CALCULATING LAWYERS' FEES: THEORY AND REALITY

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Because American courts do not traditionally provide for a prevailing party to recover attorneys' fees, the finance of civil lawsuits presents numerous problems for litigants. Insurance and contingent fees solve some of these problems, but in recent decades legislatures have in a number of instances provided for partial fee shifting. Such fee-shifting statutes require courts to set lawyers' fees. As a consequence, a lively debate over the proper standard for setting such fees has arisen, with sharp disagreement about which of two dominant systems will yield the desired results. Both systems have fierce defenders and sharp critics, with courts and commentators in each camp suggesting that the other is not thinking clearly or is ignoring reality. The study in this Comment considers actual fees in similar cases awarded by courts using each of the two major theoretical approaches. These data suggest that the debating parties may be arguing over a perceived difference that is not actually there.

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I. LITIGATION FINANCE AND FEE SHIFTING

In the United States, courts usually do not award attorneys' fees to the prevailing party in civil cases.[1] Instead, each party must pay its own legal fees. This system, known as the "American Rule," contrasts with the "English Rule," under which the prevailing party recovers both damages and the costs of litigation.[2] The American Rule, however, has come under harsh criticism and questioning in recent years.[3] At the same time, fee-shifting statutes have riddled the rule with exceptions in various categories of cases.[4] These laws allow the prevailing party to recover the costs of litigation, and are usually based on a number of different rationales.[5] For instance, one of the primary goals of fee-shifting statutes is to provide financial incentives for bringing certain types of cases. These incentives often are necessary because many injured parties are not capable of shouldering the typically high cost of litigation.[6] Although contingent fee arrangements help eliminate this problem by spreading litigation costs to attorneys,[7] fee-shifting

1. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9, 9; John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1576 (1993).

2. *See* Leubsdorf, *supra* note 1, at 12. In the English legal system, a successful litigant is entitled to recover his or her legal fees from the losing party. Vargo, *supra* note 1, at 1571. The attorney representing the winning party first prepares a bill of costs. If the losing party agrees with the amount itemized in the statement, it pays the bill. *Id.* If not, the parties present their case to a taxing master who decides the appropriate amounts after a hearing. *Id.*

3. Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651; *see also* Phyllis A. Monroe, Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148, 148–49 (1981).

4. By 1993, there were already "over 200 federal statutes and almost 2000 state statutes that provide[d] for shifting of attorneys' fees." Vargo, *supra* note 1, at 1588.

5. Rationales include: fairness, making a litigant financially whole, punishment, allowing private enforcement of civil rights (private attorneys general), affecting the relative strengths of parties, and creating incentive effects. Rowe, *supra* note 3, at 653.

6. *See* H.R. REP. NO. 94-1558, at 9 (1976) ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts."). In addition, "[f]ee incentives are recognized as especially vital in civil rights areas where the results of suit are often non-pecuniary in nature." PUBLIC INTEREST PRACTICE AND FEE AWARDS 4 (Herbert B. Newberg ed., 1980).

7. Under a contingent fee arrangement, the attorney bears the risk of nonrecovery. However, the attorney can spread those costs to her other clients:

> In the contingent fee system, the lawyer typically agrees to provide legal representation, with the fee to be paid from the proceeds of any settlement or recovery. . . . In return for

statutes further remove financial barriers to litigants by awarding fees that are "adequate to attract competent counsel."[8] This encourages attorneys to take cases that might otherwise not be economically feasible or attractive.

Most legislatures have enacted fee-shifting statutes to cover particular substantive areas. For instance, federal statutes cover topics such as consumer credit,[9] copyright,[10] antitrust,[11] securities,[12] and the environment.[13] Some of the most frequently used fee-shifting statutes, however, are those concerned with the enforcement of civil rights.[14] These statutes have substantially increased the number of civil rights cases filed.[15] Because civil rights laws[16] often require enforcement both publicly by government agencies and

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> these hefty chunks taken from the plaintiff's recovery, the lawyer agrees to forgo a fee entirely if there is no recovery: The plaintiff thus eliminates the risk of paying legal fees in a losing cause. . . .
>
> . . . The lawyer . . . does not charge the plaintiff any fees if the case is lost, but the lawyer has incurred expenses on the case . . . . Those expenses must be paid, and the only source of payment is the fees generated by clients who have recovered or settled. In setting fees, the lawyer must take the probability of success into account; fees from successful cases must cover the expenses incurred in unsuccessful cases.

STEPHEN C. YEAZELL, CIVIL PROCEDURE 344–45 (5th ed. 2000).

8. S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 (stating that the amount of fees awarded in civil rights cases should "be governed by the same standards which prevail in other types of equally complex Federal litigation" and should result in "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.").

9. 15 U.S.C. § 1640(a)(3) (2000).

10. 17 U.S.C. § 505 (2000).

11. 15 U.S.C. § 15(a). Congress first enacted the provision authorizing fee shifting in 1890 as part of the Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209, 210 (1890).

12. Securities Act of 1933 § 11(e), 15 U.S.C. § 77k(e). As originally enacted, § 11(e) of the 1933 Act did not authorize attorneys' fees. Recovery of attorneys' fees in cases involving a false registration statement under the Securities Act was first authorized in 1934. Securities Exchange Act of 1934, Ch. 404, § 206(d), 48 Stat. 881, 908 (amending Securities Act of 1933, ch. 38, § 11(e), 48 Stat. 74, 83).

13. Clean Air Act, 42 U.S.C. §§ 7413(b), 7604(d), 7607(f), 7622(b)(2)(B), 7622 (e)(2) (2000); Ocean Dumping Act of 1972, 33 U.S.C. § 1415(g)(4) (2000); Endangered Species Act, 16 U.S.C. § 1540(g)(4) (2000).

14. *See, e.g.*, Age Discrimination Act of 1975, 42 U.S.C. § 6104(e); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2000); Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a-3(b); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k); Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412 (2000); Fair Housing Act of 1968, 42 U.S.C. § 3612(p).

15. Between 1961 and 1979, the number of civil rights suits filed in federal courts grew from 296 to 24,951—a growth of nearly one hundred fold. *See* Alexander H. Schmidt, Comment, *The Second Circuit Permits States to Recover Attorney's Fees When Prevailing as Plaintiffs in Civil Rights Actions*, 50 BROOK. L. REV. 685, 687 n.6 (1984). *But see* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 689 (1987) (noting that fee-shifting statutes have not increased the rate of filing civil rights suits).

16. In this Comment, the term "civil rights laws" is defined broadly as statutes that promote the public interest. This includes, but is not limited to, litigation involving employment

by private practitioners,[17] legislatures have used fee-shifting statutes as a way of encouraging attorneys to accept meritorious civil rights cases.[18] The seminal federal civil rights fee-shifting statute is the Civil Rights Attorneys' Fees Awards Act of 1976.[19] This statute permits an award of reasonable attorneys' fees to prevailing parties in suits brought to enforce constitutional rights and certain federal statutory rights.[20] In addition to the federal statute, many states have enacted similar fee-shifting provisions. For example, California allows for a recovery of reasonable attorneys' fees "in any action which has resulted in the enforcement of an important right affecting the public interest."[21]

Most fee-shifting statutes permit the prevailing party to recover "reasonable" attorneys' fees and costs.[22] However, because the statutes usually do not define the term "reasonable," courts and commentators have disagreed over what methods should be used to calculate the fee.[23] Presently, most courts

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discrimination, sex discrimination, tenants' rights, school desegregation, political rights, and other civil and constitutional matters.

17. *See* H.R. REP. NO. 94-1558, at 1 (1976) ("The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens."); PUBLIC INTEREST PRACTICE AND FEE AWARDS, *supra* note 6, at 3–5.

18. *See* H.R. REP. NO. 94-1558, at 1 (1976) ("The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys."); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978) ("Congress desired to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'" (quoting 110 CONG. REC. 12724 (1964) (statement of Sen. Humphrey))); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation*, 73 CORNELL L. REV. 719, 768 n.178 (1988).

19. 42 U.S.C. § 1988(b).

20. *Id.* The statute provides:

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

Id.

21. CAL. CIV. PROC. CODE § 1021.5 (West 2002). In addition, many individual California civil rights statutes have their own fee-shifting provisions. *See, e.g.*, Fair Employment and Housing Act, CAL. GOV'T CODE § 12965(b) (West 2002).

22. As interpreted, most fee-shifting statutes award fees to a prevailing plaintiff under ordinary circumstances, with prevailing defendants recovering only when "a court finds that [plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment*, 434 U.S. at 422.

23. This, in turn, has led to a great deal of litigation over statutory fee shifting. *See* Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation*,

have adopted an approach that begins with the calculation of a reasonable hourly rate multiplied by the number of hours reasonably expended. A fee thus calculated is sometimes called a "lodestar" fee because it serves as the touchstone or lodestar of the court's fee determination.[24] Under a strict lodestar approach, courts end their calculation once they have arrived at this figure.[25] Under a competing approach, courts must also examine a list of factors to determine whether an enhancement or reduction of the lodestar amount is warranted;[26] if so, the court applies a multiplier[27] to that initial amount.

II. TWO THEORIES OF FEES?

A. The Evolution of Two Approaches

In the nearly one hundred years preceding the enactment of the civil rights fee-shifting statutes, courts awarded "reasonable" attorneys' fees under a variety of different approaches. In the early years, fees often were set as a percentage of the total recovery.[28] However, in cases involving injunctive relief and no monetary recovery, courts could not rely on this percentage method. Instead, many courts adopted a relatively loose multifactor approach, in which a reasonable fee was set after considering a number of predetermined factors, such as: "the standing of counsel at the bar," the "time and labor spent," the "magnitude and complexity of the litigation," the "responsibility undertaken," and "the amount recovered."[29] Many of these factors evolved from the guidelines for private fee arrangements set forth in the American Bar Association's Code of Professional Responsibility.[30]

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73 N.Y.U. L. REV. 1943, 1945 n.6 (1998) (stating that "the number of attorneys' fees cases on the Supreme Court's docket has increased significantly").

24. *See, e.g.*, Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167–68 (3d Cir. 1973).

25. There is a strong presumption that the lodestar represents a reasonable fee. *See* Blum v. Stenson, 465 U.S. 886, 897 (1984); Fischer v. SJB-P.D. Inc., 214 F.3d 1115, 1119 n.4 (9th Cir. 2000).

26. *See* Ketchum v. Moses, 17 P.3d 735, 741 (Cal. 2001) (noting that the calculation of the lodestar is only the first step in the fee award process).

27. A multiplier is a factor applied to the lodestar amount to arrive at the final fee award.

28. *See* Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 FORDHAM L. REV. 51, 76 (1988) ("Historically, fee awards in common fund cases were set by allowing the plaintiffs' attorneys a fixed percentage of the recovery."). An award of a percentage of recovery is currently still allowed in certain categories of cases. *See* Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 771 (11th Cir. 1991) ("Attorneys in a class action in which a common fund is created are entitled to compensation for their service from the common fund, but the amount is subject to court approval." (citing FED. R. CIV. P. 23(e))).

29. *See* Noerr Motor Freight, Inc. v. E. R.R. Presidents' Conference, 166 F. Supp. 163, 168–69 (E.D. Pa. 1958).

30. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B) (1980).

Perhaps not surprisingly, when faced with the question of determining fees under the new civil rights statutes of the 1970s, many courts adopted the factor-based approach that had been previously used. For instance, in awarding fees under Title VII of the Civil Rights Act of 1964, the Fifth Circuit developed a similar multifactor test in *Johnson v. Georgia Highway Express, Inc.*[31] In *Johnson*, the court balanced a list of subjective factors to produce a fee award that would provide enough incentive to attract competent counsel, but would not produce a windfall for the attorney.[32] The court listed twelve factors to consider:

> (1) The time and labor required. . . . (2) The novelty and difficulty of the questions presented. . . . (3) The skill [required] to perform the legal service. . . . (4) The preclusion of other employment . . . due to acceptance of the case. . . . (5) The customary fee. . . . (6) Whether the fee is fixed or contingent. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and results obtained. . . . (9) The experience, reputation, and ability of the attorneys. . . . (10) The "undesirability" of the case. . . . (11) The nature and length of the . . . relationship with the client. . . . [and] (12) Awards in similar cases.[33]

Despite its widespread adoption, many courts and commentators criticized the *Johnson* approach as being too subjective and for not providing sufficient guidance to trial judges.[34] The *Johnson* test "offers no guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or, indeed, how they are to be applied at all."[35] Because of this lack of guidance, trial courts exercised virtually unbounded discretion when awarding fees. This led to highly inconsistent results, with the outcome of cases depending upon "'the roll of the dice'—from court to court and from case to case."[36] According to one scholar, under the *Johnson* approach, the "only truly consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency."[37]

In contrast to *Johnson*, a more objective test for determining the reasonableness of fee awards was articulated by the Third Circuit in *Lindy Bros.*

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31. 488 F.2d 714 (5th Cir. 1974).
32. *Id.* at 717.
33. *Id.* at 717–19. California courts consider a similar set of factors, known as the *Serrano III* factors. Serrano v. Priest, 569 P.2d 1303, 1316–17 (Cal. 1977).
34. *See, e.g.*, Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 286 (1977); Cavanagh, *supra* note 28, at 78.
35. Berger, *supra* note 34, at 286–87.
36. *Id.* at 284.
37. *Id.* at 292.

Builders v. American Radiator & Standard Sanitary.[38] Concluding that the purpose of awarding attorneys' fees was to compensate the attorney for the value of his services, the court determined a reasonable fee by multiplying the number of hours reasonably expended by a reasonable hourly rate.[39] This amount was intended to constitute reasonable compensation and serve as the lodestar of the court's fee determination.[40] This approach was adopted to bring consistency and simplicity to the fee calculation analysis. "By emphasizing the number of hours worked and the reasonable billing rate, the *Lindy* formulation furnishes a more analytical framework for trial courts than is provided by the unguided 'factors' approach in *Johnson*."[41] In addition, because attorneys "typically charge clients by the hour for most forms of legal services, the *Lindy* method better mimics the legal services market."[42]

Although the *Lindy* method provides a more objective basis for determining fees, it has nevertheless been criticized on a number of grounds. In fact, some commentators have argued that the elements of the *Lindy* process remain insufficiently objective and produce inconsistent results.[43] They point to the "[w]idespread variations in fees awarded lawyers, often in the same community, by different judges, and in different categories of cases."[44] Similarly, they argue that the *Lindy* method creates a sense of mathematical precision that does not accurately represent the realities of the practice of law.[45] In addition, some courts have suggested that *Lindy* encourages lawyers to expend excessive hours, engage in duplicative and unjustified work, and inflate their billing rate.[46] This is because the *Lindy* method's emphasis is on the total number of hours worked, and is not limited to a percentage of a fixed monetary recovery. It is argued that all of these concerns lead to the conclusion that, "[d]espite the apparent simplicity of the *Lindy* formulation, considerable confusion and lack of predictability remain in its administration."[47]

Despite its deficiencies, it is generally agreed that the starting point in determining a reasonable fee is the calculation of the lodestar. Most courts use a modified lodestar approach that combines elements of both the

38. 487 F.2d 161 (3d Cir. 1973).
39. *Id.* at 167.
40. *Id.* at 167–68.
41. Cavanagh, *supra* note 28, at 80.
42. *Id.*
43. A task force appointed by the Third Circuit has compiled a list of deficiencies and complaints lodged against the *Lindy* process. *See* Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 256 (1985).
44. *Id.*
45. *Id.*
46. *In re* Fine Paper Antitrust Litigation, 751 F.2d 562 (3d Cir. 1984), *aff'g in part, rev'g in part*, 98 F.R.D. 48 (E.D. Pa. 1983).
47. *Report of the Third Circuit Task Force*, 108 F.R.D. at 249.

Johnson and *Lindy* tests.[48] However, there has been considerable disagreement as to how and when the *Johnson* factors are incorporated into that analysis. Under the multifactor approach, courts first calculate the lodestar figure and then consider the *Johnson* factors. The trial judge is given broad discretion to determine, retrospectively, whether any relevant *Johnson* factors are present in the case to justify the application of a multiplier.[49] Because a fee award based solely on the initial lodestar amount may not reflect the fair market rate for the attorney's services, a multiplier is applied to the lodestar to bring the fee award up to the compensation level that the attorney would have received in the relevant market.

In contrast, under the strict lodestar approach, the *Johnson* factors are considered only when calculating the initial lodestar amount and are not used to justify an enhancement.[50] Because the *Johnson* factors are subsumed within the lodestar analysis, they will be reflected in either a higher hourly rate or a greater number of hours expended. For example, courts will consider the skill and experience of legal representation when calculating a reasonable hourly rate.[51] They do so by looking at the "rate that lawyers of similar ability and experience in the community normally charge their paying clients."[52] Similarly, courts will examine the novelty and complexity of the case when determining the reasonable number of hours expended by the attorney.[53] If a case is particularly difficult, that factor will be reflected in a greater number of billable hours awarded. In this way, by including the *Johnson* factors within the lodestar analysis, the lodestar amount will adequately reflect the fair market value of the attorney's services. There is therefore a strong presumption that the lodestar figure represents a reasonable fee that usually should not be adjusted.[54]

48. *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424 (1983) (federal courts); Ketchum v. Moses, 17 P.3d 735 (Cal. 2001) (California state courts).

49. *See Ketchum*, 17 P.3d at 740–41.

50. *See* Blum v. Stenson, 465 U.S. 886, 897 (1984).

51. The skill and experience of the attorney is the ninth *Johnson* factor. *See* Johnson v. Ga. Highway Express, 488 F.2d 714, 718 (5th Cir. 1974).

52. Uphoff v. Elegant Bath, Ltd., 176 F.3d 399, 407 (7th Cir. 1999); *see also* ACLU v. Barnes, 168 F.3d 423, 436 (11th Cir. 1999) ("A reasonable hourly rate is 'the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.'" (quoting Norman v. Housing Auth. of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988))).

53. The novelty and difficulty of the case is the second *Johnson* factor. *See Johnson*, 488 F.2d at 717.

54. *See Blum*, 465 U.S. at 897; Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986).

B. Two Paths

With two primary methods of calculating fees established, courts in various jurisdictions adopted either one approach or the other. Federal courts, for instance, now consider the application of a multiplier in only the most "rare" and "exceptional" cases, following a series of U.S. Supreme Court decisions.[55] In contrast, many state courts apply the competing approach and continue to award multipliers in a broad range of situations. For example, in *Ketchum v. Moses*,[56] the California Supreme Court expressly rejected the federal courts' strict lodestar approach.

1. Federal Courts

Following the Supreme Court's decision in *Hensley v. Eckerhart*,[57] federal courts rely on the presumption that most of the *Johnson* factors are subsumed within the initial calculation of the lodestar amount.[58] Of those factors, the Court in *Blum v. Stenson*[59] specifically held that neither the novelty and complexity of the legal issues involved,[60] the special skill and experience of legal representation,[61] nor the results obtained in litigation[62] justify the application of a multiplier. The Court reasoned that all of these factors were already taken into account in the calculation of the lodestar amount itself.[63] For example, the Court stated that the novelty and complexity of the issues already is reflected in the number of billable hours expended. Even in cases in which an attorney of exceptional skill performed work in a complex case in a relatively few number of hours, there would be no need for a multiplier because the attorney's exceptional skill would be reflected in her hourly rate.[64]

In addition, in *City of Burlington v. Dague*,[65] the Court held that the contingent nature of payment should not be considered a basis for granting a multiplier. The Court stated that "an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar."[66]

55. *Blum*, 465 U.S. at 898–901.
56. 17 P.3d 735 (Cal. 2001).
57. 461 U.S. 424 (1983).
58. *Id.* at 434 n.9; *see Del. Valley Citizens' Council for Clean Air*, 478 U.S. at 565.
59. 465 U.S. at 886.
60. *Id.* at 898.
61. *Id.* at 899–900.
62. *Id.* at 900.
63. *Id.* at 901.
64. *Id.*
65. 505 U.S. 557 (1992).
66. *Id.* at 562.

In light of *Blum* and *Dague*, "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee."[67] Accordingly, most federal courts have all but rejected the use of a multiplier.[68] Once the basic lodestar has been determined, there is "very little room" for adjustment.[69]

2. State Courts

In contrast to the federal courts, there are fewer restrictions on the application of multipliers in many state courts. In fact, many states have explicitly rejected the Supreme Court's limitation on the factors that may be considered in determining whether to award an enhancement. For instance, the state courts in California,[70] New Jersey,[71] Hawaii,[72] Florida,[73] Texas,[74] and Pennsylvania[75] all allow consideration of *Johnson*-like factors when determining whether or not to grant a multiplier.[76] Unlike the U.S. Supreme Court, these state courts do not presume that most of the *Johnson* factors are taken into consideration when calculating the lodestar figure.[77]

The California approach is representative of the differences between many state courts and federal courts. In *Ketchum v. Moses*, the California Supreme Court held that a trial judge may adjust the initial lodestar amount up or down based on factors similar to those listed in *Johnson*.[78] The

67. Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 566 (1986).

68. Huang, *supra* note 23, at 1949 ("*Blum* was the first in a series of decisions which have all but rejected the use of a multiplier.").

69. Stewart v. Gates, 987 F.2d 1450, 1453 (9th Cir. 1993).

70. *See* Ketchum v. Moses, 17 P.3d 735 (Cal. 2001).

71. *See* Rendine v. Pantzer, 661 A.2d 1202 (N.J. 1995).

72. *See* Schefke v. Reliable Collection Agency, Ltd., 32 P.3d 52 (Haw. 2001).

73. *See* Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d. 828, 834 (Fla. 1990).

74. *See* Dillard Dep't Stores, Inc. v. Gonzales, 72 S.W.3d 398, 413 (Tex. App. 2002).

75. *See* Polselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 535 (3rd Cir. 1997) (applying Pennsylvania law).

76. Other states, however, have adopted the federal court approach. *See, e.g.*, Freeman v. Crown City Mining, Inc., 630 N.E.2d 19, 27 (Ohio Ct. App. 1993); Dutcher v. Randall Foods, 546 N.W.2d 889, 897–98 (Iowa 1996); Meyers v. Chapman Printing Co., 840 S.W.2d 814, 826 (Ky. 1992).

77. Of course, if any factors were explicitly taken into consideration while determining the lodestar amount, the state courts (like the U.S. Supreme Court) caution against considering them again in determining whether to apply a multiplier. *See* Ketchum v. Moses, 17 P.3d 735, 746 (Cal. 2001) ("We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar.").

78. *Compare Ketchum*, 17 P.3d at 741 (factors include: novelty and difficulty of questions involved, skill of the attorneys, preclusion of other employment, and the contingent nature of the fee award), *with* Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974) (factors include: the time and labor required, the novelty and difficulty of the questions presented, the skill required to perform the legal service, the preclusion of other employment due to acceptance of the case, whether the fee is fixed or contingent, and the experience, reputation, and ability of the attorneys).

California Supreme Court explicitly declined to follow the U.S. Supreme Court's decision in *Dague*,[79] and instead held that applying a fee enhancement would not result in "unfair double counting or a windfall to attorneys."[80] This is because, under California law, "the unadorned lodestar . . . does *not* include any compensation for contingent risk, extraordinary skill, or any other factors" the trial court may properly consider.[81] The multiplier is intended to bring the financial incentives for attorneys prosecuting certain types of cases in line with the incentives they have to undertake claims for which they are paid on a fee-for-services basis.[82]

C. One System or Two?

There are obvious differences between the two competing approaches, and courts adopting one have often criticized the other.[83] The principal difference between the methods is that one approach requires consideration of the *Johnson* factors during the multiplier stage, while the other permits consideration only during the initial calculation of the lodestar. In practice, this might lead to a greater number of fee enhancements in jurisdictions adopting the broad multifactor approach because those courts are allowed to consider a greater number of factors to justify an enhancement.[84]

However, higher fees are not necessarily awarded in those jurisdictions that adopt the broad multifactor approach. This is because, under both methods, the ultimate goal is to award fees that are adequate to attract competent counsel.[85] In other words, both courts attempt to award "reasonable" fees that are equal to the fair market value for the attorney's services.[86] Under the strict lodestar approach, the lodestar amount approximates the fair market rate without the use of any enhancements. Because the court considers market factors[87] in determining the lodestar, that amount is presumed to be

79. *See Ketchum*, 17 P.3d at 745 (stating that the considerations of the Court in *Dague*, "which involved issues of federal law and practice," are not applicable in California).

80. *Id.* at 746.

81. *Id.* at 745.

82. *Id.* at 742.

83. *See, e.g., id.* at 744–45 (adopting the multifactor approach and criticizing the reasoning and policy arguments supporting the strict lodestar method).

84. The results of the study in this Comment show that California state courts (adopting the multifactor approach) awarded multipliers in two out of eighteen cases, while the federal courts (adopting the strict lodestar approach) did not grant a single enhancement in nineteen cases. *See infra* text accompanying note 119.

85. *See* Blum v. Stenson, 465 U.S. 886, 893 (1984); Schefke v. Reliable Collection Agency, Ltd., 32 P.3d 52, 97 (Haw. 2001).

86. *See Blum*, 465 U.S. at 899; Ketchum, 17 P.3d at 741; Berger, *supra* note 34, at 315–17.

87. That is, the *Johnson* factors.

the reasonable fee. In contrast, when a court does not take market factors into account in calculating the lodestar, awarding the lodestar without a multiplier will result in compensation unreasonably below fair market value. Therefore, under the multifactor approach, enhancements are necessary in order to adequately reflect fair market rates. In that situation, a fee enhancement is not an additional amount above the reasonable fee, but instead is the amount necessary to arrive at the reasonable fee. Awarding a multiplier will not result in higher fees since it is applied only in order to take into account factors that would have already been considered under the other method. In theory, this means that a court will calculate the same fee using either approach—they are merely different routes to the same result.

Despite the theoretical contention that both methods will lead to the same result, many courts and commentators have argued that, in practice, the two approaches will lead to different outcomes.[88] Many scholars argue that a limitation on the application of multipliers will result in fee awards unreasonably below market rates. This stance is based primarily on the belief that, in practice, courts do not adequately account for all of the relevant *Johnson* factors when calculating the lodestar, leading inevitably to unreasonably low attorneys' fees that are inadequate to attract competent counsel.[89] Some commentators have argued that this problem is especially damaging in the context of civil rights litigation.[90] They predict that certain civil rights cases "will become impossible to litigate without . . . multipliers because [civil rights plaintiffs] will not be able to compete with [other litigants] for legal representation."[91] Specifically, these commentators argue that contingency multipliers[92] are necessary to attract competent counsel.[93]

88. *See, e.g.*, Rendine v. Pantzer, 661 A.2d 1202, 1228 (N.J. 1995); Berger, *supra* note 34, at 324–26; George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31 LOY. U. CHI. L.J. 599 (2000); Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 REV. LITIG. 301, 315 (1993); Rowe, *supra* note 3, at 673–76.

89. *See* Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 870 (1992).

90. *See, e.g.*, Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197 (1997); Kyle R. Kravitz, Note, *Denying the Devil His Due: Contingency Fee Multipliers After* City of Burlington v. Dague, 38 VILL. L. REV. 1661 (1993).

91. Davies, *supra* note 90, at 226–27 (citing Charles Silver, *Incoherence and Irrationality in the Law of Attorneys'* Fees, 12 REV. LITIG. 301, 332–33 (1993)).

92. Contingency multipliers are enhancements awarded to compensate an attorney for taking the case on a contingency basis.

93. *See* Berger, *supra* note 34, at 324–26; John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 480 (1981). *But see* Rochelle C. Dreyfuss, Note, *Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act*, 80 COLUM. L. REV. 346, 375

It is argued that contingency multipliers serve as a premium that encourages attorneys to take certain types of civil rights cases.[94] According to one scholar, the unavailability of contingency multipliers will "undermine vast amounts of legislation by discouraging lawyers from handling [civil rights] claims."[95]

In addition to commentary based on legal theory, other scholars have assessed the impact of lodestar enhancements based on interviews conducted with civil rights attorneys.[96] For example, Julie Davies designed a study to evaluate whether the unavailability of multipliers would affect the willingness and ability of attorneys to undertake civil rights litigation.[97] She asked federal civil rights practitioners whether limitations on the application of multipliers have effected civil rights litigation.[98] Although a few practitioners felt that there had been very little impact,[99] some plaintiffs' attorneys believed that "the absence of multipliers in most federal civil rights cases has had a chilling effect on the practice of civil rights law."[100] One attorney said that, without multipliers, it is difficult to receive a statutory fee award to make police misconduct cases worth litigating.[101] Another attorney stated that plaintiffs' attorneys lack the leverage to obtain settlements that provide reasonable fees without the possibility of multipliers.[102] Lastly, lawyers for civil rights nonprofit organizations cautioned that private firms attracted to civil rights practice because of the potential to receive multipliers would no longer be willing to participate.[103] These responses led Professor Davies to conclude that, at least for certain types of civil rights cases, the unavailability of multipliers "may significantly affect the economic viability of bringing these types of actions."[104]

(1980) (advocating against the use of contingency multipliers); James D. Kole, Comment, *Nonpayment Risk Multipliers: Incentives or Windfalls?*, 53 U. CHI. L. REV. 1074, 1106–07 (1986) (same).

94. *See* Silver, *supra* note 88, at 315–17.

95. *Id.* at 306.

96. *See, e.g.*, Davies, *supra* note 90, at 230–31.

97. *Id.* at 210–11.

98. *Id.* at 227.

99. For example, some defense attorneys did not believe that the lack of a multiplier has deterred plaintiffs' attorneys from undertaking the representation of civil rights clients. *Id.* at 228. One plaintiffs' attorney even stated the he believed multipliers were an abuse of the system. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 227.

103. *Id.* at 230.

104. *Id.* at 230–31.

III. TWO THEORIES IN PRACTICE: A MODEST EMPIRICAL INQUIRY

A. Study Methodology

This study looks at the amount of attorneys' fees awarded by courts using each of the two main theoretical approaches. The study focuses on civil rights cases filed in California that terminated in either 2000 or 2001. California serves as a convenient forum for this inquiry because the state courts and the federal courts have each adopted one of the two competing methods of awarding fees.[105] For the state courts, I examined all of the civil rights cases in which fees were awarded in the most populous county in the state[106] over a two year period. For the federal courts, I examined all civil rights cases terminated in California in which fees were awarded in any federal action[107] over the same period of time. However, because this study covers only cases filed in California over a two year period, the results reported are not necessarily representative of other jurisdictions. Although there is reason to believe that the data may be similar, conclusions concerning the results in other courts that have adopted the two methods must await further empirical study.

The state superior court universe was established by searching the Los Angeles County Bar Association's database of civil cases.[108] That database is derived from the Los Angeles Superior Court Civil Register, which is a compilation of information about cases filed in the Superior Court. The Register contains information about the proceedings conducted in a particular case, including a description of the type of case being litigated. The cases in the study were selected by searching the database for fee awards in lawsuits categorized under "civil rights."[109] The cases were limited to those in which a final judgment was entered in either 2000 or 2001. I collected data from each case by reviewing the courts' orders granting attorneys' fees. The order specified the total amount of fees awarded, and usually also included the hourly rate and total number of hours awarded. If the fees included a multiplier, I recorded that amount as well. In addition to the court's order,

105. The state courts use the multifactor approach while the federal courts have adopted the strict lodestar method of awarding fees.

106. I examined cases filed in Los Angeles County Superior Court.

107. The four federal districts in California are the Northern (San Francisco), Southern (San Diego), Eastern (Sacramento), and Central (Los Angeles) Districts.

108. The Bar Association's database is searchable by a wide range of criteria, including: case number, type of case, parties, law firms, and judges. In addition, the database allows the user to search for documents, motions, or orders that contain a specific keyword or phrase. I accessed the database through the Bar Association's website at http://superiorcourtregister.lacba.org.

109. I also searched for cases under a case type of "Wrongful Termination," "Other Compl-not Tort or Complex," "Injunct Relief-not Dom/Harrassmt," "Employment Complaint," and "Declaratory Relief Only."

I also examined the prevailing party's motion for attorneys' fees.[110] The moving papers revealed the hourly rate and number of hours requested, as well as whether a multiplier was sought.

The federal court universe was established from the Federal Judicial Center's database of all federal civil cases terminated in 2000 and 2001.[111] The database contains information about the filing and termination of each case, including the nature of the suit and final judgment. The cases in this study were selected by focusing only on cases filed in California that were classified under the category of "civil rights."[112] Within this subset, I searched for cases that included a judgment awarding attorneys' fees and costs. I collected data from each case by reviewing the courts' memoranda of opinions and orders granting attorneys' fees. I recorded the amount of fees granted, including the hourly rate and number of hours awarded. No multipliers were awarded in any of the federal cases I examined.

Because the total number of cases awarding fees was surprisingly small in both state and federal court,[113] I was able to examine all of the cases in each universe.[114] For each case, I calculated an average hourly rate by dividing the total amount of fees awarded by the total number of hours awarded.[115] For each court, the hourly rates awarded in each case were tabulated and analyzed. Statistical summary measures, such as the mean, median, standard deviation,[116] and variance[117] were calculated, and those of the two court systems

110. This includes any declarations or supplemental documents filed with the motion.

111. Fed. Judicial Ctr., Study No. 8429, Federal Courts Integrated Database, 1970–2000 (electronic data set), *at* http://www.icpsr.umich.edu:8080/ICPSR-STUDY/08429.xml; Fed. Judicial Ctr., Study No. 3415, Federal Courts Integrated Database, 2001 (electronic data set), *at* http://www.icpsr.umich.edu/ICPSR-STUDY/03415.xml.

112. The Federal Judicial Center database separated civil rights cases into distinct categories: civil rights voting, civil rights jobs, civil rights accommodations, civil rights welfare, and other civil rights.

113. This may be due to the fact that the settlement rate in these cases is extremely high. According to the Federal Judicial Center database, almost 80 percent of federal civil rights cases terminated in 1999 were settled or voluntarily dismissed.

114. There were cases in each universe, however, that contained missing information or documents. I did not include any data from such cases.

115. This calculation is necessary in order to compare the amount of fees awarded in each court effectively.

116. The standard deviation is a statistic that measures the variability or dispersion of a set of data. It is calculated from the deviations (distances) between each data value and the mean. The more disperse the data is, the larger the standard deviation. For data which follow a normal distribution, approximately 68 percent of all values will fall within one standard deviation of the mean, 95 percent of all values will fall within two standard deviations, and 99.7 percent of all values will fall within three standard deviations.

117. Variance is a statistic that measures how spread out or dispersed a set of data is. The value calculated will always be greater than or equal to zero, with larger values corresponding to data that are more spread out. If all data values are identical, the variance is equal to zero.

were compared. Statistical tests were then performed to determine whether the differences in the hourly rates were significant.

B. The Data

I examined a total of thirty-seven state and federal court cases. However, of the eighteen state court cases, this study only involves the thirteen that resulted in an award of attorneys' fees to the prevailing plaintiff. Similarly, of the nineteen federal cases, results are only reported for the sixteen cases involving a prevailing plaintiff.[118] Tables 1 and 2 report the total amount awarded, number of hours awarded, average rate, and the multiplier awarded for each case in each court. The total amount of fees awarded in state and federal court were $864,425.65 and $2,419,863.41 respectively. Note that the state courts awarded a multiplier in two cases, while the federal courts did not award a single enhancement.[119] This is consistent with the theoretical contention that courts adopting a broad multifactor approach will award a greater number of multipliers.[120]

TABLE 1
STATE COURT

Docket #	Fees Awarded	Hours	Hourly Rate	Multiplier
BC179938	$38,620.00	183.050	$210.98	N/A
BC181780	$80,000.00	235.720	$339.39	N/A
BC190354	$178,850.00	511.000	$350.00	N/A
BC195383	$80,000.00	626.700	$127.65	N/A
BC196351	$800.00	3.070	$260.59	N/A
BC197745	$21,420.05	69.800	$306.88	1.5
BC200462	$205,050.85	833.000	$246.16	1.2
BC209430	$16,125.00	107.500	$150.00	N/A
BC209577	$22,533.75	82.350	$273.63	N/A
BC212534	$61,316.00	317.030	$193.41	N/A
BC214938	$81,190.00	604.300	$134.35	N/A
BC219015	$58,520.00	195.066	$300.00	N/A
BS061444	$20,000.00	130.500	$153.26	N/A

118. Accordingly, three cases involved prevailing defendants. It is interesting to note that this is a relatively high number of cases, given that defendants have to satisfy a much higher burden in order to receive fees. *See supra* note 22.

119. In addition, four of the thirteen state court plaintiffs sought a multiplier, while only one plaintiff out of sixteen did so in federal court.

120. *See supra* note 84 and accompanying text. In the state court cases in which a multiplier was sought but not awarded, the trial judges generally determined that none of the *Serrano III* factors were present to justify an enhancement.

TABLE 2
FEDERAL COURT

Docket #	Court	Fees Awarded	Hours	Hourly Rate	Multiplier
98-10686	CD	$119,206.19	308.57	$386.32	N/A
99-00720	CD	$36,875.00	169.50	$217.55	N/A
98-05817	CD	$485,822.27	2173.80	$223.49	N/A
99-08302	CD	$21,335.00	89.30	$238.91	N/A
00-13363	CD	$2,220.10	9.30	$238.72	N/A
97-01247	ND	$460,192.00	2014.90	$228.39	N/A
99-05072	ND	$3,699.50	15.10	$245.00	N/A
97-02983	ND	$290,339.95	1115.66	$260.24	N/A
96-03037	ND	$125,916.00	591.16	$213.00	N/A
96-03991	ND	$41,358.00	167.10	$247.50	N/A
99-02176	ED	$66,850.00	267.40	$250.00	N/A
97-00529	ED	$703,514.90	1982.89	$354.79	N/A
97-02219	ED	$32,882.00	250.90	$131.06	N/A
00-00566	SD	$6,737.50	24.50	$275.00	N/A
01-00099	SD	$11,100.00	37.00	$300.00	N/A
99-02639	SD	$11,815.00	48.20	$245.12	N/A

Table 3 reports the mean, median, standard deviation, and variance of the hourly rates awarded in each court. Figures 4 and 5 present graphical representations of these results. Most notably, the mean and median amounts of the two courts are very similar. The median is $246.16 for state courts and $245.06 for the federal courts, which results in a difference of only $1.10. The difference in the means is slightly greater, with the federal rate $19.11 higher than the state rate. At-test[121] performed on the means indicates that the difference is not statistically significant.[122] Analyzed in conjunction with the small difference in median amounts, this data suggests that there is no meaningful difference in the hourly rates awarded in state and federal court.

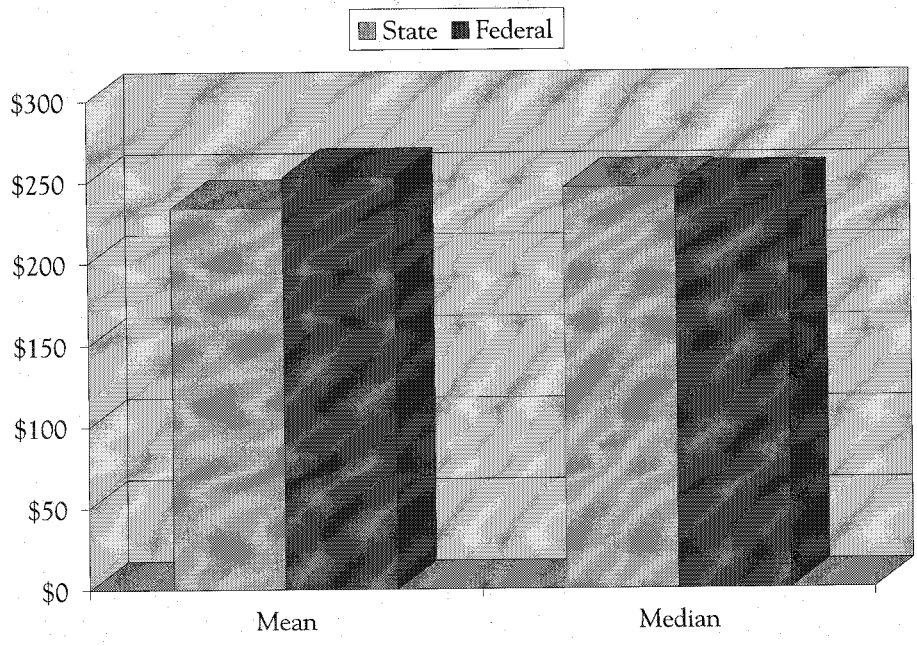
121. The t-test assesses whether the means of two groups are statistically different from each other. The t-test gives the probability that the difference between the two means is caused by chance. It is customary to say that the difference is significant (that is, not caused by chance) if the probability is less than 0.05. This means that five times out of a hundred, a statistically significant difference will be found between the means even if there was none.

122. The t-test value was .754, and, with 27 degrees of freedom, this t-value had a probability value of .457. Since this probability value far exceeds the customary cutoff value of 0.05, the difference in the means is not considered statistically significant.

TABLE 3
FEDERAL & STATE COURTS COMPARED

Court	Mean	Median	Standard Deviation	Variance
State	$234.33	$246.16	$78.34	$6,137.14
Federal	$253.44	$245.06	$58.11	$3,376.57

FIGURE 1
MEAN & MEDIAN AWARDS IN FEDERAL & STATE COURTS



As shown in Figure 5, the data indicates that there is a noticeable difference in terms of variance; the rates awarded in state court are more spread out than those awarded in federal court. The standard deviation is $78.34 for state courts and $58.11 for federal courts, which means that approximately 60 percent of state cases are within the range of $155.99 and $312.67, while 60 percent of the federal cases are within the range of $195.33 and $311.55. However, despite the difference in variance, there still is substantial overlap between the rates awarded in the two courts. For instance, a large number of cases in both courts are within the range of $200 to $300. This helps explain why the difference in means is not statistically significant.

FIGURE 2
VARIANCE IN AWARDS BETWEEN FEDERAL & STATE COURTS

C. Analysis and Discussion

The empirical evidence seems to suggest the counterintuitive conclusion that approximately the same amount of fees are awarded under the two competing methods.[123] Legal scholars and commentators have vigorously criticized the U.S. Supreme Court for limiting the application of multipliers because they believed it would lead to smaller fees being awarded in federal court. This study indicates that, at least with respect to civil rights cases filed in California, attorneys' fees awarded in federal court are not significantly lower than those awarded in state court.[124] In fact, the data indicates that, in California over the last two years, the federal courts award greater

123. The data from this study suggest that there is no statistically significant difference between fees awarded under either of the two competing methods. However, data from other jurisdictions and in other years are required before that inference truly can be made.

124. Again, due to the very limited nature of this study, these results are not necessarily representative of all jurisdictions and all types of cases.

fees than the state courts—the mean hourly rate is nearly $20 higher.[125] In addition, even in the two state cases where the court did apply a multiplier, the hourly fees still fell within the $200–$300 range, and did not result in fees much higher than those awarded in federal court. Therefore, the fear that the elimination of multipliers under the federal court approach would result in lower fees appears to be unfounded.

In theory, the two approaches are supposed to yield the same result.[126] Contrary to what many have argued, this study suggests that some courts actually are adhering to the theory in practice. That is, federal judges are considering the *Johnson* factors when they calculate the lodestar, while state judges are considering them when determining whether to apply a multiplier. By either method, judges are coming to the same results. Based on this evidence, the doctrinal debate over fee enhancements is based on a perceived difference that does not really exist in practice. Accordingly, the debate over fee enhancements appears to be misguided.

Instead of fighting about doctrinal issues that do not present a significant problem in practice, commentators should focus their attention on other issues that affect the current fee award system. The lack of a meaningful difference between the amounts awarded under the two approaches does not necessarily suggest that the current system efficiently provides attorneys with a reasonable fee. It is possible that neither approach yields a desirable result. Most scholars have argued that a reasonable fee must provide adequate financial incentives for bringing certain types of cases. "Fee incentives are recognized as especially vital in civil rights areas where the results of suit are often nonpecuniary in nature."[127] Although the empirical evidence indicates that California federal and state courts are awarding relatively the same amount of fees, there still is a question about whether that amount constitutes adequate compensation or provides adequate incentives.

For instance, many scholars have argued that the current system awards unreasonably low fees in civil rights cases. They have put forth different methods to calculate fees that they argue will approximate a reasonable fee better than the current system. For example, some commentators have argued that "fee awards should be based on the fee agreements plaintiffs enter into with their lawyers."[128] It is argued that this approach will "encourage[] lawyers to offer plaintiffs terms that reflect the market value of the services they provide."[129] "If the process works, fee awards will cover lawyers' oppor-

125. However, the federal median rate is about one dollar lower than the state rate.
126. *See* the discussion *supra* Part II.C.
127. PUBLIC INTEREST PRACTICE AND FEE AWARDS, *supra* note 6, at 4.
128. Silver, *supra* note 89, at 869 (citation omitted).
129. *Id.*

tunity costs—the fees they forgo by working on fee-shifting cases instead of other matters. Lawyers will then be as eager to handle fee-shifting cases as they are to take contingent-fee cases for damages under the American Rule."[130]

Others have argued for the adoption of an options-based method of awarding fees.[131] This approach is based on the theory that litigation is a sequence of options that necessitates the use of an options perspective when calculating attorneys' fees.[132] Because litigation can be viewed from a multi-stage decision perspective, it is argued that risk multipliers must be calculated with those considerations in mind.[133] In contrast, other commentators have argued for a public goods approach to calculating fees.[134] Under this method, civil rights statutes are recognized as mechanisms for providing important "public goods," and reasonable fees therefore are calculated using a public goods analysis.[135] Under this approach, the fee awarded to prevailing parties must compensate the prevailing attorney for the lost opportunities of employment. When establishing the lodestar, the attorney's hourly billing rate should be set at the amount the attorney could have earned in the market had the attorney not taken time to enforce the client's rights.[136] It is argued that such awards will result in an unrestricted supply of civil rights attorneys and optimal provision of civil rights enforcement.[137]

On the other end of the spectrum, the evidence from this study may even suggest that the current system is yielding higher results than necessary to attract counsel. The empirical data indicates that lawyers in civil rights cases filed in California are receiving a median hourly rate of approximately $245. This amount is substantially above the fee caps in cases against the federal government under the Equal Access to Justice Act[138] (maximum hourly rate of $125),[139] and also is well above the amount awarded to appointed counsel in federal criminal cases (maximum hourly rate of $75).[140] In addition, the rates awarded in this study appear to be higher than the average hourly rates for all lawyers in the United States. According

130. *Id.*
131. *See* Huang, *supra* note 23.
132. *See id.* at 1971.
133. *Id.* at 1959.
134. *See* William R. Mureiko, Note, A *Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes*, 1989 DUKE L.J. 438.
135. *See id.* at 439–40.
136. *Id.* at 461.
137. *Id.* at 461–62.
138. 5 U.S.C. § 504 (2000).
139. 28 U.S.C. § 2412(d)(2)(A)(ii) (2000). Higher fees are justified if they correspond to an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys.
140. 18 U.S.C. § 3006A(d)(1) (2000).

to one study, the average hourly rate for lawyers in 2000 was $197.[141] Large-firm equity partners averaged $232 an hour, with the top 10 percent earning over $335 per hour.[142] Therefore, the rates awarded in civil rights cases examined in this study are not only higher than the average rates, but actually are closer to the rates of partners in large law firms.[143]

The rates awarded in civil rights cases appear reasonable, however, when compared to the average hourly rates of California attorneys. In 2000, the average hourly rate for lawyers in California was $241.[144] Large-firm partners averaged $285 an hour, while associates earned over $196 per hour.[145] In light of the substantially higher average rates in California, the median hourly rate of $245 awarded in civil rights cases does not appear to be unreasonably high. In this way, it can be argued that the courts are awarding fees that adequately and reasonably reflect the fair market value of the attorneys' services.

Because there remains substantial uncertainty as to the reasonableness of lawyers' fees awarded under the current system, a debate over whether or not to adopt various competing systems may prove to be more useful than arguing over whether or not to award a multiplier.

CONCLUSION

In recent years there has been considerable discussion of the desirability of using multipliers when calculating reasonable attorneys' fees. In particular, a number of scholars have reached the conclusion that courts adopting the strict lodestar approach will award lower fees than those using the competing multifactor approach. However, contrary to these contentions, this study presents data indicating that there is no statistically significant difference in the amount of fees awarded under the two methods. There is even an indication that, if there is a disparity, it may be in the opposite direction. This evidence suggests that the doctrinal debate over the two approaches may be based on a perceived problem that is not actually present

141. *See* ALTMAN WEIL, INC., THE 2000 SURVEY OF LAW FIRM ECONOMICS 40 (2000) [hereinafter 2000 SURVEY]. In 2003, the average hourly rate rose to $223. *See* ALTMAN WEIL, INC., THE 2003 SURVEY OF LAW FIRM ECONOMICS 83 (2003) [hereinafter 2003 SURVEY].

142. *See* 2000 SURVEY, *supra* note 141, at 40. In 2003, the partners averaged $261 an hour, with the top 10 percent earning about $375 per hour. *See* 2003 SURVEY, *supra* note 141, at 83.

143. *See* 2000 SURVEY, *supra* note 141, at 40. In 2003, the average hourly rate rose to $223. *See* 2003 SURVEY, *supra* note 141, at 83.

144. *See* 2000 SURVEY, *supra* note 141, at 46. In 2003, the average hourly rate actually decreased to $240. *See* 2003 SURVEY, *supra* note 141, at 90.

145. *See* 2000 SURVEY, *supra* note 141, at 46. In 2003, partners averaged $307 per hour, while the associates' average hourly rate decreased to $188. *See* 2003 SURVEY, *supra* note 141, at 90.

in practice. More than anything else, this study points to the need for additional theoretical and empirical work on the various methods of determining reasonable attorneys' fees. Instead of arguing over the application of multipliers, the focus should be on whether the current fee awards are reasonable and whether they provide adequate incentives for bringing certain types of cases.

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