innovative and vigorous lawyering in a changing area of the law."[60] The court recognized that Congress mandated the broadest remedies available to enforce the civil rights laws[61] and found that courts could best follow this mandate by encouraging attorneys to promote their clients' interests to the fullest extent possible in good faith.[62] The court also noted practical difficulties with dissecting time spent on successful and unsuccessful claims.[63] For these reasons, the court

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The Third Circuit also considered the district court's reduction of the figure obtained from the initial lodestar calculation. The district court had decided that because plaintiffs failed on more than two-thirds of the claims asserted, *see supra* note 51, the court should reduce the lodestar figure by two-thirds, 578 F.2d at 486. The Third Circuit held that the lower court's approach had no "rational basis" because there "is no necessary percentage relationship between the number of claims and contentions presented in a lawsuit and the lawyer time spent on each." *Id.*

56. *See, e.g.*, Sherkow v. Wisconsin, 630 F.2d 498 (7th Cir. 1980); Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978).

57. 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

58. 611 F.2d at 631.

59. *Id.* at 636; *see also* Sherkow v. Wisconsin, 630 F.2d 498, 504 (7th Cir. 1980); Brown v. Bathke, 588 F.2d 634, 637 (8th Cir. 1978) (stating that the legislative history calls for compensating an attorney for all time reasonably expended). For the legislative history supporting this contention, see *supra* text accompanying note 23.

60. 611 F.2d at 636.

61. *Id.*; *see also* Brown v. Bathke, 588 F.2d at 636 (stating that Congress intended a liberal standard for determining fees awards).

62. 611 F.2d at 636.

63. The Sixth Circuit particularly criticized the lower court for "decimating the total hours claimed with arbitrary percentages." *Id.* Without going into further detail, the court stated:

Suffice it to say, . . . Congress has mandated that a prevailing party's attorney should

held that a prevailing plaintiff should receive compensation for all hours reasonably expended on the case, including "unsuccessful research or litigation, unless the positions asserted [were] frivolous or in bad faith."[64]

A third approach required courts to consider the relationship between the unsuccessful claims and the ultimate success achieved when determining whether to compensate for time spent on unsuccessful claims.[65] Recognizing that Congress intended the Fees Act to compensate attorneys for "all time reasonably expended,"[66] these courts agreed with the *Northcross* mandate that time spent on unsuccessful claims should not be disallowed automatically.[67] These courts also agreed that frivolous claims should not be included in the fees calculation,[68] but went beyond the *Northcross* approach by requiring further analysis to determine when unsuccessful claims may be included. In *Jones v. Diamond*[69] the United States Court of Appeals for the Fifth Circuit emphasized that complex civil rights litigation necessarily involves overlapping issues[70] and that attorneys must explore fully every aspect of the case to represent their clients adequately.[71] Therefore, in determining whether time spent on an unsuccessful claim should be included in

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be compensated "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." We know of no "traditional" method of billing whereby an attorney offers a discount based upon his or her failure to prevail on "issues or parts of issues."

Id.

The United States Court of Appeals for the Eighth Circuit also repudiated any "mechanical division" of hours spent on successful and unsuccessful claims because such a distinction ignores "the interrelated nature of many prevailing and nonprevailing claims." Brown v. Bathke, 588 F.2d at 637 n.5.

64. 611 F.2d at 636. The Sixth Circuit noted that the lower court may reduce the number of hours claimed for "duplication, padding or bad faith." *Id.*; *see also Brown*, 588 F.2d at 637 (asserting that time spent on frivolous claims is not time "reasonably expended").

65. *See, e.g.*, Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149 (7th Cir. 1981); Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc); Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980).

66. *See, e.g.*, Jones v. Diamond, 636 F.2d 1364, 1381 (5th Cir. 1981); Gurule v. Wilson, 635 F.2d 782, 793 (10th Cir. 1980).

67. *See, e.g., Jones*, 636 F.2d at 1382; *Gurule*, 635 F.2d at 793.

68. *See, e.g., Jones*, 636 F.2d at 1382; *Gurule*, 635 F.2d at 794.

69. 636 F.2d 1364 (5th Cir. 1981). Plaintiffs successfully obtained injunctive relief because the court concluded that the conditions of plaintiffs' confinement violated constitutional guarantees. *Id.* at 1367. The Fifth Circuit, however, affirmed the lower court's judgment denying the class representative and six individual plaintiffs monetary damages. *Id.*

70. *Id.* at 1382; *see also* Copeland v. Marshall, 641 F.2d 880, 892 n.18 (D.C. Cir. 1980) (noting that a case often involves varions legal theories).

71. 636 F.2d at 1382.

calculating the fees award, lower courts must "consider the relationship of the claims that resulted in judgment with the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case."[72]

The United States Court of Appeals for the Tenth Circuit advanced a similar standard in *Gurule v. Wilson*.[73] The *Gurule* court recognized that attorneys should not be penalized for litigating unsuccessful claims that were "part and parcel" of the success achieved.[74] The Tenth Circuit noted, however, that a court could reduce a fees award for time spent on "substantial[ly] separate" issues that were unsuccessful.[75] In *Syvock v. Milwaukee Boiler Manufacturing Co.*[76] the United States Court of Appeals for the Seventh Circuit also distinguished between "independent" unsuccessful claims and unsuccessful claims that were "mere *aspects* of a larger claim."[77] The Seventh Circuit held that fees awards should be reduced only for "independent" unsuccessful claims.[78]

C. Hensley v. Eckerhart

Because the courts of appeals had adopted varying standards for determining a fees award for partially prevailing plaintiffs, the Supreme Court attempted to resolve the conflict in *Hensley v. Eckerhart*.[79] In *Hensley* plaintiffs had challenged the constitutionality of treatment and conditions at the Forensic Unit of Fulton

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72. *Id.*

73. 635 F.2d 782 (10th Cir. 1980).

74. *Id.* at 794 (citing with approval Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir. 1979)); *see also* Copeland v. Marshall, 641 F.2d 880, 892 n.18 (D.C. Cir. 1980) (asserting that no reduction is appropriate when the issue is "part and parcel" of one matter).

75. 635 F.2d at 794.

76. 665 F.2d 149 (7th Cir. 1981).

77. *Id.* at 165 (emphasis in original). Thus, the Seventh Circuit distinguished the *Syvock* case from Busche v. Burkee, 649 F.2d 509 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981), and Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980), in which the court had limited the fees awards to successful claims, *see supra* note 46 and accompanying text. The plaintiff in *Syvock* succeeded in establishing defendant's liability, but failed to prove that defendant had acted willfully and that plaintiff had mitigated his damages. 665 F.2d at 165. The Seventh Circuit considered these unsuccessful claims to be "mere aspects of a larger claim" in which the plaintiff did succeed. *Id.* The plaintiff in *Busche* had failed to prove two of three alleged due process violations, and the plaintiff in *Muscare* had failed to prove that a regulation was unconstitutional although he had successfully proved that he had been denied procedural due process. *Id.* at 163-65. The Seventh Circuit considered the unsuccessful claims in these cases to be "independent" from the successful claims. *Id.* at 165.

78. 665 F.2d at 165; *see also* Copeland v. Marshall, 641 F.2d 880, 892 n.18 (D.C. Cir. 1980) (stating that reduction is appropriate only when unsuccessful issues are "truly fractionable").

79. 461 U.S. 424 (1983).

State Hospital in Fulton, Missouri.[80] The district court held that an involuntarily committed patient has a constitutional right to minimally adequate treatment and found constitutional violations in five of six general areas.[81] Plaintiffs then filed a request for attorney's fees under the Fees Act.[82] The district court determined that plaintiffs were prevailing parties and refused to eliminate from the award the hours spent on unsuccessful claims.[83] The Eighth Circuit affirmed.[84]

The Supreme Court's majority opinion initially analyzed the legislative history of the Fees Act,[85] but found that it provided no "definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success."[86] The Court acknowledged that a plaintiff must be a prevailing party, but declared that the "generous formulation" of this phrase[87] "brings the plaintiff only across the statutory threshold. It remains for the dis-

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80. Plaintiffs brought suit on behalf of all persons involuntarily confined at the Forensic Unit, which housed persons dangerous to themselves or others. Plaintiffs named officials at the Forensic Unit and members of the Missouri Mental Health Commission as defendants. *Id.* at 426.

Plaintiffs originally filed suit in 1972 in a three count complaint. Count I challenged the constitutionality of treatment; count II challenged the placement of patients in the maximum security building without procedural due process; count III sought compensation for patients who performed labor for maintenance of the institution. *Id.* The parties resolved count II by consent decree in 1973. Count III became moot in August 1974 when defendants began compensating patients for labor performed. In April 1975 plaintiffs voluntarily dismissed the suit and filed a new two count complaint challenging the constitutionality of treatment and seeking back pay for patients. In July 1976 plaintiffs voluntarily dismissed the back pay count. In August 1977 plaintiffs filed an amended one count complaint specifying the conditions that allegedly violated the patients' constitutional rights. *Id.* at 426-27.

81. *See* Eckerhart v. Hensley, 475 F. Supp. 908, 915-28 (W.D. Mo. 1979). The court found that plaintiffs': (1) physical environment; (2) individual treatment plans; (3) general environment; (4) visitation, telephone, and mail privileges; and (5) seclusion and restraint guidelines were inadequate. With regard to staffing, however, the court found that staffing levels were minimally adequate. *Id.*; *see Hensley*, 461 U.S. at 427-28 & n.1.

82. Plaintiffs' four attorneys claimed that they worked 2985 hours and sought payment at rates varying from $40 to $65 per hour. The fee request included the period from January 1975 through the end of the litigation. *Hensley*, 461 U.S. at 428.

83. *Id.* The district court, however, did not grant the entire request. The court reduced the number of hours of one attorney by 30% to account for his inexperience and his failure to keep contemporaneous records. The district court also declined plaintiffs' request for an upward adjustment. *Id.* at 428-29.

84. Eckerhart v. Hensley, 664 F.2d 294 (8th Cir. 1981) (per curiam).

85. *Hensley*, 461 U.S. at 429-31. For an analysis of the legislative history and cases cited therein, see *supra* notes 15-31 and accompanying text.

86. 461 U.S. at 431.

87. *Id.* at 433. The Court cited Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978), for the broad definition of prevailing party. *See supra* text accompanying note 49 (discussing *Nadeau*'s definition).

trict court to determine what fee is 'reasonable.' "[88] The Court held that the most useful starting point for making this determination is the objective lodestar figure.[89] The calculation of the lodestar, however, "does not end the inquiry;" other considerations may compel a court to adjust the fee award.[90] The Supreme Court asserted that when a plaintiff has prevailed only partially, a crucial factor in making this determination is the "results obtained."[91] By limiting awards to prevailing parties, the Fees Act requires courts to treat claims that are unrelated[92] to the successful result as if the party had not raised the claims.[93] A district court, therefore, must assess the relationship between successful and unsuccessful claims because "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' "[94] If the claims involve "a common core of facts or [are] based on related legal theories," however, a reduction in the fee award is inappropriate.[95] In these cases courts must not attempt to divide hours on a claim-by-claim basis as if the lawsuit were a series of discrete claims. Rather, courts must focus on the "significance of the overall relief" and consider the relationship between the extent of success and the amount of the fees award, awarding only an amount that is reasonable in relation to the results obtained.[96]

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88. *Hensley*, 461 U.S. at 433.

89. *Id.* For an explanation of the lodestar method of calculation, see *supra* text accompanying note 34.

90. 461 U.S. at 434.

91. *Id.*

92. The Court admitted that no certain method exists for determining the relationship among claims, *id.* at 437 n.12, and offered only rough guidelines. According to the Court, if a plaintiff fails on a claim that is "distinct in all respects" from his successful claims, the lower court should exclude the hours spent on the unsuccessful claim. If a suit, however, involves related claims a reduction simply because the court did not adopt each contention is inappropriate for a plaintiff who has won "substantial relief." *Id.* at 440. "[T]he extent of a plaintiff's success is a crucial factor . . . ." *Id.*

93. *Id.* at 435.

94. *Id.* (quoting Davis v. County of Los Angeles, 8 Empl. Prac. Dec. at 5049).

95. 461 U.S. at 435.

96. *Id.* at 435, 440. For example, the Court stated that the fees award based on 2557 hours may have been reasonable in this case because of the substantial relief obtained. An award, however, based on the claimed hours would have been excessive if plaintiffs had prevailed on only one of the six claims. *Id.* at 436.

The Supreme Court maintained that a district court necessarily has discretion in awarding fees because the lower court has a superior understanding of the litigation. In exercising that discretion, however, a district court must make clear that it has considered the relationship between the amount of the fees award and the success achieved. *Id.* at 437. Because the district court in this case had not given proper attention to this relationship, the Court vacated the award and remanded the case. *Id.* at 438, 440.

Chief Justice Burger concurred. The Chief Justice emphasized that a party who seeks

In a separate opinion[97] Justice Brennan stressed the delicate balance inherent in the Fees Act[98] and accused the majority of an imbalanced analysis. Justice Brennan found that the majority emphasized those aspects of discretion necessary to prevent "windfalls" to attorneys without giving proper attention to the need to ensure that competent counsel will represent civil rights plaintiffs who have bona fide claims.[99] To ensure that competent counsel is available, fees awards must compensate attorneys as fully as market standards allow.[100] Turning to the majority's newly enunicated standard, Justice Brennan agreed that the relationship between results and fees is a necessary factor.[101] Justice Brennan, however, disapproved of too much reliance on this factor because work on unrelated claims often develops facts that are intertwined. Justice Brennan also indicated that determining how much time an attorney devoted to which claim may be impossible.[102]

In addition to these theoretical objections to the majority's approach, Justice Brennan expressed concern that the majority seri-

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to shift the burden of fees to his opponent "must keep records in sufficient detail that a neutral judge can make a fair evaluation" of the "reasonable fees to be allowed." *Id.* at 441 (Burger, C. J., concurring).

97. Justice Marshall, Justice Blackmun, and Justice Stevens joined Justice Brennan's opinion, dissenting in part.

98. 461 U.S. at 443-44 (Brennan, J., dissenting in part); *see supra* notes 4-5 and accompanying text and *infra* note 104.

99. *Id.* at 444 (Brennan, J., dissenting in part).

100. *Id.* at 447 (Brennan, J., dissenting in part).

Justice Brennan also argued that full compensation should include compensation for the time value of money and any risk factors involved. He stated:

> [T]he Court expressly approves consideration of the full range of *Johnson* . . . factors. . . . If the rate used in calculating the fee does not already include some factor for risk or the time value of money, it ought to be enhanced by some percentage figure. By the same token, attorneys need not obtain "excellent" results to merit a fully compensatory fee.

Id. at 449 n.8 (Brennan, J., dissenting in part) (citations omitted); *see also* Blum v. Stenson, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) (reaffirming view that Congress "has clearly indicated that the risk of not prevailing" is a proper basis for an upward adjustment).

101. *Id.* at 448 (Brennan, J., dissenting in part). Justice Brennan recognized that the extent of the plaintiff's success is an important factor: "Any system for awarding attorney's fees that did not take account of the relationship hetween results and fees would fail to accomplish Congress' goal of checking insubstantial litigation." *Id.*

102. *Id.* Justice Brennan stated:

> For instance, in taking a deposition of a state official, plaintiffs' counsel may find it necessary to cover a range of territory that includes both the successful and the unsuccessful claims. It is sometimes virtually impossible to determine how much time was devoted to one category or the other, and the incremental time required to pursue both claims rather than just one is likely to be small.

Id.

ously erred in vacating the fees award and in dooming the parties to further litigation.[103] According to Justice Brennan, unless the award is so low that it inadequately compensates attorneys or is so high that the award constitutes an unmistakable windfall, the award "substantially accomplishes Congress' objectives. More exacting review . . . frustrates rather than advances the policies of [the Fees Act]."[104] Justice Brennan was concerned that regular appellate scrutiny of fees awards will replace the Fees Act's straightforward command with a growing body of judicial doctrine that will lead to further confusion and less certain standards.[105] Similarly, protracted litigation over fees, and other obstacles to prevailing parties who seek reasonable attorney's fees, likely will discourage competent counsel from representing civil rights plaintiffs, especially those plaintiffs with "less-than-certain prospects for success."[106] The Court's holding, according to Justice Brennan, invites "losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees . . . ."[107] Despite Justice Brennan's objections, however, the majority in *Hensley* chose to resolve the dispute over the proper determination of a fees award for a partially prevailing plaintiff by directing lower courts to focus on the overall success achieved by the action and to consider the relationship between unsuccessful and successful claims, looking especially for a common core of facts and related legal theories. The recent cases that follow illustrate lower courts' attempts to apply this new standard.

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103. *Id.* at 450 (Brennan, J., dissenting in part). "I fear that the sudden appearance of a new Supreme Court precedent in this area will unjustifiably provoke new litigation and prolong old litigation over attorney's fees." *Id.* at 457 (Brennan, J., dissenting in part).

104. *Id.* at 455 (Brennan, J., dissenting in part) (footnote omitted). Justice Brennan recognized that the inherent tension of the Fees Act requires a delicately balanced standard. "If [plaintiffs'] attorneys . . . do not expect to receive full compensation for their efforts when they are successful, or if they feel they can 'lard' winning cases witb additional work solely to augment their fees, the balance struck by [the Fees Act] goes awry." *Id.* at 447 (Brennan, J., dissenting in part).

105. *Id.* at 455 (Brennan, J., dissenting in part). Justice Brennan characterized this appellate review as "a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake." *Id.*

106. *Id.* at 456 (Brennan, J., dissentmg in part). Justice Brennan ohserved that "from prevailing plaintiffs' point of view, appellate litigation of attorney's fee issues increases the delay, uncertainty, and expense of bringing a civil rights case . . . . The longer litigation proceeds . . . the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply to give up." *Id.* at 456.

107. *Id.* at 442 (Brennan, J., dissenting in part).

III. RECENT DEVELOPMENT

A. *Cases Reducing Fees Award for Unsuccessful Claims*

In *Mandhare v. W.S. LaFargue Elementary School*[108] a school librarian who was denied reappointment brought suit under Title VII alleging discrimination on the basis of national origin.[109] Plaintiff sought reinstatement, back pay, and general equitable relief.[110] The court found indications of unlawful discrimination,[111] but ordered only reinstatement and reduced the fees award accordingly.[112] The court reasoned that *Hensley* allowed the court to choose between identifying and excluding specific hours or simply reducing the fees award to account for limited success. The court opted for the latter and reduced the fees award by twenty-five percent because plaintiff "did not prevail on that significant claim for relief, back pay, nor did she prevail on the request for general and equitable relief."[113]

In *Leverett v. Town of Limon*[114] landowners challenged a newly passed zoning ordinance and sought an injunction on procedural and substantive due process grounds.[115] Plaintiffs succeeded only on the procedural due process claim.[116] Addressing the attorney's fees issue, the court stated that plaintiffs had "two distinct

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108. 605 F. Supp. 238 (E.D. La. 1985).

109. *Id.* at 239. Plaintiff was of Asian origin. Defendant Lafourche Parish School Board employed plaintiff as a librarian for W.S. LaFargue Elementary School during the 1980-81 school year. The elementary school served students from kindergarten through second grade. Because plaintiff's heavy accent created communication problems with the elementary school children, the Superintendent of Schools for Lafourche Parish recommended plaintiff's transfer to a junior high school. The school board did not heed the recommendation and voted not to appoint plaintiff for the 1981-82 school year. *Id.* at 239-40.

110. Title VII specifically provides these remedies to the victims of unlawful employment practices. *See* 42 U.S.C. § 2000e-5(g) (1982).

111. The court noted that the termination of plaintiff's appointment was the first time that the school board had not approved a recommendation of the superintendent. *Mandhare*, 605 F. Supp. at 240. The school board failed to mention plaintiff's name in a public session. The board stated that it accepted all recommendations "except the appointment of ¶p;" the reference was to plaintiff. *Id.* The court further found that plaintiff was "eminently qualified." *Id.* at 241. The court also rejected the argument that plaintiff's heavy accent caused a communication problem that necessitated terminating her employment. Because the school board would have transferred plaintiff to a junior high school, plaintiff "was not being considered for a position which would require such communication" as story-tolling and introduction to the library. *Id.* at 240-41.

112. *Id.* at 243.

113. *Id.*

114. 567 F. Supp. 471 (D. Colo. 1983).

115. *Id.* at 472. The ordinance limited the number of cattle that plaintiffs could keep at their clinic. *Id.* at 474.

116. *Id.* at 475.

claims" for which they sought "two distinct remedies."[117] The court found that plaintiffs were "prevailing parties" only on the successful procedural due process claim. In determining the fees award, therefore, the court excluded time spent on the unsuccessful substantive due process claim.[118]

In *Ryan v. Raytheon Data Systems Co.*[119] plaintiff brought a Title VII action alleging discriminatory discharge, sexual harassment, and retaliatory discharge.[120] Plaintiff prevailed only on the discriminatory discharge claim.[121] In considering the question of attorney's fees, the court found that plaintiff's attorney had "presented a total array of claims wholly out of proportion to what [the court] found to be meritorius," and that pursuing the unsuccessful claims did not contribute to the success achieved.[122] Because plaintiff achieved " 'only limited success' in comparison with what she sought," the court reduced the fees award to an amount " 'reasonable in relation to the results obtained.' "[123]

In *Wabasha v. Solem*[124] the United States District Court for the District of South Dakota used similar reasoning to exclude unsuccessful claims from the fees award calculation.[125] In *Wabasha* plaintiffs filed a class action suit on behalf of all native American inmates confined in the adjustment center of the South Dakota Penitentiary.[126] Plaintiffs presented three major theories of relief: (1) that conditions of confinement constituted cruel and unusual punishment; (2) that procedures governing placement and detention violated procedural due process; and (3) that officials racially discriminated in placement and confinement decisions.[127] Plaintiffs only partially prevailed.[128] The court found that the "results ob-

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117. *Id.*

118. *Id.*

119. 601 F. Supp. 243 (D. Mass. 1984).

120. *Id.* at 247.

121. *Id.* at 249-50. The court held that plaintiff failed to prove the claims of sexual harrassment and retaliatory discharge. *Id.* at 250.

122. *Id.* at 255.

123. *Id.* (quoting *Hensley*, 461 U.S. at 440).

124. 580 F. Supp. 448 (D.S.D. 1984).

125. *Id.* at 464.

126. *Id.* at 450. In the proceeding that addressed plaintiffs' fee request, the court summarized Wabasha v. Solem, No. 79-4064 (D.S.D. Apr. 13, 1982), the unpublished memorandum decision in the underlying action. *See id.*

127. *Id.* at 450, 464.

128. *Id.* at 464. Plaintiffs did not prevail on the racial discrimination claim. Regarding the other claims, the court characterized plaintiffs' success as moderate. According to the court, "only minor problems were found with respect to individual living conditions . . . . The plaintiffs also did not completely succeed on all their due process allegations, but were

tained . . . fell far short of the original goal" and that plaintiffs' theories "were not based on a common core of facts [or] related legal theories . . . . The theories presented . . . would each achieve a different type of relief."[129] The court, therefore, determined that *Hensley* mandated a reduction of the fees award.[130]

In *Mary Beth G. v. City of Chicago*[131] one plaintiff, who had been arrested and strip searched for a misdemeanor offense, raised claims of false arrest, excessive force, and unconstitutional treatment,[132] but prevailed only in challenging the strip search.[133] In considering the appropriate fees award, the United States Court of Appeals for the Seventh Circuit attempted to refine the *Hensley* standard to some extent. The court stated, "We believe a useful tool for making this determination [of whether the claims arose from a common core of facts] is to focus on whether the claims seek relief for essentially the same course of conduct."[134] The court then denied a fees award that included time spent on the false arrest and excessive force claims because plaintiff succeeded only on the strip search claim.[135] The court applied its test narrowly, inter-

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only moderately successful." *Id.*

129. *Id.* at 464-65.

130. *Id.* at 465. The court reduced the lodestar using a multiplier of 0.40. *Id.* at 465. For the analyses of other courts that have narrowly interpreted *Hensley*, see, e.g., Sisco v. J.S. Alberici Constr. Co., 733 F.2d 55, 58 (8th Cir. 1984) (directing district court to exclude hours spent on unsuccessful claims even though successful and unsuccessful claims were "based on a common core of facts" and on legal theories "not unrelated"); Wojtkowski v. Cade, 725 F.2d 127, 130 (1st Cir. 1984) (holding that the unsuccessful claims against city and police chief were distinct from successful claims against police officers for incident involving plaintiff's arrest and detention); King v. McCord, 707 F.2d 466, 467 (11th Cir. 1983) (per curiam) (upholding ruling that plaintiff's unsuccessful claims of discriminatory failure to promote and discriminatory failure to rehire were "not sufficiently intertwined" with successful claim under the Equal Pay Act); Jordan v. Dorsey, 587 F. Supp. 282, 287 (E.D. Pa. 1984) (excluding hours expended on behalf of named plaintiffs who were predecessors in time to victorious low-income tenants despite attorneys' argument that time expended was in pursuit of suit's central claim); Gates v. ITT Continental Baking Co., 581 F. Supp. 204, 211 (N.D. Ohio 1984) (holding discharged black employee not entitled to fees award that included time spent on unsuccessful punitive damages claim and unsuccessful claims under 42 U.S.C. § 1983 and § 1985 because these claims were "separate and distinct" from successful discriminatory discharge claim); Monahan v. State of Nebraska, 575 F. Supp. 132, 136-37 (D. Neb. 1983) (reducing lodestar figure by 40% because plaintiff's success was short lived and limited).

131. 723 F.2d 1263 (7th Cir. 1983).

132. *Id.* at 1267. Four plaintiffs challenged the constitutionality of the arrest and search procedure, but only one raised the additional claims of false arrest and excessive force. *Id.* at 1266-67.

133. *Id.* at 1279-80.

134. *Id.* at 1279.

135. *Id.* at 1279-80.

preting the course of conduct surrounding the arrest as distinct from the course of conduct surrounding the search.[136]

B. Cases Allowing Fees Award to Include Unsuccessful Claims

The United States District Court for the Southern District of New York followed a similar approach to *Mary Beth G* in *Lyons v. Cunningham*,[137] focusing on the set of facts from which the claims arose.[138] Although this approach is very much like the "same course of conduct" standard, the *Lyons* court reached a different result than the Seventh Circuit reached in *Mary Beth G.*. In *Lyons* plaintiffs prevailed in a civil rights suit filed after their son had committed suicide in defendant's jail. Plaintiffs prevailed against only two of nine defendants and the father failed to recover on his claim as administrator of his son's estate.[139] The court, however, did not reduce the fee award, reasoning that the plaintiffs pursued the unsuccessful claims based "on a common set of facts—the events which led to Larry Lyons' death."[140] The claims also involved similar legal issues.[141] Although the court recognized that the quantum of proof was different for the different allegations, "the assertions that defendants violated plaintiffs' civil rights and acted negligently [were] alternative means of presenting the same claim."[142]

Similarly, in *Action on Smoking and Health v. Civil Aeronautics Board*,[143] the plaintiff successfully challenged the defendant's 1981 regulations concerning smoking aboard commercial aircraft.[144] Defendant challenged the fees award, arguing that the lower court

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136. *Id.*

137. 583 F. Supp. 1147 (S.D.N.Y. 1983).

138. *Id.* at 1152.

139. *Id.* at 1152-53.

140. *Id.* at 1152. The court found that the plaintiffs had a "good faith basis" for the claims against all the defendants who came into contact with decedent on the day he died. "[T]he jury's decision concerning [these defendants] 'is not a sufficient reason for reducing [plaintiffs'] fee.'" *Id.* (quoting *Hensley*, 461 U.S. at 435). The *Lyons* court also stated that the plaintiffs' individual requests and Mr. Lyons' claim as administrator were related. "[B]oth claims [were] based on the same set of facts." 583 F. Supp. at 1153.

The *Lyons* court's focus on whether the claims arose from the same set of facts is essentially the same as focusing on "whether the claims [sought] relief for essentially the same course of conduct." Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1279 (7th Cir. 1983). The only difference lies in the *Lyons* court's broader view of that test.

141. *Id.* Both claims involved the New York survival statute. 583 F. Supp. at 1153.

142. *Id.* at 1152.

143. 724 F.2d 211 (D.C. Cir. 1984).

144. *See* Action on Smoking and Health v. Civil Aeronautics Bd., 699 F.2d 1209 (D.C. Cir. 1983).

should have excluded hours spent on an unresolved challenge of 1979 regulations. The United States Court of Appeals for the District of Columbia disagreed and held that the challenges to the 1979 and 1981 regulations involved " 'a common core of facts' and were 'based on related legal theories.' "[145] In reaching this conclusion the court defined the common issues in light of their "consistent argumentative theme: the rights of non-smoking airline passengers were . . . being inadequately protected."[146]

IV. ANALYSIS

A. *Criticisms of* Hensley *and Progeny*

These recent cases illustrate that the present standard under *Hensley* for awarding attorney's fees to partially prevailing plaintiffs fails to remedy the wide disparity among fora. The Supreme Court's attempt to provide definitive guidelines fails because the

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145. *Action on Smoking and Health*, 724 F.2d at 215-16 (quoting *Hensley*, 461 U.S. at 435). Although plaintiff sought fees under the Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2325 (1982), the Supreme Court had declared that the standards set forth in *Hensley* should apply to all cases in which Congress authorized an award of fees to a prevailing party. *Hensley*, 461 U.S. at 433 n.7.

146. *Action on Smoking and Health*, 724 F.2d at 216. For the analyses of other courts that have broadly interpreted *Hensley*, see, e.g., Abraham v. Pekarski, 728 F.2d 167, 175 (3d Cir.) (upholding inclusion of time spent on depositions concerning unsuccessful claim because the depositions helped establish the successful due process claim), *cert. denied*, 104 S. Ct. 3513 (1984); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1137 (11th Cir. 1984) (instructing district court to include time spent on developing facts of unsuccessful hiring and promotion claims if these facts were "probative" to the successful wage claim); Citizens Council v. Brinegar, 741 F.2d 584, 595-96 (3d Cir. 1984) (holding that plaintiffs were entitled to fees for unsuccessful claims because all claims were "substantially related" and advanced the same theory); Redding v. Fairman, 717 F.2d 1105, 1119 (7th Cir. 1983) (fees award not reduced although the court dismissed one plaintiff, and two other plaintiffs received only nominal damages because plaintiffs litigated the case as a "single action"), *cert. denied*, 465 U.S. 1025 (1984); Webb v. County Bd. of Educ., 715 F.2d 254, 259-60 (6th Cir. 1983) (although plaintiff obtained only individual relief, fees award not reduced for time spent pursuing class action because the individual and class allegations were "sufficiently related"), *aff'd*, 105 S. Ct. 1923 (1985); Delaware Valley Citizens' Council for Clean Air v. Commonwealth, 581 F. Supp. 1412, 1420 (E.D. Pa. 1984) (exclusion of time spent on unsuccessful claims held inappropriate because plaintiffs "won substantial relief"); Krodel v. Young, 576 F. Supp. 390, 396 (D.D.C. 1983) (fees award not reduced although plaintiff prevailed on only one of five claims that alleged unconstitutional denial of five separate promotions because plaintiff could have won back pay and reinstatement for only one denied promotion and because the claims were based on a common core of facts), *aff'd*, 748 F.2d 701 (1984), *cert. denied*, 106 S. Ct. 62 (1985); McKenna v. Peekskill Hous. Auth., 573 F. Supp. 976, 981 (S.D.N.Y. 1983) (fees award not reduced for plaintiffs' unsuccessful attempt at class certification); Monroe v. United Air Lines, 565 F. Supp. 274, 286 (N.D. Ill. 1983) (fees award not reduced for time spent on unsuccessful preliminary injunction motion because plaintiffs based motion on identical facts and legal theories that underpinned plaintiffs' success on the merits).

Hensley standard is too flexible. Splits among circuits continue as courts interpret "related legal theories"[147] and "common core of facts"[148] either narrowly or broadly.[149] Some courts merely emphasize the "limited success achieved" without considering the relationship among claims.[150] *Hensley*, therefore, may be characterized accurately as a "noncase" that provides no guidance on the complex issue of attorney's fees.[151] Moreover, the ambiguous standard will lead to more appeals as dissatisfied parties attempt to find a forum that applies *Hensley* in accordance with their interests. Justice Brennan foresaw *Hensley*'s failure: "Ultimately, [the Fees Act's] straightforward command is replaced by a vast body of artificial, judge-made doctrine . . . , which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake."[152]

The *Hensley* opinion also disregards congressional intent. The legislative history provides guidelines for determining fee awards, but the Supreme Court failed to recognize this congressional guidance.[153] Although the Supreme Court appropriately provided a generous "prevailing party" standard and a workable, objective figure with which to begin the analysis of fees awards,[154] the Court's

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147. *Hensley*, 461 U.S. at 435.

148. *Id.*

149. *Compare, e.g.*, Wabasha v. Solem, 580 F. Supp. 448, 464 (D.S.D. 1984) (applying the *Hensley* standard narrowly to find three claims concerning confinement in a detention center not based on a common core of facts) *with* Lyons v. Cunningham, 583 F. Supp. 1147, 1152 (S.D.N.Y. 1983) (reading *Hensley* broadly to find civil rights and negligence claims against various defendants in a case involving a prison incident based on a common set of facts).

150. See, e.g., cases discussed *supra* notes 108-23 and accompanying text.

151. Interview with James Blumstein, Professor of Law at Vanderbilt University School of Law, in Nashville, Tennessee (Oct. 1984). The *Hensley* standard fails to provide adequate guidelines by which lower courts may assess the fees issue. On one hand, a court may adopt a characterization of a case "as a single claim supported by several legal theories," in which case "the opinion of the court in *Hensley* would be eviscerated." Walton v. Lehman, 570 F. Supp. 490, 494 (E.D. Pa. 1983). On the other hand, a court may define narrowly the *Hensley* standard and circumvent the policy goals of the Fees Act. *See infra* text accompanying notes 168-77.

152. *Hensley*, 461 U.S. at 455 (Brennan, J., dissenting in part).

153. The Supreme Court in *Hensley* stated that the legislative history "does not provide a definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success." *Hensley*, 461 U.S. at 431. *But see supra* notes 22-44 and accompanying text.

154. The legislative history provides a generous formulation for the definition of prevailing party. *See supra* note 6. The cases cited in the legislative history recognized that the lodestar sum is the appropriate initial determination. *See supra* notes 31-44 and accompanying text.

focus on the relationship between successful and unsuccessful claims misdirects the focus of an appropriate analysis. The Supreme Court justified the exclusion of unsuccessful, unrelated claims from the fees calculation by stating that Congress intended to exclude these claims when it authorized fees awards only to prevailing parties.[155] The Court, however, admitted that the prevailing party question is only the threshold determination.[156] Once a court finds that a party has "prevailed" within the meaning of the Fees Act, the legislative history requires compensation " 'for all time reasonably expended,' "[157] rather than compensation only for time expended on a prevailing claim.[158] In addition to this express direction in the legislative history, Congress cited approvingly a number of cases that were to serve as guidelines for determining fees awards.[159] None of these cases required a reduction for time spent on unsuccessful claims or implied that courts should consider the relationship between successful and unsuccessful claims. Rather, these cases based the fees awards on "all time reasonably expended."[160] The appropriate focus in determining the fees awards, therefore, is clearly the time reasonably expended in the case.

The Supreme Court's supplanting of congressional guidelines with the Court's own guidelines reveals the Court's reluctance to provide fees awards that are as broad as the legislative history mandates.[161] In so doing the Court iguored the primary policy goals of the Fees Act.[162] Congress sought to make civil rights cases more attractive to private practitioners and to facilitate private enforcement of civil rights laws.[163] Reducing an award for time spent on "unrelated" claims may create a disincentive for an attorney to accept a civil rights case unless taking the case involves little risk.[164] If the potential of losing legitimate claims is high, the

155. *Hensley*, 461 U.S. at 435; *see supra* text accompanying notes 92-94.

156. *See Hensley*, 461 U.S. at 433.

157. SENATE REPORT, *supra* note 2, at 6 (quoting Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 246 (C.D. Cal. 1974)). One commentator argues that *Stanford Daily*, 64 F.R.D. at 683, gave the ouly exception to this rule: only hours devoted to "clearly meritless claims" should be excluded. E. LARSON, *supra* note 27, at 178.

158. *See supra* notes 58-60, 66-67 and accompanying text (discussing recognition that courts were not to limit awards to tiine spent pursuing successfnl claims).

159. *See supra* note 24 and accompanying text.

160. *See supra* notes 32-44 and accompanying text; *see also* E. LARSON, *supra* note 27, at 177-78.

161. *See supra* note 61 and accompanying text.

162. *See Hensley*, 461 U.S. at 444 (Brennan, J., dissenting in part).

163. *See supra* notes 17-21 and accompanying text.

164. Justice Brennan recognized the chilling effect that reduced awards and extended

plaintiff's attorney risks being inadequately compensated for reasonable time expended. The risk of nonpayment is especially great when plaintiffs are low-income individuals. Low-income individuals, therefore, may have greater difficulty obtaining counsel to represent their interests, especially plaintiffs "with less-than-certain prospects for success."[165] This distinct possibility under *Hensley* contravenes the fundamental purpose of the Fees Act—attracting adequate counsel for civil rights plaintiffs who could not otherwise afford to pursue their claims.[166] The Court's decision may accentuate the chilling effect on private enforcement in a geographic area where private enforcement is most essential—an area where a judge or jury may be unsympathetic to claims of unconstitutional discrimination. The *Hensley* standard also may compromise a client's interests even after he has procured representation. A reduction in a fees award for time spent on unsuccessful claims "may . . . invite overly conservative tactics or even prohibit some high-risk but deserving actions entirely."[167] This inhibitive effect on legitimate claims clearly would frustrate congressional objectives.

The cases that narrowly interpret *Hensley* exemplify how courts can manipulate the ambiguous standard and undermine the goals of the Fees Act. The most atrocious abuse of *Hensley*'s flexibility occurred in *Mandhare v. W.S. LaFargue Elementary School*.[168] Plaintiff's unsuccessful claims for back pay and equitable relief necessarily arose from the same circumstances on which plaintiff based the successful reinstatement claim, but the unsympathetic court ignored this fact. More importantly, the legitimacy of the unsuccessful claims in *Mandhare* cannot be questioned.[169]

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litigation over fees awards would have on attorneys. *See supra* notes 104-07 and accompanying text.

Although the majority in *Hensley* asserted that cases involving unrelated claims likely would be infrequent, *Hensley*, 461 U.S. at 435, lower courts often have reduced fee awards hy declaring claims unrelated. *See supra* notes 124-36 and accompanying text. The risk of a reduced award, therefore, is a realistic concern.

165. *Hensley*, 461 U.S. at 456 (Brennan, J., dissenting in part).

166. In many civil rights cases "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, . . . citizens must have the opportunity to recover what it costs to them to vindicate these rights in court." SENATE REPORT, *supra* note 2, at 2.

167. Seigal v. Merrick, 619 F.2d 160, 165 (2d Cir. 1980) (footnote omitted) (addressing the attorney's fees issue in a securities common fund case); *see also* Northcross v. Board of Educ., 611 F.2d 624, 636 (6th Cir. 1979) (asserting that a reduction in fees for time spent on unsuccessful claims will "discourage innovative and vigorous lawyering"), *cert. denied*, 447 U.S. 911 (1980).

168. 605 F. Supp. 238 (E.D. La. 1985); *see supra* notes 108-13 and accompanying text.

169. Title VII expressly includes claims for back pay and equitable relief among the

Plaintiff's attorney arguably had an ethical duty to assert these claims.[170] Although the time spent pursuing the unsuccessful claims was time reasonably expended, the flexibility of *Hensley* allowed the court to emphasize the limited success achieved and to reduce the fees award accordingly.[171] The *Mandhare* court, therefore, undermined the goals of the Fees Act in an abusive situation that demanded the Fees Act's strictest enforcement.[172]

In *Leverett v. Town of Limon*[173] the court reduced the fees award for time spent on an unsuccessful substantive due process claim despite plaintiffs' success on a procedural due process claim.[174] The court focused on the distinct remedies that plaintiffs sought with each claim.[175] The court manipulated the ambiguous guidelines in *Hensley* by emphasizing the limited success achieved without recognizing that the two due process claims were related legal theories arising from a common core of facts. In the vast majority of due process challenges, plaintiff's counsel reasonably may assert both procedural and substantive violations[176] and a failure to raise both these issues may constitute inadequate representation

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appropriate remedies for unlawful employment practices. *See* 42 U.S.C. § 2000e-5(g) (1982).

170. The Model Code of Professional Responsibility requires that an attorney represent his client zealously. A lawyer must not "fail to seek the lawful objectives of his client through reasonably available means." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1981) (footnote omitted). Thus, a lawyer is under an ethical duty to assert legitimate claims that advance his client's interests. Under the *Hensley* standard, a lawyer may confront a difficult decision of which claims to assert. In asserting a legitimate but distinct claim, the lawyer may face a high risk of nonpayment; if he fails to assert the claim, however, he may face ethical sanctions. A litigant's ignorance of how a court will use the *Hensley* guidelines in assessing the relationship among his claims, *see infra* notes 186-90 and accompanying text, will exacerbate this difficulty.

171. *See Mandhare*, 605 F. Supp. at 243.

172. The court found several indications of discrimination, *see supra* note 111, but refused to award a fee that would compensate plaintiff's counsel adequately. In a geographic area where such abusive discrimination persists, private enforcement will occur only with adequate compensation. The *Mandhare* court provided a disincentive for private representation of civil rights plaintiffs.

173. 567 F. Supp. 471 (D. Colo. 1983); *see supra* notes 114-18 and accompanying text.

174. *Leverett*, 567 F. Supp. at 475.

175. *Id.*

176. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 485 (9th ed. 1975) (asserting that while the "most obvious ingredient" of the due process guarantee is procedural, the Court also has found in the due process guarantee certain constitutional restraints on the substantive ordering of rights and duties—"a restraint on the content as well as the methods of governmental action"). The legitimacy of both procedural and substantive claims in a due process challenge is especially apparent when the claims involve personal liberty interests. *See id.* (noting the decline of substantive due process protection of economic and property rights).

in many instances.[177] The court in *Leverett* failed to compensate plaintiffs' counsel for all time reasonably expended. *Leverett*, therefore, serves as another example of how *Hensley* allows courts to contravene legislative intent.

Not all cases that have narrowly applied *Hensley*, however, have achieved a result inconsistent with the Fees Act. In *Ryan v. Raytheon Data Systems Co.*[178] the related claims of discriminatory discharge, sexual harrassment, and retaliatory discharge necessarily arose from a common core of facts—plaintiff's employment and discharge. The court, however, reduced the fees award appropriately because the time expended on the unsuccessful claims was not reasonable. The court held that the unsuccessful claims were "nonmeritorious"[179] and in no way contributed to plaintiff's success.[180] Had the court followed *Hensley*'s guidance and awarded fees for time expended on all related claims that arose from a common core of facts,[181] the resulting fees award would have provided plaintiff's counsel with a windfall. The court's narrow application of *Hensley* preserved the balance of the Fees Act.

The *Ryan* case demonstrates the misdirected focus of the *Hensley* standard. If courts apply the *Hensley* standard strictly, the balance between providing adequate compensation to attract competent counsel and preventing windfalls to attorneys depends solely on a court's characterization of a claim as being related or unrelated to an unsuccessful claim. If the court in *Ryan* wished to achieve the same correct result while applying *Hensley*, the court would have had to defy reason and find that the claims were unrelated. The claims were related but time spent on the nonmeritorious claims did not deserve compensation because this time was not reasonably expended. The *Hensley* standard, therefore, misses the point: the relationship among claims in no way determines whether the time expended on the claims was reasonable.

Although a broad application of *Hensley* in *Ryan* would have created a windfall to plaintiff's counsel, most cases that have broadly applied the *Hensley* standard to include more hours in the fees award calculation have followed more closely the purpose of the Fees Act. In general, adequate compensation decreases the pos-

177. *See supra* note 170.
178. 601 F. Supp. 243 (D. Mass. 1984); *see supra* notes 119-23 and accompanying text.
179. *Ryan*, 601 F. Supp. at 255.
180. *Id.*
181. *See Hensley*, 461 U.S. at 435.

sibility of compromised claims[182] and provides the congressionally mandated incentive for private counsel to enforce civil rights legislation.[183] These broad interpretations, however, possess a serious flaw. As *Ryan* indicates, a broad view of "common core of facts" and "related legal theories" could encompass nonmeritorious claims. Courts, however, should not include the time spent on these claims when making the fees calculation because this time is not reasonably expended. These broad interpretations, by potentially compensating attorneys for pursuing nonmeritorious claims, allow attorneys to pad their bills. A broad interpretation, therefore, could wreak havoc on the delicate balance of the Fees Act.[184]

The wide discretion available under the *Hensley* standard fails to provide much-needed foresight. The ambiguous guidelines force litigants to proceed in a complex case[185] with no knowledge of how the court will determine the fees award. A litigant might rely on a previous interpretation by the immediate court, but the possibility of a different characterization haunts him. This uncertainty increases the chances of compromised claims and decreases the chances for settlement.[186] The possibility of a different characterization also provides incentive to appeal an unfavorable award, which leads to protracted litigation of the least socially productive sort.[187] All of these problems with the *Hensley* ruling clearly demonstrate the need for a new procedure and standard that will provide definitive guidelines and comply with congressional intent.

B. Proposal

The appropriate standard for awarding attorney's fees to partially prevailing plaintiffs must conform to congressional intent as manifested in the legislative history of the Fees Act. This basic tenet of statutory construction is especially compelling in the context of attorney's fees because only Congress can authorize fee

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182. *See supra* note 167 and accompanying text.

183. *See supra* note 2.

184. *See supra* notes 4-5 and accompanying text.

185. Civil rights litigation is complicated in and of itself; attorney's fees issues exacerbate that complexity. *See, e.g.*, Dickerson v. City Bank & Trust Co., 590 F. Supp. 714, 719-20 (D. Kan. 1984) (recognizing the "confused and protracted nature of this litigation on the attorney's fees issue"); Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 581 F. Supp. 1412, 1420 (E.D. Pa. 1984) (calling the litigation leading to the fees request "complex and prolonged").

186. *See supra* notes 162-67 and accompanying text.

187. *See supra* text accompanying note 107.

shifting among litigants.[188] Courts, therefore, must determine fees awards in the manner that Congress authorized. The legislative history of the Fees Act expressly requires compensation for all time reasonably expended on the case.[189] This standard serves the goals of the Fees Act by granting fees awards that are adequate to attract competent counsel for civil rights plaintiffs without producing windfalls for attorneys.[190] Thus, in determining whether to include a partially prevailing attorney's time spent pursuing unsuccessful claims, courts should focus on whether the time spent pursuing the claims was reasonably expended.

The *Hensley* standard's focus on the relationship between the claims and the ultimate success achieved is misdirected because the relationship among claims does not determine the reasonableness of the time expended.[191] Another suggested standard would compensate a plaintiff's attorney for work on all nonfrivolous claims.[192] Countervailing considerations reveal that this approach also would be both impractical and inconsistent with legislative intent. The history of decisions under the Fees Act reveals a conservative tendency among some courts in awarding fees,[193] and these courts would be very reluctant to adopt such a broad standard. More importantly, a standard that compensates for work on all nonfrivolous claims would upset the balance of the Fees Act by over-emphasizing the compensation of prevailing plaintiffs' attorneys.[194] This broad standard clearly increases the likelihood of windfalls to attorneys by encompassing more claims in the fees calculation. Furthermore, by focusing on whether the claims were frivolous, this standard raises the stakes of fee shifting. Because a defendant may receive a fees award for time spent defending frivolous claims,[195] the court would face an "all or nothing" decision.

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188. *See supra* note 16 and accompanying text.

189. *See supra* text accompanying note 23.

190. *See supra* note 24.

191. *See supra* text following note 181 (discussing *Hensley*'s misdirected focus in context of *Ryan* case).

192. *See* E. LARSON, *supra* note 27, at 177-78.

193. *See id.* at 162. Some courts may disagree with the policy behind the Fees Act or "harbor an inherent dislike for public interest cases." *Id.* The traditional "American Rule" may influence other courts to use their discretion to limit fee shifting. *See id.* at 162-63.

194. "If attorneys representing civil rights plaintiffs do not expect to receive full compensation . . . , or if they feel they can 'lard' winning cases with additional work solely to augment their fees, the balance struck by [the Fees Act] goes awry." *Hensley*, 461 U.S. at 447 (Brennan, J., dissenting in part). For a discussion of Congress' fear of giving a "blank check" to plaintiffs' attorneys, see *supra* notes 5 and text accompanying note 22.

195. "A prevailing defendant may recover an attorney's fee . . . where the suit was

Reducing a plaintiff's fee request necessarily would make the plaintiff liable for the defendant's costs in defending the frivolous claim and could lead to ethical sanctions against the plaintiff's attorney for asserting the frivolous claim.[196] A court, therefore, might be reluctant to reduce a fees award. Thus, a standard based on nonfrivolous claims would increase the likelihood of windfalls to attorneys in two different respects and, consequently, would contravene legislative intent.[197]

The appropriate focus in determining whether the time expended pursuing a claim was reasonable is not whether the claim was related to a successful claim, nor whether the claim was frivolous, but whether the claim was legitimate. In this regard, Rule 16 of the Federal Rules of Civil Procedure provides an aid to resolving the problems of fee shifting. The rule allows a court to call a pretrial conference for "[t]he simplification of the issues . . . [and] [s]uch other matters as may aid in the disposition of the action."[198] In a conference preceding a civil rights action, the court could allow the defendant to challenge any claim of the plaintiff, and the court then could consider the challenge under a "questionable merit" standard. This standard properly focuses on the legitimacy of claims rather than on the relationship among claims. Furthermore, a "questionable merit" standard eliminates the necessity of ruling that a claim is completely meritless or frivolous and thereby allows a court to view the claims objectively without ethical overtones.[199]

Under this standard, if the court declared in the pretrial conference that the defendant's challenge was unwarranted, the plaintiff could proceed with the certainty that, if he were to prevail at

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vexatious, frivolous, or brought to harass or embarass the defendant." *Hensley*, 461 U.S. at 429 n.2; *see* HOUSE REPORT, *supra* note 6, at 7.

196. The Model Code of Professional Responsibility provides that a lawyer shall not "[f]ile a suit, assert a position . . . or take other action" when he knows or obviously should know that such action would serve merely to harass another. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981). Furthermore, a lawyer shall not knowingly advance a claim "that is unwarranted under existing law" unless he can support the action by a "good faith argument for an extension, modification, or reversal of existing law." *Id.* at DR 7-102 (A)(2).

197. In addition to increasing the likelihood of windfalls to attorneys, an all or nothing approach to the fees issue creates a risk of no fees being awarded to partially prevailing plaintiffs. A court that disagreed with the goals of the Fees Act or that adhered faithfully to the "American Rule" might disallow compensation entirely rather than allow a broad award for all nonfrivolous claims.

198. FED. R. CIV. P. 16(c)(1), (11).

199. *See supra* note 196 and accompanying text.

trial, the court would compensate for time reasonably spent on all claims.[200] If the judge found that a claim was of "questionable merit," the plaintiff would proceed at risk, but at a risk that he would understand fully. If the plaintiff lost on the claim and the court after hearing all the evidence did not change its ruling that the claim was of questionable merit, the court would not compensate the plaintiff for time expended in pursuit of the claim.[201] If the plaintiff prevailed on the claim, however, the court not only would compensate for the time expended, but also should award an upward adjustment because the risk involved in asserting the claim deserves consideration in the fees calculation.[202] In addition, the potential for an upward adjustment will deter defendants from indiscriminately challenging all claims[203] and will deter multiple challenges. If a court rules that a claim is of questionable merit,

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200. The plaintiff's fee request will remain subject to a reasonableness standard. A court may eliminate hours spent on duplicative effort or hours expended by an inexperienced attorney, but hours expended on legitimate, unsuccessful claims will not be excluded completely.

201. If a plaintiff chooses to pursue a claim that the court has ruled questionable, the court later may consider whether to compensate the defendant for time spent defending the claim in trial and for time spent challenging the claim in the pretrial conference. If a plaintiff chooses not to pursue the claim, an award to the defendant is inappropriate.

202. Justice Brennan has argued that courts should consider "the prelitigation likelihood that the claims which did in fact prevail would prevail . . . . If the rate used . . . does not already include some factor for risk . . . , it ought to be enhanced by some percentage figure." *Hensley*, 461 U.S. at 449 & n.8 (Brennan, J., dissenting in part); *see also* Blum v. Stenson, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) (reaffirming view that Congress "has clearly indicated that the risk of not prevailing" is a proper basis for an upward adjustment because majority leaves question unresolved).

The Sixth Circuit recognized the need for an upward adjustment to account for risk in Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). The court stated:

> Perhaps the most significant factor in [civil rights] cases which at times renders the routine hourly fee unreasonably low is the fact that the award is contingent upon success. An attorney's regular hourly billing is based upon an expectation of payment, win, lose or draw. If he or she will only be paid in the event of victory, those rates will be adjusted upward to compensate for the risk . . . of not being paid at all.

Id. at 638; *see also* Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (noting that the law should entitle lawyers whose compensation depends on victory to a greater fee than those lawyers to whom the law assures compensation regardless of outcome); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 113 (3d Cir. 1976) (upholding the substantially increased award because of risk entailed).

203. To further prevent defendants from challenging all claims, courts should compensate attorneys of prevailing plaintiffs for time spent preparing for and participating in the pretrial conference. Courts should not be reluctant to make upward adjustments because the concern for over-compensation is less compelling at present than the concern for inadequate compensation, especially because the latter threatens the main goal of the Fees Act—compensation adequate to induce attorneys to represent civil rights plaintiffs. *See Hensley*, 461 U.S. at 448-49 (Brennan, J., dissenting in part).

the plaintiff may choose not to litigate the claim.[204] If a plaintiff, however, chooses not to pursue a truly questionable claim, this procedure will serve the goal of limiting insubstantial litigation.

Ryan v. Raytheon Data Systems Co.[205] provides an appropriate fact situation for demonstrating how this procedure and new standard will alleviate problems in the complex area of fee shifting without upsetting the balance of the Fees Act. The court in *Ryan* found that the claims of sexual harassment and retaliatory discharge were "nonmeritorious."[206] Assuming the court determines at the pretrial conference that these claims would fail under a questionable merit standard,[207] the plaintiff would not expect compensation for time expended on these claims if he pursued them and lost. The plaintiff's fee request would be reduced, and the likelihood of settlement would increase. If the plaintiff won on these claims, the defendant would understand that the plaintiff is entitled to an increased award for the risk involved in pursuing the claims. The court, therefore, would facilitate settlement because the parties would understand the consequences of the court's characterization of claims.

More importantly, this procedure would promote the goals of the Fees Act. Plaintiff's counsel could not pad his bill with questionable claims and litigate extensively the fees issue in pursuit of a windfall. This check on the plaintiff would alleviate defendants' fears of excessive fees awards.[208] Plaintiff's counsel, however, would know that time reasonably expended on all legitimate claims would receive compensation. This procedure, therefore, preserves the appropriate incentive for representation of civil rights plaintiffs.

This procedure and new standard will resolve the problems that *Hensley* created and preserve the delicate balance of the Fees Act by following legislative intent and by providing a market force

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204. *See* Dubose v. Pierce, 579 F. Supp. 937, 957 & n.31 (D. Conn. 1984) (indicating that because claim was of "doubtful validity" plaintiffs chose not to pursue it). A court should be aware that an unfavorable ruling may thwart legitimate claims and should use caution in making its ruling.

205. 601 F. Supp. 243 (D. Mass. 1984); *see supra* notes 119-23 and accompanying text.

206. *Ryan*, 601 F. Supp. at 255.

207. If these claims did survive the questionable merit standard, all parties would understand that if plaintiff prevailed, the court's fees award would compensate plaintiff's counsel for all time reasonably expended pursuing these claims. The court may exclude hours that are duplicative or excessive in light of the skill required; the court will consider "billing judgment" as a component in fee setting. *Hensley*, 461 U.S. at 434. The court, however, would consider these factors concerning *all* claims rather than only the successful claims.

208. *See supra* note 5 and accompanying text.

approach to fee shifting.[209] The legitimacy of the claim, rather than on the relationship among claims, will determine the fees award. Even if courts must continue to operate under the *Hensley* standard, using a pretrial conference on the fees issue will aid courts and litigants. Although *Hensley* contravenes legislative intent, the procedure will alleviate some problems because a court could inform litigants which claims the court will consider distinct and unrelated. Regardless of the standard, the litigants' knowledge of the court's approach to the fees award will eliminate confusion, restrain appeals, and facilitate settlement.[210] This procedure also will help the parties and the court control the complex question of fees from the outset of the litigation. This market force approach provides an initiative among the parties and the court to help them deal effectively and knowledgeably with the inherent tension in the Fees Act—the tension between attracting competent counsel through compensation and preventing windfalls to attorneys.

V. CONCLUSION

The inherent tension in the Fees Act requires a standard that delicately balances the need to provide civil rights plaintiffs adequate access to the judicial system with the concern of preventing windfalls to attorneys. The Supreme Court's reluctance in *Hensley* to follow Congress' broad mandate in awarding attorney's fees threatens the primary goal behind passage of the Fees Act. Moreover, the *Hensley* standard adds confusion and ambiguity to an already complex field and fails to remedy the disparity among circuits. Without a reassessment of the standard for awarding fees to partially prevailing plaintiffs, litigation over attorney's fees will increase and will continue to divert judicial resources to socially unproductive endeavors.[211] The "Frankenstein's monster" of protracted litigation[212] must be tamed by a new standard and procedure that reinstates the precarious balance of the Fees Act

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209. This Recent Development refers to the initiative among litigants and the court as a "market force approach" because the procedure allows the litigants and the court to control the fees issue and the extent of the litigation. The parties also can alleviate their respective fears involved in fee shifting. *See supra* text accompanying note 199.

210. "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley*, 461 U.S. at 437. *Hensley* paradoxically undermines this goal by establishing an ambiguous standard.

211. Justice Brennan called appeals from awards of attorney's fees "one of the least socially productive types of litigation imaginable." *Id.* at 442 (Brennan, J., dissenting in part).

212. *See supra* note 105 and text accompanying note 152.

and that provides parties with the ability to maintain that balance. The new standard should focus on the legitimacy of the claims rather than on the relationship among the claims, and the most efficient procedure for implementing this standard and controlling the fees issue is a pretrial conference. This new standard and procedure will enable courts and litigants to better handle the complex fees question that otherwise will threaten to dwarf the original litigation, and will most effectively serve the goals of the Fees Act.

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