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Time for a Reality Check: Facing the 900 Pound Gorilla in Attorney Fee Awards in Federal Civil Rights Cases

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ABSTRACT

TIME FOR A REALITY CHECK: FACING THE 900 POUND GORILLA IN ATTORNEY FEE AWARDS IN FEDERAL CIVIL RIGHTS CASES

There is a 900 pound gorilla in the room when courts attempt to calculate attorney fee awards in federal civil rights cases. That 900 pound gorilla is the impact that the prevalence of contingency fee agreements on the court’s ability calculate attorney fee awards that reflect reality.

Part I of this article traces the development of the law regarding an award of attorney fees in federal civil rights cases. The article follows the sometimes tortuous and contradictory path the Supreme Court followed and the development of the “lodestar” method of calculating attorney fee awards. In developing and adhering to the “lodestar” method, the Court has steadfastly refused to acknowledge and address the use of contingency fee agreements by plaintiff attorneys in federal civil rights cases.

Part II of the article discusses the impact of this refusal. The Supreme Court’s development of the law regarding attorney fee awards viewed the legal landscape as one in which there was an insufficient supply of attorneys to undertake representation of all plaintiffs with civil rights claims, and in which contingency fee agreements were reluctantly used by attorneys as a means of providing court access to poor or low income plaintiffs. This view no longer reflects the real legal landscape, with its large population of attorneys and ubiquitous use of contingency fee agreements as a marketing tool. As a result, attorney fee awards have become unhinged from reality.

Part III of the article discusses two possible methods courts could employ to calculate attorney fee awards that more accurately reflect reality.
TIME FOR A REALITY CHECK: FACING THE 900 POUND GORILLA IN ATTORNEY FEE AWARDS IN FEDERAL CIVIL RIGHTS CASES

By Todd P. Prugar

INTRODUCTION

There is a 900 pound gorilla in the room of federal civil rights cases. A significant incentive for attorneys to represent plaintiffs in federal civil rights cases is the knowledge that victory guarantees payment; and payment comes not from the client, the plaintiff, but from the defendant. Several federal civil rights statutes require defendants to pay all or some of the plaintiffs’ attorney fees when plaintiff prevails in at least part of the case. As will be more fully reviewed below, as courts have evolved the process, the starting point for determining the amount of the attorney fees is for the court to decide on the reasonable number of hours the attorney spent on the case, then multiplying the reasonable number of hours by a reasonable hourly rate. There is, however, a 900lb gorilla in the room of this process. That 900lb gorilla is the prevalence of contingency fee agreements between attorneys and civil rights plaintiffs. In this era of contingency fee agreements in much of, not only civil rights litigation, but all civil litigation, how are courts able to accurately determine a reasonable hourly rate? Part I of this paper traces the development of the law regarding attorney fee awards in federal civil rights cases, including the rise of the lodestar method and calculation of a reasonable rate. Part II discusses the impact the current legal landscape, with a large population of attorneys and the prevalence of contingency fee agreements, has on a court’s ability to develop a factual evidentiary basis for determining a reasonable hourly rate, resulting in attorney fee awards that have no basis in reality. Part III suggests that courts need to rethink/reformulate their approach
to determining the amount of attorney fee awards in federal civil rights cases and offers some alternative methods.

I. DEVELOPMENT OF THE LAW REGARDING ATTORNEY FEE AWARDS IN FEDERAL CIVIL RIGHTS CASES

To understand the nature of the problem, a survey of the law regarding the award of attorney fees in federal civil rights cases is needed. Although the determination of an attorney’s fee would appear to be a simple and straightforward matter, a review shows the law evolving on a sometimes circuitous and contradictory path.\(^1\)

Several federal statutes, including some civil rights statutes, have provisions expressly providing for the award of attorney fees.\(^2\) In *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*,\(^3\) the Supreme Court held that, unless Congress has specifically provided to the contrary in a statute, federal courts follow the “American Rule” which provides that parties are responsible for their own attorney fees.\(^4\) As note by the Supreme Court in *Hensley v. Eckerhart*,\(^5\) in response to *Alyeska Pipeline*, Congress enacted the Civil Rights Attorney’s Fees Award Act of 1976, 42 U.S.C. §1988.

\(^1\) As this paper focuses on the intersection of “reasonable hourly rates” and contingency fee agreements in determining the amount of an attorney fee award, the following summary of the law focuses on that issue. Other issues have also developed regarding the award of attorney fees, and those issues have evolved their own line of cases. For the most part, however, those lines of cases are beyond the scope of this paper.

\(^2\) For example, Title VII provides: “In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs.” (42 U.S.C. §200e-5(k)); and Title II provides: “In any action commenced pursuant to this subchapter, 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, and the United States shall be liable for costs the same as a private person.” (42 U.S.C.A. §2000a-3(b)). There are approximately 150 such federal “fee-shifting” statutes. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983).

\(^3\) 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)

\(^4\) *Id.*, 421 U.S. at 247

The language of the Civil Rights Attorney’s Fees Award Act is patterned upon the attorney fee provisions contained in Title VII and Title II of the Civil Rights Act of 1964. The Act states:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.

The Court in **Hensley** also made extensive reference to parts of the Congressional Record behind the Attorney’s Fees Award Act. For example, the Court noted that, based on the Congressional Record, “the purpose of §1988 is to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.” As for determining the amount of the fee, the **Hensley** Court further noted that both the House and Senate Report for §1988 referred to 12 factors set forth in the case of **Johnson v. Georgia Hwy. Express, Inc.**, 488 F.2d 714 (5th Cir. 1974). Those 12 factors were:

(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 employment by the attorney 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 the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of

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7 42 U.S.C. §1988


9 **Hensley**, 461 U.S. at 429-30
the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.\textsuperscript{10}

The Senate report also referred to three district court cases that the Senate believed “correctly applied” the 12 factors set forth in Johnson.\textsuperscript{11} A look at Johnson and these three cases at this point is instructive.\textsuperscript{12}

Johnson was a Title VII class action claim alleging discrimination based on race or color. After prevailing at trial, plaintiffs requested an attorney fee award of $30,145.50 based on

\textsuperscript{10} \textit{Id.} at 430, fn. 3, quoting \textit{Johnson}, 488 F.2d at 717-19. The Supreme Court further noted that “These factors derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.” \textit{Hensley}, 461 U.S. at 430, fn. 3.

\textsuperscript{11} \textit{Hensley}, 461 U.S. at 430.

\textsuperscript{12} As noted by Justice Scalia in a concurring opinion in a subsequent case, reliance on Johnson and the three referenced district court cases to divine Congressional intent is problematic. Congress is elected to enact statutes rather than point to cases, and its Members have better uses for their time than poring over District Court opinions. That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action of Congress displays the level of unreality that our unrestrained use of legislative history has attained. I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and Senate Reports); . . . As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant (for that end Johnson would not merely have been cited, but its 12 factors would have been described, which they were not), but rather to influence judicial construction.


As will be seen in the discussion of these cases, based on what is attributed to the opinions in these cases as compared to what was actually said in the cases, apparently view people in Congress, or on the Supreme Court, actually sat down and read the cases. As the Supreme Court, however, has repeatedly referred to the Congressional record and these four cases as the Court developed the law of attorney fee awards in federal civil rights cases, a review of the four cases is necessary to understand the evolution of the law.
affidavits 659.5 hours of work by the attorneys exclusive of trial time.\textsuperscript{13} The District Court, however, reduced the amount, awarding $13,500.00, based on 60 man days of work at $200.00 per day, and three trial days for two attorneys at $250.00 per day per attorney.\textsuperscript{14} On appeal, the Court of Appeals for the Fifth Circuit ruled that the District Court judge erred as the judgment did not elucidate the factors which contributed to the decision and the amount of the award had no visible “correlation to the facts and figures submitted by plaintiff.”\textsuperscript{15} The Court then listed and briefly discussed the above-referenced 12 factors, although the Court did not apply the factors to the case before it.

As seen above, the fifth factor is “the customary fee.” By this phrase, however, the Court did not mean the customary fee charged by that particular plaintiff’s attorney. The court stated, “[t]he \textit{customary fee for similar work in the community} should be considered.”\textsuperscript{16} The next factor was “whether the fee is fixed or contingent.” The Court stated, “The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney’s fee expectations when he accepted the case.”\textsuperscript{17} The Court did not discuss what impact the attorney’s fee expectations should have on the award, or why they should have any impact on the amount of the award. Nor did the Court discuss whether an award should be higher or lower if the fee was contingent as opposed to fixed. Instead, the Court went on to quote a passage from \textit{Clark v. American Marine Corp.}, 320 F.Supp. 709 (E.D. La. 1970):

\begin{quote}
[the statute does not prescribe the payment of fees to the lawyers. It allows the award to be made to the prevailing party. Whether or not he agreed to pay a fee and in what amount is not decisive. Conceivably, a litigant might agree to pay his counsel a fixed dollar fee. This might be even more than the fee eventually
\end{quote}

\begin{flushright}
\textsuperscript{13} \textit{Johnson}, 488 F.2d at 715. \\
\textsuperscript{14} \textit{Id.} at 716. \\
\textsuperscript{15} \textit{Id.} at 717. \\
\textsuperscript{16} \textit{Id.} (emphasis added). \\
\textsuperscript{17}\textit{Id.}
\end{flushright}
allowed by the court. Or he might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court’s decision. The criterion for the court is not what the parties agreed but what is reasonable.\textsuperscript{18}

This passage would seem to obliterate any consideration, not only for the “attorney’s fee expectations,” but also whether the fee was fixed or contingent or what the actual amount of the agreed upon fee is. The Court apparently didn’t care what plaintiff agreed to pay plaintiff’s attorney or the method by which that amount was calculated. As the statute was not meant to pay plaintiff’s attorney, but meant to allow an award to the prevailing plaintiff, the nature of the fee arrangement between plaintiff and plaintiff’s attorney, and the amount the plaintiff actually agreed to pay were irrelevant.

The Court remanded the case to the district court to apply the factors the Court set forth. Before doing so, however, the Court stated:

The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession. The guidelines contained herein are merely an attempt to assist in this balancing process.\textsuperscript{19}

The first district court case the Supreme Court referred to in \textit{Hensley} that the Senate believed correctly applied \textit{Johnson} was \textit{Stanford Daily v. Zurcher}.\textsuperscript{20} \textit{Stanford Daily} involved the award of attorney fees to plaintiffs who had received declaratory relief upholding the constitutional rights of individuals, who were not suspected of committing any crimes, to be free

\textsuperscript{18} \textit{Id.} at 718, quoting Clark, 320 F.Supp. at 711.
\textsuperscript{19} Johnson, 488 F.2d at 719-20.
from unwanted police searches and seizures.\(^{21}\) After making a reference to the Johnson case, the Stanford Daily court made the following comment: “The court must avoid the Scylla of simply accepting the attorneys’ account of the value of the legal services which they have provided. ‘The Court cannot properly fix attorneys’ fees merely by multiplying the hourly rate for each attorney times the number of hours he worked on the case.’ Lindy Bros. B[uilders], Inc. [] v. American R[adiator] & S[anitary] Corp., 487 F.2d 161 (3d Cir. 1973).”\(^{22}\) The Stanford Daily court then listed the twelve factors in Johnson, but then stated, “Of course, a district court might not find it possible to consider all, or most of, the factors in any one case. . . . Also, the Fifth Circuit’s opinion does not indicate how a district court is to use the list, how a court is to attach a relative weight to the different factors in determining an award.”\(^{23}\)

The court then moved to the Lindy I case and stated that, under the approach in that case that “a district court first determine fees in terms of actual hours worked and normal billing rates and, then, modify this sum in light of the contingent nature of success and the quality of the attorney’s work.”\(^{24}\) The court then decided on the following approach to determining an award of attorney fees:

This court, following the suggestion of the Ninth Circuit, intends to consider many of the factors listed in Johnson within a modified version of the framework offered in Lindy Bros. Specifically, the court will consider: the amount of time devoted by the attorneys to the litigation; the value of the time in light of billing rates and of the attorneys’ experience, reputation, and ability; and the attorneys’ performance, given the novelty and the complexity of the legal issues in the litigation. This consideration will be grounded upon the court’s opportunity to view the attorneys’ work during the course of litigation and upon the information

\(^{21}\) Stanford Daily, 64 F.R.D. at 681.

\(^{22}\) The case the Court was citing came to be known as “Lindy IU.” Although not indicated in the citation contained in the Stanford Daily court’s opinion, the quote from Lindy I is found on page 167 of the Lindy I opinion.

\(^{23}\) Stanford Daily, 64 F.R.D. at 682.

\(^{24}\) Id. The opinion in Lindy I will be encountered again along the Supreme Court’s path to developing the law in attorney fee cases.
provided by the parties in their numerous briefs and affidavits.\textsuperscript{25}

Thus, contrary to what was indicated in the Congressional Record, the court in \textit{Stanford Daily} didn’t apply the \textit{Johnson} factors. Rather, the \textit{Stanford Daily} court applied a hybrid of \textit{Johnson} and \textit{Lindy I}.

The next district court case that the Supreme Court referred to in \textit{Hensley} that the Senate claimed applied the \textit{Johnson} factors was an unreported case, \textit{Davis v. County of Los Angeles}.\textsuperscript{26} \textit{Davis} involved an award of attorney fees to plaintiffs who had obtained a judgment in a Title VII case. Instead of listing the twelve \textit{Johnson} factors, the \textit{Davis} Court listed six factors, stating, “The factors to be considered in computation of the appropriate amount of the award include the time spent by the attorneys, the difficulty of the case, the skill requisite to perform the legal service properly, the fee customarily charged in the locality for similar legal services, the results achieved, the experience, reputation, and ability of the attorneys performing the services.”\textsuperscript{27} Referring to \textit{Johnson}, the \textit{Davis} Court stated, “The determination of the amount of attorneys’ fees to be awarded necessarily involves a balancing of many factors,” then added, “The Court’s first hand observations of the conduct of the case is also an important consideration.”\textsuperscript{28} The \textit{Davis} Court, however, never discussed application of the twelve \textit{Johnson} factors to the case before it, in fact, the court never even listed the twelve factors. Rather, the \textit{Davis} court simply awarded an amount to the plaintiff’s attorneys, apparently based on the six factors it listed, but without much of any discussion.\textsuperscript{29}

\textsuperscript{25} \textit{Id.} at 682-83.
\textsuperscript{26} 1974 WL 180 (C.D. Cal. 1974).
\textsuperscript{27} \textit{Id}.
\textsuperscript{28} \textit{Id}.
\textsuperscript{29} \textit{Id}.
The third and final district court case that the Supreme Court referred to in Hensley that the Senate believed correctly applied the twelve Johnson factors was Swann v. Charlotte-Mecklenberg Bd. of Educ.\textsuperscript{30} Interestingly, the Court in Swann makes no reference to the twelve factors in Johnson, in fact, the Court in Swann makes no reference to Johnson at all. Instead, the Swann Court applied nine factors of its own, some of which were similar to those in Johnson, some of which, such as “fees paid to opposing counsel” and “expenses and advancements,” aren’t found in Johnson at all.\textsuperscript{31}

Thus, Johnson lists twelve factors without providing much guidance as to how these factors are to be applied or balanced. Additionally, of the three district court cases referred to by the Supreme Court in Hensley as being selected by the Senate as “correctly appl[y]ing” the twelve Johnson factors, one of them applied a hybrid of the Johnson and Lindy I approaches, one referred to Johnson but not the twelve factors and did not discuss application of those factors to the case before it, and the last one made no reference to Johnson but instead applied its own list of nine factors. Awards of attorney fees under the then new §1988 attorney fee award statute was not off to a clear start.

The issue before the Supreme Court in Hensley was the relationship between the extent to which the plaintiff was the “prevailing party” in a federal civil rights case and the amount of the attorney fee award.\textsuperscript{32} In reaching its decision, the Court stated:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. . . . The product of reasonable hours times a reasonable rate does not

\textsuperscript{30}66 F.R.D. 483 (WD N.C. 1975).
\textsuperscript{31}Id. at 485-86.
\textsuperscript{32}Hensley, 461 U.S. at 433.
end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of “results obtained.”

The Hensley Court held that the extent of a plaintiff’s success is an important factor in determining the amount of an attorney fee award under §1988 and remanded the case to the district court to re-determine the amount of the award given the plaintiff’s lack of complete success on all claims.

The Supreme Court again addressed the issue of an award of attorney fees to plaintiffs in federal civil rights cases in Blum v. Stenson. Blum was a statewide class action regarding eligibility for Supplementary Security Income (SSI) benefits. The plaintiffs were represented by the Legal Aid Society, a private nonprofit law office. After plaintiffs were successful, they moved for attorney fees, even though they were represented by a nonprofit office. After calculating an amount based on the hours worked and hourly rates, plaintiffs sought a 50% increase due to the complexity of the case and the benefits achieved. The district court granted the requested increase and the Court of Appeals affirmed.

The Supreme Court granted certiorari “to consider whether it was proper for the District Court to use prevailing market rates in awarding attorney fees to nonprofit legal services organizations and whether the District Court abused its discretion in increasing the fee award above that based on market rates.” In addressing these issues, the Supreme Court again made reference to the legislative history, Johnson, Stanford Daily, Davis and Swann.

33 Id. at 433-34.
34 Id. at 439-40.
36 Id. at 890-91.
37 Id. at 892. The Court’s phrasing of the issues is interesting. The Court phrased the issue as concerning “awarding attorney fees to nonprofit legal services organizations.” As set forth earlier, however, in Hensley and the cases the Supreme Court referenced therein, the courts
In addressing the issue of whether a plaintiff represented by a nonprofit legal services office should receive an award of attorney fees at all, the Supreme Court emphasized that the actual amount or fee paid by the plaintiff, what the Court referred to as a “cost-based standard,” was not relevant to determining the amount of the award, but that the award should be calculated in accordance with prevailing market rates. The Court stated:

In all four of the cases cited by the Senate Report, fee awards were calculated according to prevailing market rates. None of these four cases made any mention of a cost-based standard. .. It is also clear from the legislative history that Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization. The citations to Stanford Daily and Davis make this explicit. 38

Quoting from Davis, the Court further stated, “In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs’ counsel . . . are employed by . . . a privately funded non-profit public interest law firm.” 39 Accordingly, the Court held, “The statute and legislative history establish that ‘reasonable fees’ under §1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. Policy arguments advanced in favor of a cost-based standard should be addressed to Congress rather than to this Court.” 40

38 Blum, 465 U.S. at 894-95 (footnotes omitted).
39 Id. at 895, quoting Davis, 64 F.R.D. at 681.
40 Blum, 465 U.S. at 895-96. The statement, that changes to the standard used to calculate an award of attorney fees are policy arguments that should be addressed to Congress, lacks reasoning. As has been seen, nothing in the statute itself sets forth a standard by which an award of attorney fees is to be calculated. As has also been seen, the legislative history refers to the twelve Johnson factors. The Supreme Court, without any policy arguments to Congress,
The Court then addressed the issue of the upward adjustment of the fee by 50%. In addressing this issue, the Court stated:

In *Hensley*, we reviewed the cases cited in the legislative history of §1988 and concluded that the “product of reasonable hours times a reasonable rate” normally provides a “reasonable” attorney’s fee within the meaning of the statute. . . . The statute requires a “reasonable fee,” and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high. When, however, the applicant has carried his burden of showing that the claimed rate and the number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by §1988.\(^{41}\)

The problem with this analysis is that the Supreme Court in *Hensley* made no such statement that reasonable hours times a reasonable hourly rate yields a presumptively reasonable fee under §1988. To the contrary, as set forth above, the Supreme Court in *Hensley* stated, “The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward . . .”\(^{42}\)

The Court in *Blum* held, however, that an upward adjustment from the presumptively reasonable fee (obtained by multiplying reasonable hours by the reasonable hourly rate) may be warranted in some special circumstances, but that “The burden of proving such an adjustment is necessary to the determination of a reasonable fee is on the applicant.”\(^{43}\) The Court concluded that the record in the case before it contained no evidence to support an upward adjustment. The Court was dismissive of the factors relied on by the district court in making the upward adjustment. The Court considered that some of those factors, such as the quality of the representation and the complexity of the case, would have been reflected in the reasonable

\(^{41}\) *Id.* at 897, citation omitted.
\(^{42}\) *Hensley*, 461 U.S. at 434 (emphasis added).
\(^{43}\) *Blum*, 465 U.S. at 898.
hourly rate. The Court also stated that other Johnson factors, such as the results obtained, “generally will be subsumed within other factors used to calculate a reasonable fee” and, therefore, should not also be used to justify an increase in the award. Consequently, the Supreme Court reversed the award to the extent that it increased the attorney fees by the amount of the upward adjustment.

When the Supreme Court addressed the issue of attorney fee awards again in City of Riverside v. Rivera, the issue resulted in a fractured Court, with Justice Brennan writing the opinion for the plurality, joined by Justices Marshall, Blackmum and Stevens, while Justice Powell filed an opinion concurring in the judgment, and Chief Justice Berger, along with Justices Rehnquist, White and O’Connor dissented. In City of Riverside, plaintiffs brought an action for violation of federal and state civil rights against a city and some of its police officers, winning a jury verdict totaling $33,350.00. Plaintiffs then sought an award of attorney fees and were ultimately awarded $245,456.25. The issue on appeal to the Supreme Court was whether the amount of the attorney fee award was unreasonable “because it was disproportionate to the amount of damages.”

In addressing the issue, Justice Brennan in the plurality opinion again referred to the Johnson case and the legislative history behind §1988. The opinion also began referring to the reasonable fee, calculated by multiplying reasonable hours worked by a reasonable hourly rate, as the “lodestar” amount and stated that the lodestar “is presumed to be the reasonable fee

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44 Id. at 898-900. The Court’s reasoning indicates that a plaintiff could, in effect, “back door” an upward adjustment by asking for a higher hourly rate by claiming such a higher rate is the prevailing rate for similar complex litigation.
45 Id. at 902.
47 Id. at 564-66.
48 Id. at 567.
contemplated by §1988.”  The plurality opinion went on to reject the petitioners’ contention that attorney fee awards in damages cases should be modeled on contingency fee arrangement commonly used in personal injury litigation. The plurality reasoned that a civil rights case should not be equated with a private tort suit because a civil rights case “seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms,” that the damages a plaintiff recovers “contributes significantly to the deterrence of civil rights violations in the future,” and because Congress recognized that a plaintiff bringing a civil rights action is also acting as a private attorney general. Referring again to the Congressional record, the plurality opinion stated, “Congress made clear that it ‘intended that the amount of fees awarded under §1988 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.’ . . . ‘[C]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee paying client, ‘for all time reasonably expended on a matter.’”

Consequently, the plurality opinion concluded that limiting an attorney fee award to a proportion of the damages awarded would:

seriously undermine Congress’ purpose in enacting §1988. Congress enacted §1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. These victims cannot afford to purchase legal services at the rates set by the private market. . . . Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve

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49 Id. at 567-68.
50 Id. at 573-74.
51 Id. at 574-75.
52 Id. at 575-76, citations omitted, Court’s emphasis.
substantial expenditures of time and effort but produce only small monetary recoveries.\textsuperscript{53}

The plurality opinion went on to claim that “Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.”\textsuperscript{54} In a footnote, the plurality opinion went on to state that, while private sector fee comparisons may be relevant for determining an appropriate hourly rate, “Congress clearly rejected the notion that attorney’s fees under §1988 should be based on private sector fee arrangements.”\textsuperscript{55} Therefore, the attorney fee award was affirmed.\textsuperscript{56}

In his concurrence, Justice Powell believed that the plurality’s reading of Hensley was too expansive. In Justice Powell’s view, although the fee award may have seemed unreasonable on its face, as the amount of hours claimed or the rate claimed were supported by District Court’s findings, there was no basis for overturning the fee award.\textsuperscript{57} Regarding petitioner’s argument that a contingent fee rate should have been considered in making the attorney fee award, Justice Powell stated, “The use of contingent-fee arrangements in many types of tort cases was customary long before Congress enacted §1988. It is clear from the legislative history that §1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases.”\textsuperscript{58}

\textsuperscript{53} Id. at 566.
\textsuperscript{54} Id. at 578.
\textsuperscript{55} Id. at 578, fn. 9. This reasoning appears to be faulty. If private sector fee arrangements are being used to determine the appropriate hourly rate, then attorney fee awards are being based on private sector fee arrangements.
\textsuperscript{56} Id. at 581.
\textsuperscript{57} Id. at 581, 583 (Powell, J., concurring).
\textsuperscript{58} Id. at 586 (Powell, J., concurring).
The dissenting opinions focused more on practical concerns. In his dissent, Chief Justice Burger felt the fee award was unreasonable because the hourly rate used to calculate the award was too high given the limited experience of the attorneys representing plaintiffs.\(^{59}\) In his dissent, Justice Rehnquist agreed with the plurality that “the importation of the contingent-fee model to govern fee awards under §1988 is not warranted by the terms and legislative history of the statute.”\(^{60}\) Justice Rehnquist, however, took the position that spending 1,946.75 hours to recover $33,350.00 was clearly not reasonable.\(^{61}\) Justice Rehnquist argued that the legislative history of §1988 establishes a “fundamental principle that the award of a ‘reasonable’ attorney fee under §1988 means a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys.”\(^{62}\)

The proper award of attorney fees would eventually result in another fractured court. This time, the issue started with a case, *Pennsylvania v. Delaware Valley Citizens’ Council (Delaware Valley I)*\(^{63}\) brought by a citizens group under the Clean Air Act. After they were successful, the citizens group sought an award of attorney fees. The district court initially calculated the “lodestar” amount by multiplying reasonable hours spent on the work by reasonable hourly rates. The district court used three different hourly rates, depending on the difficulty of the work involved. The district court then enhanced the lodestar amount to reflect what it determined to be the superior quality of the attorneys’ legal work and also, because plaintiffs apparently had a contingent fee arrangement with their attorneys, to reflect the risk that

\(^{59}\) *Id.* at 587 (Burger, C.J., dissenting).

\(^{60}\) *Id.* at 595 (Rehnquist, J., dissenting).

\(^{61}\) *Id.* at 588 (Rehnquist, J., dissenting).

\(^{62}\) *Id.* at 591.

the attorneys would not have been paid if plaintiffs were not successful. After the Third Circuit affirmed, the Supreme Court granted certiorari, in part to consider whether an award of attorney fees may be enhanced to reflect superior representation, and also whether enhancement is proper to reflect the risk of nonpayment if plaintiff should lose.

In writing the opinion for the majority, Justice White offered a somewhat skewered history of attorney fee awards under §1988. Justice White referred again to the twelve Johnson factors. He then stated, however, that use of these factors "was not without its shortcomings. Its major fault was that it gave very little actual guidance to district courts. Setting attorneys fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." The Court’s opinion then stated that, in response to the problems with application of the Johnson factors, the Third Circuit developed the “lodestar” approach, beginning in the Lindy I case.

This statement is incorrect. Lindy I was decided before Johnson. As noted above, the opinion in Stanford Daily, one of the district court cases that Congress asserted “correctly” applied the Johnson factors, referred to Lindy I and applied an approach that could be seen as a hybrid of Johnson and Lindy I. Thus, the “lodestar” procedure begun in Lindy I was not a response to any problems with application of the Johnson factors, but preceded those factors.

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64 Id. at 553-55.
65 Id. at 548-49. The Court also considered whether the Clean Air Act authorizes an award of attorney fees that includes time spent by counsel participating in regulatory proceedings. On this issue, the Supreme Court agreed with the district court and court of appeals that an award of attorney fees could include time spent participating in regulatory proceedings. Id at 561.
66 Id. at 562-63.
67 Id. at 563, referring to Lindy I, 487 F.2d 161, 167 (3d. Cir. 1973).
68 See text accompanying footnotes 22-25, supra.
69 The repeated references by the Supreme Court, and other courts, to Lindy I is interesting. Lindy I was not a civil rights case, but involved civil suits arising out of anti-trust actions under the Clayton Act. Lindy I also did not involve a request by plaintiff for an award of attorney fees
As has been seen, the lodestar amount is calculated by multiplying reasonable hours spent by a reasonable hourly rate. The Court went on to stated that in *Lindy Bros. Builders Inc. v. American Radiator & Standard Sanitary Corp.* (*Lindy II*), the Third Circuit ruled that the lodestar amount could be adjusted to reflect the contingent nature of the recovery and also the quality of the work performed. The Supreme Court found this approach better than *Johnson* as it “provided a more analytical framework,” but, “On the other hand, allowing courts to adjust the lodestar amount based on considerations of the ‘riskiness’ of the lawsuit and the quality of the attorney’s work could still produce inconsistent and arbitrary awards.”

The Court went on to discuss the *Hensley* case, and took the view that *Hensley* adopted a modified lodestar approach in which the lodestar amount could possibly be modified by application of the factors in *Johnson*, although many of the *Johnson* factors are subsumed in the calculation of the lodestar amount. This approach, the Court asserted, was then refined by the *Blum* case, which the Court viewed as standing for the proposition that, once the reasonable hours and a reasonable rate have been determined, the resulting product is presumptively the reasonable fee, that the lodestar subsumes many other factors and that, while upward adjustments are still permissible, they are proper only in rare and exceptional cases and must be supported by

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from the defendants, but a request by plaintiffs’ attorneys for an award of fees payable out of a portion of the settlement fund for those plaintiffs who did not have a contractual relationship with the attorneys. The basis of the request and the court’s decision on how to determine the award was what is known as the “equitable fund doctrine.” *Lindy I*, 487 F.2d at 164-66. Thus, the reasoning of *Lindy I* would seem to have no relationship to the basis for an award of attorney fees in a federal civil rights case.

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*540 F.2d 102, 117 (3d Cir. 1976).*

*Delaware Valley I*, 478 U.S. at 563.

*Id.* at 563.

*Id.* at 564.
specific evidence on the record.\textsuperscript{74} The Court concluded that this approach was “wholly consistent” with the rationale behind attorney fee award statutes.

These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a “reasonable fee,” the purpose behind the fee-shifting statute has been satisfied. . .

In short, the lodestar figure includes most, if not all, of the relevant factors constituting a “reasonable” attorney’s fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.\textsuperscript{75}

Therefore, the Court concluded that the district court improperly enhanced the lodestar amount based on the superior quality of the representation as that factor would have already been reflected in the calculation of the lodestar amount, and there was no evidence in the record to support enhancing the lodestar amount.\textsuperscript{76}

The Court did not address the issue of an upward adjustment based on the risk of loss created by the contingency agreement. The Court concluded that reargument was necessary on that issue.\textsuperscript{77}

That issue would lead to another fractured Court in Pennsylvania v. Delaware Valley Citizens’ Council (Delaware Valley II).\textsuperscript{78} Justice White wrote the plurality opinion, in which Chief Justice Rehnquist and Justices Powell and Scalia joined, Justice O’Connor wrote a concurring opinion, joining in parts of the plurality opinion but disagreeing with other parts, and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{74} Id. at 564-65.
\item \textsuperscript{75} Id. at 565-66.
\item \textsuperscript{76} Id. at 566-68.
\item \textsuperscript{77} Id. at 568.
\item \textsuperscript{78} 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987).
\end{itemize}
\end{footnotesize}
Justice Blackmun wrote a dissenting opinion in which Justices Brennan, Marshall and Stevens joined.

One who had read prior Supreme Court cases on the issue of attorney fee awards and also the legislative history behind §1988 may have wondered why the risk created by a contingency fee arrangement between plaintiffs and their attorneys was an issue at all. As set forth above, those authorities established that attorney fee award statutes do not proscribe payment to attorneys, but an award to plaintiffs. The basis for an award of attorney fees is what is reasonable based on prevailing rates for similar work in the community. Consequently, the nature of the agreement between plaintiffs and their attorneys, whether a fixed fee, an hourly arrangement or a contingent arrangement, is not relevant. As the court in *Johnson* stated, “Such arrangements should not determine the court’s decision. The criterion for the court is not what the parties agreed but what is reasonable.”

The Supreme Court reiterated this view in *Blum*, holding that a reasonable fee is to be calculated based on prevailing market rates in the relevant community, and that the actual fee arrangement between plaintiffs and their attorneys, what the Court called the cost-based standard, was legally irrelevant should not be the basis for an award of attorney fees.

Thus, following this reasoning, that plaintiff attorneys assumed the risk of nonpayment by entering into a contingency fee arrangement should have no bearing on the amount of an award of attorney fees to the plaintiffs.

Instead of applying the reasoning and holdings of these prior decisions, the plurality instead discussed the divergence of opinion among the Courts of Appeal on whether the lodestar should be adjusted to reflect the contingency risk. After reviewing the reasoning of these circuit

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79 *Johnson*, 488 F.2d at 718. See also, text accompanying footnote 18, *supra*.
80 *Blum*, 465 U.S. at 895-96. See also, text accompanying footnotes 38-40, *supra*. 
court opinions, the plurality was persuaded, more on policy grounds, that enhancing the lodestar amount to reflect the contingency risk was not appropriate. The plurality opinion stated:

Enhancing fees for risk of loss forces losing defendants to compensate plaintiff’s lawyers for not prevailing against defendants in other cases. This result is not consistent with Congress’ decision to adopt the rule that only prevailing parties are entitled to fees. If risk multipliers or enhancement are viewed as no more than compensating attorneys for their willingness to take the risk of loss and of nonpayment, we are nevertheless not at all sure that Congress intended that fees be denied when a plaintiff loses, but authorized payment for assuming the risk of an uncompensated loss. Such enhancement also penalizes the defendants who have the strongest case; and in theory, at least, would authorize the highest fees in cases least likely to be won and hence encourage the bringing of more risky cases, especially by lawyers whose time is not fully occupied with other work. Because it is difficult ever to be completely sure that a case will be won, enhancing fees for the assumption of the risk of nonpayment would justify some degree of enhancement in almost every case.81

The plurality went on to dispute the argument that, without a contingency risk enhancement to the lodestar amount, attorneys would not take cases from clients who would not pay, undermining the purpose of the fee-shifting statutes. The plurality stated:

We agree that a fundamental aim of such statutes is to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel, this by providing lawyers with reasonable fees to be paid by the losing defendants. But it does not follow that fee enhancement for risk is necessary or allowable. Surely that is not the case where plaintiffs can afford to pay and have agreed to pay, win or lose. The same is true where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes. Nor is it true in those cases where plaintiffs secure help from organizations whose very purpose is to provide legal help through salaried counsel to those who themselves cannot afford to pay a lawyer. It is also unlikely to be true in any market where there are competent lawyers whose time is not fully occupied by other matters.82

The risk an attorney incurs in a contingency fee arrangement is that payment is contingent on success. The attorney’s risk is that, if the case is lost, the attorney will not be paid.

The plurality reasoned, however, that the things that made a case “risky,” the novelty and

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81 Delaware Valley II, 483 U.S. at 724-25.
82 Id. at 725-26.
difficulty of the issues involved, the time spent on possibly protracted litigation, are factors already considered by the court in determining the reasonable number of hours and the reasonable hourly rate to be used in calculating the lodestar amount. Thus, the plurality concluded, a contingency enhancement might actually be superfluous and unnecessary.\(^83\) Therefore, the plurality reversed the Court of Appeals, holding that an enhancement to the lodestar amount to reflect the risk of loss in a contingent arrangement was improper.\(^84\)

In her concurring opinion, Justice O’Connor, unlike the plurality, concluded that Congress did not foreclose the consideration of the risk created by a contingency fee arrangement when determining the reasonable attorney fee.\(^85\) In that sense, she was in agreement with the dissent (which would effectively make the dissent the majority view on the issue of whether the risk of loss created by a contingency fee arrangement could be used to adjust the lodestar amount upward). Justice O’Connor then went on to state, however, that she agreed with the plurality that factors such as the novelty and difficulty of issues and the potential for protracted litigation were already considered in calculating the lodestar amount and, therefore, a risk multiplier should not have been applied in the present case.\(^86\) Justice O’Connor noted that “The private market commonly compensates for contingency through arrangements in which the attorney receives a percentage of the damages awarded to the plaintiff.” Without any discussion or explanation though, Justice O’Connor concluded that the private market model of contingency compensation would provide very little guidance in determining what attorney fee award should

\(^{83}\) Id. at 726-27.
\(^{84}\) Id. at 727. The remainder of the plurality opinion discussed whether such an enhancement was proper under §304(d) of the Clean Air Act, and concluded that enhancement under that statute was improper also.
\(^{85}\) Id. at 731, (O’Connor, J., concurring).
\(^{86}\) Id. at 731 (O’Connor, J., concurring).
be made to a successful plaintiff. After briefly discussing how difficult accurately calculating the risk created by the contingency would be, Justice O’Connor set out three brief “constraints”: first, courts should treat a determination as to how a particular market compensates for contingent risk as controlling future cases in the same market; second, the party seeking the contingent modifier has the burden of proving the degree to which the relevant market compensates for the contingent risk; and third, an enhancement should not be granted based on the “‘legal’ risks or risks peculiar to the case.”

Justice O’Connor’s concurring opinion provided no guidance as to just how courts were to determine the manner in which a particular market compensates for the risk of loss created by a contingent agreement, nor what proof or evidence was needed or could be used to support such a determination. Also, by suggesting that courts ignore legal risks or risks peculiar to the particular case before the courts, Justice O’Connor was effectively suggesting that all district courts somehow determine what factor or multiplier would be appropriate in that particular market, then apply that factor or multiplier in any case involving a contingent fee agreement between plaintiffs and plaintiffs’ attorneys.

As noted above, the dissent in *Delaware Valley II* was written by Justice Blackmun and joined by Justices Brennan, Marshall and Stevens. Thus, the four justices who comprised the plurality in *City of Riverside* comprised the dissent in *Delaware Valley II*. Interestingly then, the four justices who argued in *City of Riverside* that attorney fee awards in civil rights cases should not be based on contingency agreements and that “Congress clearly rejected the notion that

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87 *Id.* at 731 (O’Connor, J., concurring)
88 *Id.* at 733-34, (O’Connor, J., concurring).
attorney’s fees under §1988 should be based on private sector fee arrangements,”89 were now essentially arguing in Delaware Valley II that the existence of a contingency fee agreement justified the upward enhancement of the lodestar amount to compensate for the risk of loss caused by the contingency.

The dissent argued that a fee, that may be appropriate if paid promptly and regardless of the outcome, may be inadequate and inappropriate when payment is contingent upon winning.90 The dissent further claimed that, in the private market, lawyers charge a premium when their fee is contingent upon winning and that “the premium for contingency usually is recouped by basing the fee on a percentage of the damages recovered.”91 The dissent further attempted to argue that calculating the lodestar amount does not render unnecessary the application of the factors set forth in Johnson. “The lodestar, however, was designed to simplify, not circumvent, application of the Johnson factors where appropriate,” and that one of those factors is whether the fee is contingent.92 The dissent went on to argue that a contingency risk adjustment was essential to attract lawyers to take on plaintiff civil rights cases. “This is simply the law of supply and demand. If lawyers can earn substantially higher pay from other cases in the private sector, they will tend either to reject statutory enforcement cases or they effectively will be penalized for taking such cases.”93

Regarding how this contingency risk premium would be calculated, the dissent claimed, “Once it is recognized that it is the fact of contingency, not the likelihood of success in any particular case, that mandates an increase in an attorney’s fee, the frightening difficulties  

89 City of Riverside, 477 U.S. at 578, fn. 9. See also, footnotes 51-55 supra, and accompanying text.  
90 Delaware Valley II, 483 U.S at 735 (Blackmun, J., dissenting).  
91 Id. at 735-37 (Blackmun, J., dissenting).  
92 Id. at 739-40 (Blackmun, J., dissenting).  
93 Id. at 741 (Blackmun, J., dissenting).
envisioned by the plurality disappear.” If, however, as the dissent claimed, the private sector compensates for the contingency risk by basing the fee on a percentage of the damages recovered, that would seem to indicate that in a civil rights case, a fee award that compensates for the contingency risk could be calculated by multiplying the amount of damages by whatever percentage was commonly used in contingent agreements in that particular market. The dissent, however, could not advocate such a method as the four justices comprising the dissent rejected that method as the plurality in City of Riverside.

Although the dissent never clearly set forth a workable method for calculating a contingency risk premium, the dissent would put limits on when a contingent risk adjustment would be appropriate. If the client has contracted to pay the “lodestar” fee regardless of the outcome of the case, then the attorney has not assumed a risk of nonpayment and a contingent risk adjustment would not be appropriate. The dissent also stated, however, that even in some situations in which the attorney has entered into a contingency fee agreement and assumed the risk of nonpayment, a contingent risk adjustment would still be inappropriate. “[I]f the attorney has entered into a contingent-fee contract in a suit seeking substantial damages, the attorney again has mitigated the risk to some extent by exchanging the risk of nonpayment for the prospect of compensation greater than the lodestar amount.” The dissent would limit application of a contingent risk adjustment to cases in which the attorney and client entered into a contingent fee contract because the client was unable or unwilling to pay attorney fees and the case sought only injunctive or declarative relief or would not generate significant funds even if

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94 Id. at 747 (Blackmun, J., dissenting).
95 Id. at 748 (Blackmun, J., dissenting).
96 Id. at 749 (Blackmun, J., dissenting).
successful.\textsuperscript{97}

When the Supreme Court next addressed the issue of contingency fee agreements in determining an attorney fee award, the Court was nearly unanimous in its holding. In \textbf{Blanchard v. Bergeron},\textsuperscript{98} seven justices joined in the majority opinion authored by Justice White, with Justice Scalia filing an opinion concurring in part and concurring in the judgment.\textsuperscript{99} In \textbf{Blanchard}, the Court essentially reconfirmed earlier statements that the actual amount of attorney fees paid or owed by a plaintiff based on the fee agreement between plaintiff and plaintiff’s counsel did not control the amount of an attorney fee award.

In \textbf{Blanchard}, the plaintiff/petitioner brought a civil rights action alleging he had been beaten by a sheriff’s deputy. A jury awarded the plaintiff/petitioner $5,000.00 in compensatory damages and $5,000.00 in punitive damages. Plaintiff/petitioner then sought an award of attorney fees and costs totaling $40,000.00. The district court made a calculation of attorney fees based on hours worked and a reasonable hourly rate, then reduced this amount by approximately $2,200.00 resulting in $7,500.00 in fees and $886.92 in costs. Plaintiff/petitioner appealed, seeking an increase. The Court of Appeals for the Fifth Circuit, following precedent in that circuit, ruled that because plaintiff/petitioner had entered into a contingency fee agreement of forty percent with his attorneys, that agreement capped the amount of attorney fees plaintiff/petitioner could receive, and reduced the fee award to $4,000.00, or forty percent of the jury award. Perceiving a conflict in the courts of appeal as to whether a contingency fee

\textsuperscript{97} \textit{Id.} at 749 (Blackmun, J., dissenting).
\textsuperscript{98} 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989).
\textsuperscript{99} As was set forth earlier, Justice Scalia’s concurring opinion took fault with the Court’s reliance, in part, on the Congressional record in reaching its decision. \textit{See}, footnote 12, \textit{supra}. 

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agreement could provide a cap to an attorney fee award, the Supreme Court granted certiorari. In making its analysis, the Court again referred to the legislative history behind §1988.

“The legislative history of the Act is instructive insofar as it tells us: ‘In computing the fee, counsel for prevailing parties should be paid, as is traditional for attorneys compensated by a fee paying client, “for all time reasonably expended on a matter.”’” The Court also again referred to Johnson, which happened to be a Fifth Circuit case, and the three district court cases, Stanford Daily, Davis and Swann. In fact, the Court used Stanford Daily, Davis and Swann to justify not applying part of the reasoning in Johnson that would support the conclusion that the amount a plaintiff agreed to pay plaintiff’s attorney acts as a cap on an attorney fee award.

Johnson says “In no event, however, should a litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount.” This latter statement, never disowned in the Circuit, was the basis for the decision below. But we doubt that Congress embraced this aspect of Johnson for it pointed to three District Court cases in which the factors are “correctly applied.” Those cases clarify that the fee arrangement is but a single factor and not determinative.

The Court then summarized the holdings in Stanford Daily, Davis and Swann in one sentence each and concluded, “Johnson’s ‘list of 12’ thus provides a useful catalogue of the many factors to be considered in assessing the reasonableness of an award of attorney’s fees; but the one factor at issue here, the attorney’s private fee arrangement, standing alone, is not dispositive.”

A major problem with the Court’s reasoning is that, as set forth above, neither Stanford Daily, Davis nor Swann actually apply Johnson’s “list of 12.” Stanford Daily applied a hybrid of Johnson and the Lindy I lodestar. Davis referred to the Johnson factors but never actually listed

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100 489 U.S. at 88-90. Given the statements of the Supreme Court in prior attorney fee award cases, as set forth above, why any court of appeals would hold that a contingency fee agreement could serve as a cap on an award of attorney fees is hard to understand.

101 Id. at 91 (citations omitted).

102 Id. at 92 (citations omitted).

103 Id. at 92-93.
or discussed application of the factors. Swann made no reference to Johnson at all, but applied its own list of nine factors.\footnote{104}

Following its reading of those cases, however, the Court went on to reason that “reasonableness” is the key to determining an award of attorney fees. The actual amount the plaintiff agreed to pay did not matter, as it could be more or less than what a reasonable fee would be.

As we understand § 1988’s provision for allowing a “reasonable attorney’s fee,” it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way.\footnote{105}

The Court stated that the “lodestar” approach to calculating an award of attorney fees should continue to be used no matter what the underlying arrangement between plaintiff and plaintiff’s attorney.

\textit{Hensley v. Eckerhart} directed lower courts to make an initial estimate of reasonable attorney’s fees by applying prevailing billing rates to the hours reasonably expended on successful claims. And we have said repeatedly that “[t]he initial estimate of a reasonable attorney’s fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” The courts may then adjust this lodestar calculation by other factors. We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent-fee agreement. To the contrary, in \textit{Hensley} and in subsequent cases, we have adopted the lodestar approach as the centerpiece of attorney’s fee awards. The Johnson factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation.\footnote{106}

\footnote{104} For a review of the \textit{Johnson}, \textit{Stanford Daily, Davis} and \textit{Swann} cases, see text accompanying footnotes 13-31, \textit{supra}.  
\footnote{105} Blanchard, 489 U.S at 93.  
\footnote{106} \textit{Id.} at 94, (citations omitted).
The Court also expressed concern that, if a contingent-fee agreement were used to limit the award of attorney fees, that might lead to an “undesirable emphasis” on the recovery of damages, that plaintiffs’ attorneys would be focus too much on the amount of a damages award to the detriment of other remedies such as injunctive or declaratory relief.\textsuperscript{107} The Court was also not impressed with the argument that not limiting recovery to the amount of the contingency fee agreement would result in a windfall for plaintiffs’ attorneys. “Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff’s civil rights claim.”\textsuperscript{108} Therefore, the Court concluded, “The contingent-fee model, premised on the award to an attorney of an amount representing a percentage of the damages, is thus inappropriate for the determination of fees under §1988,”\textsuperscript{109} and reversed and remanded the case.

In \textit{Venegas v. Mitchell},\textsuperscript{110} the Court faced an issue that was almost the mirror image of the issue in \textit{Blanchard}. As discussed above, the Court in \textit{Blanchard} stated that the amount plaintiff agreed to pay plaintiff’s attorney in a contingency fee agreement did not limit the amount of an award of attorney fees. In \textit{Venegas}, the Court faced the issue of whether the amount of an attorney fee award could limit the amount a plaintiff had to pay his attorney.

\textit{Venegas} brought a civil rights action against police officers of the City of Long Beach. The complaint was originally dismissed by the district court as barred by the statute of

\textsuperscript{107} \textit{Id.} at 95-96. The Court’s reasoning in this part is flawed. If, as the Court worries, contingent fee agreements could lead to an “undesirable emphasis” on the amount of monetary damages recovered, then that emphasis will already exist whenever plaintiff and plaintiff’s attorney enter into a contingency fee agreement no matter what method the courts use to calculate the a reasonable attorney fee award.

\textsuperscript{108} \textit{Id.} at 96.

\textsuperscript{109} \textit{Id.} at 96.

\textsuperscript{110} 495 U.S. 82, 110 S.Ct. 179, 109 L.Ed.2d 74 (1990).
limitations, but was reinstated on appeal. At that point, Venegas retained Mitchell as his attorney. Venegas and Mitchell signed a contingent fee contract by which Mitchell would represent Venegas for a fee of forty percent of the gross amount of any recovery.\textsuperscript{111} Venegas obtained a judgment of $2.08 million. Mitchell then moved for attorney fees and the district court entered an award for Venegas for attorney fees in the amount of $117,000.00, of which $75,000.00 was attributable to work done by Mitchell. The district court calculated the award by multiplying a reasonable hourly rate times the hours Mitchell expended on the case to arrive at a lodestar figure, then doubled that amount to reflect Mitchell’s competent performance.\textsuperscript{112} Mitchell and Venegas then became involved in a dispute over Mitchell’s fee. Mitchell sought payment of $406,000.00, or forty percent of the judgment, while Venegas claimed that Mitchell’s fee was limited to the reasonable fee calculated by the court. The Court of Appeals essentially agreed with Mitchell and the Supreme Court granted certiorari.\textsuperscript{113}

Justice White delivered the opinion of a unanimous Court, holding, as had been set forth in previous cases, that an award of attorney fees has nothing to do with what a plaintiff paid or agreed to pay to plaintiff’s attorney and, therefore, could not act as a cap or limitation on what a plaintiff was contractually obligated to pay plaintiff’s attorney. The Court noted that nothing in

\textsuperscript{111} The agreement not only provided for a forty percent contingency fee, the agreement also gave Mitchell, the attorney, “the right to apply for and collect any attorney fee award made by a court” and “also provided that any fee awarded by the court would be applied, dollar for dollar, to offset the contingent fee.” \textit{Venegas}, 495 U.S. at 84. These provisions would seem to indicate that if the amount of the attorney fee award to Venegas exceeded the amount of the contingency fee (if, for example, the damages awarded by the jury were relatively small), Mitchell would get to keep the difference. In other words, as applied, the contingency agreement between Venegas and Mitchell provided Mitchell with the amount of the contingency fee or the “reasonable” attorney fee award, whichever was higher.

\textsuperscript{112} The appropriateness of doubling the lodestar amount to reflect the attorney’s performance is questionable giving the Court’s holding in \textit{Delaware Valley I.}

\textsuperscript{113} \textit{Id.} at 84-86.
§1988 regulates what plaintiffs may promise to pay their attorneys if they lose or if they win.\(^\text{114}\) The Court recognized that “we have generally turned away from the contingent-fee model to the lodestar model,” but that did not compel the conclusion that §1988 required a court to invalidate a contingency agreement between an attorney and client. “We have never held that §1988 constrains the freedom of the civil rights plaintiffs to become contractually and personally bound to pay an attorney a percentage of any recovery, if any, even though such a fee is larger than the statutory fee the defendant must pay the plaintiff.”\(^\text{115}\)

The Court went on to state that because “Section 1988 makes the prevailing party eligible for a discretionary award of attorney fees,” a prevailing plaintiff may receive an award of attorney fees no matter what he paid plaintiff’s attorney, even if he was represented free of charge.\(^\text{116}\) Consequently, the Court rejected the argument, that Venegas tried to make based on \textit{Blanchard}, that because the court awarded fee would go to the attorney, the fee agreement should be ignored so the plaintiff need only pay the statutory award. The Court stated:

There are two difficulties with this argument. First, \textit{Blanchard} did not address contractual obligations of plaintiffs to their attorneys; it dealt only with what the losing defendant must pay the plaintiff, whatever might be the substance of the contract between the plaintiff and the attorney. Second, we have already rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff.\(^\text{117}\)

In its conclusion, the Court again emphasized that an award of attorney fees is distinct from and not dependent on what a plaintiff actually paid or agreed to pay plaintiff’s attorney:

In sum, § 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the “reasonable attorney’s fee” that a defendant must pay pursuant to

\(^{\text{114}}\) \textit{Id.} at 86-87.
\(^{\text{115}}\) \textit{Id.} at 87.
\(^{\text{116}}\) \textit{Id.} at 87-88, Court’s italics.
\(^{\text{117}}\) \textit{Id.} at 89, citation omitted.
a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract.\textsuperscript{118}

Some of this reasoning was applied when the Supreme Court, in \textit{City of Burlington v. Dague}.\textsuperscript{119} again turned to the issue of whether the lodestar amount should be enhanced to compensate for the contingency risk factor. \textit{Dague} was not a civil rights case, but was based on violations of the Resource Conservation and Recovery Act and the Clean Water Act. After prevailing, the plaintiff sought an award of attorney fees as provided in those statutes. The district court calculated the lodestar amount then, because plaintiffs’ attorneys were retained on a contingent fee basis, increased the lodestar amount by twenty-five percent to reflect the contingent risk of no payment. The court of appeals affirmed. The Supreme Court granted certiorari to address the issue of whether the lodestar amount in an attorney fee award may be enhanced to reflect the contingency risk arising from a contingent fee agreement.\textsuperscript{120}

As set forth above, when this issue was addressed in \textit{Delaware Valley II}, it resulted in a fractured court. This time, however, there was a more solid majority of six justices. For Justice Scalia, who wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Kennedy, Souter and Thomas, the answer to the question was an emphatic no.

\textsuperscript{118} \textit{Id.} at 90. Venegas also argued that, even if §1988 did not invalidate the contingency fee agreement, he should not have to pay the contingent amount because it was unreasonable. The Supreme Court did not address this argument, but only stated that the two lower courts had rejected the argument and the Supreme Court saw no reason to disturb those conclusions. That raises a question though, of how a court could calculate a reasonable fee to be $75,000.00 (and that is after doubling the presumptively reasonable lodestar amount), and yet at the same time also conclude that a fee of $406,000.00 is also reasonable. There are also possible ethical issues of whether an attorney can ethically seek a fee that is over five times more than what a court calculated to be a reasonable fee after doubling the lodestar amount. In reality, what is happening is that the contingency risk factor is being imposed by plaintiffs’ attorneys on prevailing plaintiffs. Prevailing plaintiffs such as Venegas are paying a fee higher than what they would have to pay under a reasonable hourly rate to compensate plaintiffs’ attorneys for the cases that the attorneys worked for which they were not paid because they were not successful.\textsuperscript{119} 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). \textsuperscript{120} \textit{Id.} at 559-60.
Justice Scalia reasoned that the risk of loss in a particular case is a product of two factors: 1) the legal and factual merits of the claim; and 2) the difficulty in establishing those merits. Echoing Justice White’s plurality opinion in Delaware Valley II, the Court stated that the second factor was already reflected in the lodestar amount through the increased hours needed to overcome the difficulty or the higher hourly rate for attorney with the skill and experience to do so. While the first factor was not reflected in the lodestar amount, there were good reasons that it should not be. The Court reasoned that, the less meritorious the case, the greater the risk of loss and, therefore, the greater the contingent risk enhancement would be. Therefore, “the consequence of awarding contingency enhancements to take account of this ‘merits’ factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones.”

Justice Scalia’s majority opinion also declined to adopt the approach suggested by Justice O’Connor’s concurrence in Delaware Valley II that there should be a contingent-fee enhancement based on the difference in market treatment of contingency cases as a class. The Court reasoned that such an approach was impossible to fairly implement. Such an approach would require an average contingency risk modifier, which would itself be difficult to determine, that would be applied to all cases with the result that only cases with an average risk would be fairly compensated, while those of a lower than average risk would be overcompensated. The Court reasoned that a contingency risk enhancement was not compatible with the attorney fee award statutes. First, as the statutes bar a plaintiff from recovering attorney fees relating to claims that he lost:

so should it bar a prevailing plaintiff from recovering for the risk of loss. An

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121 Id. at 562-63.  
122 Id. at 564-65.
attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney’s time (or anticipated time) in cases where his client does not prevail.\textsuperscript{123}

Second, the Court noted that previous cases had generally turned away from the contingency model of determining an attorney fee award in preference for the lodestar method, even when using the lodestar model resulted in a higher fee award than the contingency approach. The Court further reasoned:

Contingency enhancement is a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it. Contingency enhancement is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.\textsuperscript{124}

Finally, the Court reasoned that the lodestar approach was much easier to administer, whereas a contingency fee enhancement would make setting fees more complex and arbitrary, resulting in burdensome satellite litigation.\textsuperscript{125} Therefore, adopting Justice White’s opinion in \textit{Delaware Valley II}, the Court held that contingency fee enhancement was not permitted under the statutes at issue.\textsuperscript{126}

Justice Blackmun filed a dissenting opinion in which Justice Stevens joined. Justice Blackmun argued that a “reasonable” fee must be fully compensable, and a market attorney who

\textsuperscript{123} \textit{Id.} at 565, citations omitted. Under the majority’s view of contingency fee agreements, what plaintiffs’ attorneys essentially do is impose the contingency risk on successful plaintiffs. Through a contingency agreement, successful plaintiffs pay a higher fee to compensate plaintiffs’ attorneys for the time spent on representing unsuccessful plaintiffs. Looked at in this manner, by not enhancing an attorney fee award to reflect the contingency risk, the Court is refusing to shift the contingency risk from successful plaintiffs to losing defendants.

\textsuperscript{124} \textit{Id.} at 566.

\textsuperscript{125} \textit{Id.} at 566-67.

\textsuperscript{126} \textit{Id.} at 567.
is paid only when his client prevails will tend to charge a higher fee. Therefore, to be fully compensable, a fee award must be enhanced where the attorney has assumed the risk of nonpayment. Justice Blackmun contended that, if a contingency enhancement were not applied, then federal civil rights litigation would be less remunerative than private litigation, with the result that “the only attorneys who will take such cases will be underemployed lawyers -- who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation -- and public interest lawyers who, by any measure, are insufficiently numerous to handle all the cases for which other competent attorneys cannot be found.”

Justice Blackmun also disputed the majority’s reasoning that allowing a contingency enhancement would contravene the prevailing party limitation by effectively allowing the attorney to recover fees for cases in which his client did not prevail. Justice Blackmun contended that this reasoning was faulty because the statutes provide for an award of fee to the prevailing party, not their attorneys. Justice Blackmun’s dissent also dismissed most of the majority’s reasoning on the basis that the majority simply didn’t understand the reality of how contingent fees worked. Justice Blackmun argued that a contingency fee enhancement was necessary to combat the incentive that all lawyers have to avoid any fee bearing claim in which the plaintiff cannot guarantee the lawyer’s compensation if he does not prevail. Justice

127 Id. at 567-68 (Blackmun, J., dissenting).
128 Id. at 569 (Blackmun, J., dissenting).
129 Id. at 571-72 (Blackmun, J., dissenting). Although not stated clearly, what Justice Blackmun was apparently trying to argue was, as a contingency fee agreement shifts the risk of non-payment to the plaintiff, and as plaintiff was the prevailing party, then plaintiff was entitled to an enhancement of the attorney fee award made to him. This argument fails to address, however, the position repeatedly taken by the Court, as set forth above, that what the plaintiff agreed to pay his attorney in the particular case before the court is irrelevant to calculation of the attorney fee award, which is to be based on the lodestar amount calculated by multiplying reasonable hours by the reasonable hourly rate, which is determined by reference to prevailing rates in the community.
Blackmun argued again, as he had in the dissent in *Delaware Valley II*, that without a contingency enhancement, plaintiffs whose cases do not involve substantial damages and who cannot afford to pay an hourly rate will be unable to find competent lawyers.\(^{130}\)

Justice O’Connor wrote a separate dissenting opinion. While admitting that “courts called upon to determine the enhancements appropriate for various markets would be required to make economic calculations based on less-than-perfect data,” she reiterated her position in her concurrence in *Delaware Valley II* that contingent enhancements may be appropriate in some cases and should be based on difference in market treatment of contingency fee cases as a class.\(^{131}\)

Recently, the Supreme Court again addressed attorney fee awards in civil rights cases in *Perdue v. Kenny A. ex. rel. Winn*.\(^{132}\) In its opinion, the Court reiterated and summarized the process for determining a reasonable attorney fee award. The issue in the case was once again whether and when an award of attorney fees may be enhanced due to the superior performance of the attorney. The Court, in an opinion by Justice Alito, joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas, held that an enhancement to the lodestar amount was permissible, but only in rare circumstances and must be supported by the record. The Court then went on to conclude that the enhancement in the case before it was excessive and arbitrary.\(^{133}\) Justices Kennedy and Thomas each filed a concurring opinion, both essentially stating that they

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\(^{130}\) *Id.* at 574 (Blackmun, J., dissenting). While the foundation of Justice Blackmun’s reasoning, that lawyers have an incentive to avoid any case in which “plaintiff cannot guarantee the lawyer’s compensation if he does not prevail,” may have been true at one time, no longer applies. As will be more fully set forth in Part II, *infra*, far from avoiding cases in which payment is not guaranteed if the lawyer does not prevail, plaintiff attorneys now overwhelmingly offer to take cases on the basis that they will not be compensated if they do not prevail.

\(^{131}\) *Id.* at 576 (O’Connor, J., dissenting).

\(^{132}\) ___U.S.__, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010).

\(^{133}\) *Id* 130 S.Ct. at 1669.
agreed with the Court that enhancement was permissible but should be granted only in the rarest of circumstances. Justice Breyer wrote an opinion concurring in part and dissenting in part, joined by Justices Stevens, Ginsburg and Sotomaor. Justice Breyer agreed that an enhancement was permissible in some circumstances, but he contended that the Court should have ended its discussion there and erred by going further and reversing the enhancement granted by the district court, finding the enhancement was supported by the record.

In writing the majority opinion, Justice Alito gave his own history of attorney fee awards under §1988 and similar statutes. Repeating prior Court opinions, Justice Alito’s opinion faulted the 12 Johnson factors as giving little real actual guidance, then repeated the erroneous view that the Lindy I case pioneered the lodestar approach as an alternative to Johnson. The lodestar method, in Justice Alito’s opinion for the Court, had two important virtues. First, the lodestar looked to “prevailing market rates in the relevant community” and, therefore, produced “an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.” The second virtue was that the lodestar method was readily administrable.

The Court discerned six rules from its prior cases involving fee-shifting statutes, or

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134 Id. 130 S.Ct. at 1677 (Kennedy, J., concurring) and 1677-78 (Thomas, J., concurring).
135 Id., 130 S.Ct. at 1678-84 (Breyer, J., concurring in part and dissenting in part).
136 Id., 130 S.Ct. at 1671-72. Justice Alito also claimed that §1988 failed to “explain what Congress meant by a ‘reasonable’ fee, and therefore the task of identifying the appropriate methodology for determining a ‘reasonable’ fee was left for the court.” Id, 130 S.Ct. at 1671. These contentions appear somewhat disingenuous. As set forth above, while the statute itself may not explain what reasonable meant or how to determine a reasonable fee, courts, including the Supreme Court, repeatedly relied on the Congressional record and Congress’s reference to Johnson and the three district court cases to explain what was “reasonable” and how to determine it. Ironically, immediately after claiming that Congress provided little guidance as to the meaning of “reasonable,” Justice Alito’s opinion refers to Johnson.
137 Id., 130 S.Ct. at 1672, (citations omitted, Court’s italics).
138 Id., 130 S.Ct. at 1672.
statutes providing for the award of attorney fees: first, a reasonable fee is a fee that is “sufficient to induce a capable attorney to undertake the representation of meritorious civil rights cases”; second, the fee yielded by the lodestar method is “presumptively sufficient to achieve this objective”; third, enhancements, though never yet awarded in a case by the Supreme Court, are permissible but only in rare and exceptional circumstances; fourth, the fee produced by the lodestar method “includes most, if not all, of the relevant factors constituting a ‘reasonable’ attorney’s fee”; fifth, the burden of proving that an enhancement is necessary must be borne by the party seeking the fee; and sixth, the party seeking the enhancement most produce “specific evidence” to support it.\footnote{Id. 130 S.Ct. at 1672-73.}

After listing some circumstances that could perhaps support the enhancement of the lodestar amount, the Court ultimately determined that the record did not support a finding of any of those circumstances in the case before the Court, and therefore, the Court reversed.\footnote{Id. 130 S.Ct. at 1674-75, 1676-77.} Before reaching its conclusion, however, the Court rejected the notion that enhancements were needed because “departures from hourly billing are becoming more common.” Perhaps referring to contingency fee arrangements, the Court stated, “As we have noted, the lodestar was adopted because it provides a rough approximation of general billing practices, and accordingly, if hourly billing becomes unusual, an alternative to the lodestar method may have to be found.”\footnote{Id. 130 S.Ct. at 1675.}

Thus, the Court recognized that, if the assumptions underlying the use of the lodestar method, and if hourly billing was no longer the prevailing billing method in the community, the lodestar method would no longer produce a result that approximated what an attorney would be paid if he were representing a paying client. Consequently, the amount produced by the lodestar

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\begin{itemize}
  \item \footnote{Id. 130 S.Ct. at 1672-73.}
  \item \footnote{Id. 130 S.Ct. at 1674-75, 1676-77.}
  \item \footnote{Id. 130 S.Ct. at 1675.}
\end{itemize}
method would no longer be reasonable.

The Court did not explain, however, what would be needed to establish that hourly billing has become “unusual.” Given the number of cases that the Supreme Court itself addressed that involved the use of contingency fee agreements, the Court cannot deny the extensive use of such agreements. There can be no doubt that contingency fee agreements have become the prevalent form of attorney-client agreement in civil rights and similar cases.

II. THE PREVALENCY OF CONTINGENCY FEE AGREEMENTS AND THE IMPACT ON THE SEARCH FOR A “REASONABLE” FEE

As set forth above, the Supreme Court gave no guidelines as to when the hourly billing method would no longer be considered standard, but would become “unusual.” There is a strong argument, however, that in today’s legal market, the hourly billing method, at least for plaintiff attorneys, is unusual.

The last few decades has seen a burgeoning in the number of attorneys and a corresponding rise in the use of contingency fee agreements. The number of attorneys licensed in the United States has been steadily growing. By 2009, the ABA reported that 1,180,386 attorneys were licensed in the United States, while accredited law schools were churning out over 43,000 new attorneys a year.\(^{142}\) The use of contingency fee agreements has also been on the rise. By 1996, approximately one million new contingency cases were being filed each year.\(^ {143}\) Since that time, “the use of contingency fee arrangements, though still most prevalent in personal injury litigation, has spread to anti-trust litigation, shareholder derivative suits, patent litigation, etc.”

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\(^{142}\) *Supreme Court – Leading Cases*, 124 Harv. L. Rev. 356-57 (2010).

mergers and acquisitions, securities litigation, and even lobbying.”\textsuperscript{144} Contingency fee agreements now permeate almost all aspects of litigation.\textsuperscript{145} Though still controversial, contingency fee agreements have become “ubiquitous.”\textsuperscript{146}

These changes tend to undermine some of the assumptions behind Supreme Court decisions regarding the award of attorney fees in civil rights cases. Perhaps taking a cue from the legislative history behind §1988, the Supreme Court has viewed the legal landscape as one in which the number of plaintiffs with claims exceeded the number of attorneys available to take those claims. Consequently, fee-shifting statutes, providing for an award of attorney fees to prevailing plaintiffs, were necessary to provide attorneys with an incentive to represent civil rights plaintiffs and thus ensure that persons with civil rights grievances would have access to the courts.\textsuperscript{147} This view is most clearly expressed in the plurality opinion in City of Riverside, and the dissenting opinions in Delaware Valley II and Dague. The justices writing those opinions argued that a “reasonable” attorney fee must at least approximate attorneys could earn by

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\textsuperscript{145} See, e.g., \textit{Id} at 611 (commenting on Justice Scalia’s majority opinion in Dague), “Furthermore, Justice Scalia dismissed the market for contingency claims, assuming that attorneys’ hourly rates are their ‘ordinary’ rates. The fact is that hourly rates are no more ‘ordinary’ than contingency rates.”
\textsuperscript{146} Adam Shajnfield, \textit{A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements}, 54 N.Y.L. Sch. L. Rev. 733, 774 (2010).
\textsuperscript{147} Hensley, 461 U.S. at 429. Of note, however, if statutes like §1988 were meant to encourage attorneys to represent plaintiffs with civil rights claims, that would seem to undermine the view of the Courts that the award of fees belongs to the plaintiff and not to plaintiff’s attorney. The statutes would seem to provide greater incentive if the attorneys could be sure that the money award was going to directly to them, thus avoiding possible situations in which a fee award is made but plaintiff’s attorney never receives the award due to prior government liens or other financial woes of the plaintiff. See, e.g., Astrue v. Ratliff, __U.S.__, 130 S.Ct. 2521, 177 L.Ed.2d 91 (2010), (attorney, who successfully represented plaintiff in suit to recover social security benefits and also moved for and received an award for fees and costs, never received payment as the government offset the fee award by the amount plaintiff owed government, Supreme Court reasoning that, as award belonged to the party and not the attorney, government properly offset award, using it to pay prior debt plaintiff owed to the government).
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representing plaintiffs in private tort actions or attorneys would forego representing civil rights plaintiffs in favor of representing plaintiffs in other actions in which they could earn higher fees; thus, for example, in certain situations the lodestar amount had to be enhanced to reflect the risk premium that attorneys working under a contingency agreement in private litigation usually charge.\textsuperscript{148} Given the number of attorneys, however, now licensed in the United States and the number of attorneys produced by law schools every year, this view, that plaintiffs with claims are competing against each other because the demand for attorneys exceeds the supply, is no longer valid. Because of the large number of attorneys, and with fee-shifting statutes providing at least some payment for attorneys representing civil rights plaintiffs, such plaintiffs will usually have no problem attracting counsel to take their cases.\textsuperscript{149}

Similarly, the Court’s view of how contingency fee agreements are used no longer reflects reality. Courts previously accepted contingency fee agreements because they often provided the “keys to the courthouse door” to poor or low income individuals; persons who could not afford to pay a retainer or hourly rates could pay a portion of any recovery they received in return for successful representation by an attorney.\textsuperscript{150} Courts, for example the Court in Dague, have also viewed contingency arrangements as a method by which plaintiff attorneys pool their cases and extract a higher fee in cases in which they are successful, to make up for a lack of payment in cases that they lose.\textsuperscript{151}

Who hasn’t, however, seen ads on television or other media, featuring plaintiff attorneys seeking to obtain clients by promising that the client will not have to pay any fee unless the

\textsuperscript{148} See text accompanying notes 52-54, 90-93, and 127-130, supra.
\textsuperscript{149} Supreme Court – Leading Cases, supra, note 142 at 356-57.
\textsuperscript{150} See, e.g., In re Abrams & Abrams, P.A. v. National Union Fire Ins. Co., 605 F.3d 238, 245-46 (4th Cir. 2010); and Shajnfield, note 146, supra at 776.
\textsuperscript{151} See, text accompanying footnotes 123-124, supra.
attorney obtains a recovery. Plaintiff attorneys now use contingency fee agreements for almost all clients, whether or not the client has the ability to pay an hourly fee, without regard to the factual circumstances and even when there is no meaningful risk of non-recovery. Thus, far from being a tool to enable poor or low income claimants to obtain legal representation, contingency fee agreements are a marketing ploy to attract clients, and have almost completely replaced hourly billing in most of plaintiff litigation.

This point is where the 900 pound gorilla enters the room of civil rights litigation. As set forth above, the goal in making an award of attorney fees under §1988 or similar fee-shifting statutes is to roughly approximate what fees attorneys receive from clients who are billed by the hour and actually pay on the basis of an hourly rate. The lodestar method requires the court, in making a fee award, to multiply reasonable hours by a reasonable hourly rate. The ensure that the hourly rate requested is reasonable, the burden is on the requesting party to submit evidence supporting the rates claimed. Accordingly, prevailing parties and their attorneys must “justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney’s own affidavits -- that the requested rates are in line with those prevailing in the


153 See, Eyal Zamir and Ilana Ritov, Neither Saints Nor Sinners, found at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1085985 (Jan. 22, 2008), (study concluding that plaintiffs prefer contingent fee arrangements because non-contingency fees are a mixed gamble that expose plaintiffs to the risk of losing their case and still paying an attorney fee, while contingency agreements are a pure positive gamble that eliminates the risk of loss in that, while there may be a smaller gain in the case of success, there is no risk of loss because no fee is paid if the case is lost).

154 Perdue, 130 S.Ct. at 1672.

155 Hensley, 461 U.S. at 433. See also, Blum, 465 U.S. at 895 (§1988 and its legislative history establish that reasonable fees are to be calculated according to the prevailing rates in the relevant community).
community for similar services by lawyers of reasonably comparable skill, experience and reputation.”156 As some courts have noted, however, given the ubiquity of contingency fee agreements in today’s legal landscape, where can a court or prevailing party find evidence of prevailing hourly rates? “The difficulty here, as in most civil rights cases, is the lack of a readily ascertainable market rate for plaintiffs’ civil rights litigation, a result of the fact that most plaintiffs’ attorneys charge their clients on a contingency basis.”157

What often happens now in fee award litigation is that prevailing plaintiffs and their attorneys no longer provide evidence of hourly rates actually billed to and paid by paying clients to justify the hourly rates being requested. Instead, for some time now, prevailing plaintiffs and their attorneys have provided affidavits, usually from fellow plaintiff attorneys, that opine that, given the circumstances of the particular cases and the skill and expertise of the particular attorney, the hourly rates being claimed are “reasonable.” Many courts have been accepting this opinion evidence of what is reasonable instead of evidence of hourly rates that are actually being billed and paid.158

156 Blum, 465 U.S. at 895, n.11.
157 Malloy v. Monahan, 73 F.3d 1012, 1018 (10th Cir. 2010). Cf. Norman v. Housing Auth. of Montgomery, 836 F.2d 1292, 1300 (11th Cir. 1988), (“The court recognizes that few practitioners who regularly defend the poor and disadvantaged have the opportunity to bill and collect on an hourly basis. Accordingly, it may be virtually impossible to establish a prevailing market rate for such services.”)
158 See, e.g., Duckworth v. Whisenant, 97 F.3d 1393, 1396 (11th Cir. 1996), (party seeking an award of attorney fees may support claimed hourly rate by direct evidence of rates charged or opinion evidence that rates are reasonable); Guam Soc. of Obstetricians & Gynecologists v. Ada, 100 F.3d 691, 695 (9th Cir. 1996), (moving party sufficiently supported claimed rates through affidavits opining that claimed rate was reasonable and within range of billing rates in community); Ridley v. Costco Wholesale Corp., 217 Fed. Appx. 130, 139 (3d Cir. 2007), (prevailing party supported claimed hourly rate by submitting affidavits from two experienced civil rights practitioners that claimed rate was reasonable for someone with moving attorney’s experience); and Hutchinson ex. rel. Julien v. Patrick, 636 F.3d 1, 16 (1st Cir. 2011), (court properly accepted claimed hourly rate that was supported by affidavits from “an independent

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As should be obvious, accepting this type of opinion evidence is fraught with abuse. This procedure creates a situation in which plaintiff attorney A, when prevailing in a civil rights case, uses affidavits from plaintiff attorney B and plaintiff attorney C opining that the rate requested by plaintiff attorney A is reasonable; plaintiff attorney B, when prevailing in a civil rights case, uses affidavits from plaintiff attorney A and plaintiff attorney C opining that the rate requested by plaintiff attorney B is reasonable, and so on. Some courts have understood that opinion evidence as to the reasonableness of a claimed hourly rate is not evidence of what hourly rates are actually being billed and paid in the relevant community.\(^{159}\) Accepting affidavits that merely opine that a claimed rate is reasonable results in fee awards calculated using hourly rates when

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\(^{159}\) See e.g., *Carson v. Billings Police Dept.*, 470 F.3d 889, 891 (9th Cir. 2006), (where plaintiff’s counsel submitted affidavit stating what his rate was and affidavits from other experienced attorneys opining that plaintiff’s counsel deserved the rate he charged, plaintiff’s counsel had failed to submit evidence of prevailing market rates when none of the affidavits stated that rate claimed by plaintiff’s counsel was actually charged by other attorneys in the community); and *Wolfe v. Green*, slip op. 2010 WL 3809857 (S.D. WV 2010), (affidavits from prominent attorneys in the community opining that rate claimed by plaintiff’s attorney was reasonable would have merited greater weight had these local attorneys testified to their actual hourly rates). Although the Supreme Court has never directly stated whether opinion evidence that an claimed hourly rate is reasonable is sufficient to support a fee award, the Court in a footnote in *Hensley* suggested that “a mere conclusory statement that [a] fee was reasonable” would not be sufficient to support a fee award. *Hensley*, 461 U.S. at 439 n.15. Referring to this statement, the Court in the *Norman* case stated, “It should also be noted that in line with the goal of obtaining objectivity, satisfactory evidence necessarily must speak to rates actually billed and paid in similar lawsuits. Testimony that a given fee is reasonable is therefore unsatisfactory evidence of market rate.” *Norman*, 836 F.2d at 1299. After citing to *Hensley*, however, the Court in *Norman* then indicated that opinion evidence may be accepted in certain situations. The Court stated, “Evidence of rates may be adduced through direct evidence of charges by lawyers under similar circumstances or by opinion evidence. The weight to be given to opinion evidence of course will be affected by the detail contained in the testimony on matters such as similarity of skill, reputation, experience, similarity of case and client, and breadth of the sample of which the expert has knowledge.” *Norman*, 836 F.2d at 1299. This statement would seem to indicate that an “expert” or other affiant cannot simply opine that the claimed rate is reasonable. Rather, the expert must be able to provide evidence as to the actual rates charged in similar cases by attorneys of similar skill, reputation and experience.
there is no evidence that any attorney as actually charged such an hourly rate or that any client has actually paid such an hourly rate.

The development of the law regarding attorney fee awards in federal civil rights cases has led to a current situation that does not reflect the reality of today’s legal climate with its large population of attorneys and the ubiquitous use of contingency fee agreements, which hinders the availability of evidence of actual hourly rates. As a result, there is no certainty that attorney fee awards approximate or roughly reflect hourly rates that are actually billed by attorneys and paid by clients and, therefore, the purpose of such statutes, that plaintiff receives an award that adequately compensates them for attorney fees without providing a windfall to plaintiff attorneys, is not being fulfilled. In short, the Supreme Court’s refusal to acknowledge the impact of the widespread use of contingency fee agreements has resulted in attorney fee awards that are unhinged from reality. Consequently, courts need to consider a different approach to return attorney fee awards to reality.

III. FACING THE 900 POUND GORILLA: POSSIBLE METHODS FOR DETERMINING A REASONABLE FEE AWARD

A. A Contingent Fee Approach

One method for facing the 900 pound gorilla and to return reality to the realm of attorney fee awards in civil rights cases would be to acknowledge the ubiquitous use of contingency fee agreements and simply apply the same contingency fee percentage that plaintiff attorneys charge their clients. Any award or jury verdict for monetary damages that a plaintiff receives would be multiplied by this contingency percentage to arrive at an award of attorney fees. This method, at least on its face, would appear to be an attractive alternative with some strong arguments in its favor.
At first blush, using a contingency fee percentage would seem to comply with the objectives behind fee-shifting statutes in civil rights cases. As set forth earlier, the goal is to ensure effective access to judicial process to plaintiffs with civil rights claims by providing them with a reasonable award of attorney fees; an award is “reasonable” when it is sufficient to induce an attorney to undertake the representation, and, therefore, should reflect what an attorney could earn for similar work in the relevant community, the prevailing market rate in the community.\(^{160}\) Consequently, if the contingency fee percentage is what an attorney could earn in other plaintiff cases, if the contingency fee percentage has become the prevailing market rate, “the customary fee for similar work in the community,”\(^ {161}\) then the contingency fee percentage is what should be used to determine the amount of a reasonable fee award. Stated another way, the market controls what is reasonable, and if the current market employs contingency fee percentages as fees for attorneys, then attorney fee awards should likewise employ contingency fee percentages in determining reasonable attorney fee awards.

Another reason for using contingency percentage is ease of administration. Ease of administration is one of the reasons that the Supreme Court has cited to support continued use of the lodestar method.\(^ {162}\) The contingency fee percentage would be even easier. Contingency fees percentages are fairly standard.\(^ {163}\) The court would simply have to multiply the amount of the jury verdict or monetary award by the standard contingency fee percentage. There would be no need to struggle to determine what the appropriate hourly rate is for an attorney of comparable

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\(^ {160}\) See, text accompanying footnotes 8, 16-19, 40 and 52.

\(^ {161}\) Johnson, 488 F.2d at 717.

\(^ {162}\) See, text accompanying footnotes 125 and 138, supra.

\(^ {163}\) See, e.g., Shajnfield, note 146, supra at 775, 800 and footnotes 127 and 128 (noting that, despite competition among numerous plaintiff attorneys, contingency fee percentages have become standardized to between thirty to fifty percent of recovery depending on what stage of the litigation that the recovery is obtained).
skill, experience and reputation, no need to comb through billing records looking for duplicative or unnecessary hours, no need to worry about whether any special circumstances exist requiring an upward or downward adjustment, nor any need to be concerned about contingency enhancements as that would already be included.

As seductive as these reasons may be, there are also significant shortcomings and problems in using a contingent fee percentage approach. One such troubling aspect is that a contingent fee percentage approach would not encourage lawyers to represent an important group of civil rights plaintiffs. As the Supreme Court justices have noted, due to the facts of a particular civil rights case, a plaintiff may be seeking only declarative or injunctive relief and no or little monetary damages, or the plaintiff may have suffered limited monetary damages.164 Even with the current large population of attorneys, most attorneys would be hesitant to represent these types of civil rights plaintiffs if an award was based only on application of a contingent fee percentage. Thirty to fifty percent of nothing is nothing. An award based on a contingent fee percentage in such situations would result in either no award, or an award so small that representing the plaintiff would not be economically feasible.

Therefore, in cases in which a plaintiff is seeking only declaratory or injunctive relief, or in which the potential monetary damages were limited, applying a contingent fee percentage would be impractical. In such situations, the court would have to resort to the lodestar method or some other approach that accounts for the hours involved in the representation. This consideration, however, could spawn further debate and possible further litigation. Courts would

164See, e.g., Delaware Valley II, 483 U.S. at 749 (Blackmun, J., dissenting); Dague, 505 U.S. at 574 (Blackmun, J., dissenting). An example of a plaintiff with a viable civil rights claim but limited monetary damages would be a plaintiff who was dismissed from her employment for race, gender or other improper discriminatory reasons, but who was able to quickly find other employment at a salary that was close to or exceeded her salary at her prior job.
have to determine the “tipping point,” the point at which monetary damages or potential monetary damages crosses the threshold, becomes too small to apply a contingent fee percentage or, conversely, is big enough to warrant application of a contingent fee percentage. There would also be disputes as to when this determination should be made. Should the determination of damages or potential damages be made at the beginning of the case, sometime after discovery or after trial? An even thornier problem is how that determination should be made, what basis could a court use to evaluate the damages or potential damages involved in a civil rights case. What role would settlement negotiations play in such a determination? For example, if a plaintiff made an initial settlement demand of $1 million, but a jury ultimately awards only $10,000.00 in damages, should the contingency fee percentage be applied, or some hourly rate method? Also, what role would punitive damages play in this determination? If a particular case plaintiff has suffered limited monetary damages or a jury has awarded a small amount of monetary damages, but the jury also awards substantial punitive damages, should a contingency fee percentage be applied, or some hourly rate method? Disputes over these types of issues and questions could result in further protracted litigation that would undermine the ease of administration that would be one of the reasons for using a contingency fee percentage. 165

There are other compelling reasons for not using a contingent fee percentage to determine an award of attorney fees. As noted earlier, one view of contingent fee percentages is that they include an enhancement risk through which a plaintiff attorney is effectively charging a

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165 An argument could be made that these problems could be averted by requiring plaintiffs, when filing a civil rights complaint, to state whether plaintiff will seek an award of attorney fees using a contingency fee method, or whether plaintiff will seek an award of attorney fees using some hourly rate method. Defendants may dispute, however, why plaintiff should get to choose which method is used. Further, plaintiffs may argue that they do not have sufficient information early in the litigation, particularly before the close of discovery, to make an informed decision as to which method to use, particularly when punitive damages may be involved.
successful client a higher fee to compensate for the time the attorney spent representing another client in a case in which the attorney received little or no recovery. The Supreme Court has set forth strenuous reasons for refusing to impose this risk enhancement on defendants.\textsuperscript{166} Thus, while operation of market forces may support an argument that shifting the risk enhancement from a plaintiff’s attorney to a successful plaintiff in a contingency case is reasonable, that does not mean that shifting the risk enhancement to a defendant is equally reasonable.

The use of contingency fee agreements has also raised strong ethical concerns.\textsuperscript{167} As has been discussed, one view of contingency fee agreements is that they allow an attorney to pool his cases by imposing the risk enhancement on successful plaintiffs, resulting in a successful plaintiff paying a higher attorney fee to compensate the attorney for the time expended in representing an unsuccessful plaintiff (or plaintiff who received only a small monetary award).

The ethics of this arrangement has been questioned by some. An attorney is supposed to represent his client’s interests, not his client’s interests relative to his other clients’ interests. Therefore, can an attorney ethically charge client A, who was successful in his case, a higher fee so as to compensate the attorney for representing client B, who was unsuccessful? Stated another way, can an attorney ethically charge client A for the attorney’s representation of client

\begin{footnotes}
\textsuperscript{166} See text accompanying notes 81-84 and 121-124 supra.
\textsuperscript{167} Professor Brickman has been one of the leading writers addressing the ethical concerns raised by use of contingency fee agreements. Some of these writings have already been discussed \textit{See}, notes 143 and 152 supra. For some of Professor Brickman’s other writings, \textit{see also}, Lester Brickman, \textit{Effective Hourly Rates of Contingency Fee Lawyers: Competing Data and Non-Competitive Fees}, 81 Wash. U. L. Rev. 653 (2003); Lester Brickman, \textit{ABA Regulation of Contingency Fees: Money Talks, Ethics Walks}, 65 Fordham L. Rev. 247 (1996); and Lester Brickman, \textit{The Market for Contingent Fee Financed Tort Litigation: Is It Price Competitive?}, 25 Cardozo L. Rev. 65 (2003). Professor Brickman is not alone in expressing concerns about ethics and the use of contingency fee agreements. \textit{See}, e.g., William W. Hodes, \textit{Cheating Clients with the Percentage-of-the-Gross Contingency Fee Scam}, 30 Hofstra L. Rev. 767 (2002); and Stephen J. Safranek, \textit{Curbing the Fees of Class Action Lawyers in Light of City of Burlington}, 41 Wayne L. Rev. 1301 (1995). The following discussion concerning ethics and the use of contingency fee agreements is drawn from these sources.
\end{footnotes}
Some may argue that these criticisms take the wrong view of the modern use of contingency fee agreements. Contingency fee agreements can be viewed, not as a means by which attorneys pool cases, but as a marketing tool used to attract clients by taking away the client’s risk of loss by not requiring the client to pay anything if the attorney is unsuccessful. The client will not be charged an hourly rate and billed as the case progresses or at the end of the case. In exchange for eliminating this risk of loss, instead of billing the client at an hourly rate, the attorney charges a percentage of any recovery.

Even viewed in this manner, however, the use of standard percentages in contingency fee agreements has also raised ethical concerns. The contingency fee percentage includes a risk enhancement that is supposed to reflect the risk of non-recovery in that particular case. Consequently, charging a standard contingent fee in all cases without regard to factual differences and differing risks can result in overcharging a client and is considered by many to be unethical.

Thus, while using a contingency fee percentage to calculate an award of attorney fees may seem straightforward and easy on its face, there are several pitfalls. The Supreme Court

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168 The Venegas case is an example of this issue. As set forth earlier (see text accompanying notes 110-118, supra), Venegas had retained Mitchell to represent him in a civil rights case. Mitchell represented Venegas based on a contingency fee agreement. Venegas ultimately obtained a judgment of over $2 million. The district court calculated an attorney fee award using the lodestar method. The district court multiplied the hours spent by Mitchell times a reasonable hourly rate, then doubled that amount, resulting in an award of $75,000.00 (indicating that an unenhanced, straight hours times hourly rate calculation would have resulted in a fee of $37,500.00). Based on the contingency fee agreement, however, Mitchell received attorney fees in the amount of $406,000.00. That raises the question of how Venegas could be ethically charged an attorney fee that was over five times larger than the “reasonable” fee calculated by the court, and ten times larger than the straight hourly rate fee, so as to compensate Mitchell for cases in which Mitchell unsuccessfully (or less successfully) represented other clients. Or again, stated more briefly, can Venegas ethically be charged ten times the fee based on a reasonable hourly rate so that Mitchell can effectively ensure payment for representing other people?
would have to change its long held antagonism to contingency fees. Further, such a method would not be practical in civil rights cases involving only injunctive or declaratory relief or limited damages, and the use of contingency fees is still controversial and fraught with ethical questions. Consequently, courts may be reluctant to use a contingency fee percentage method and a different approach is needed.

B. Finding a Standard Hourly Rate

One of the biggest challenges in calculating an attorney fee award using the lodestar method is determining a reasonable hourly rate. Many courts have approached this task on a case-by-case basis, remaking the determination again and again in each successful civil rights case that comes before the court.

Some courts, however, have developed what could be termed “standard hourly rates” for their jurisdiction, a list or index of what hourly rates attorneys of varying experience receive. For example, in the District of Columbia, when determining reasonable rates for purposes of an attorney fee award, courts use two matrices known as the “Laffey Matrix,” which provides billing rates for attorneys in the Washington, D.C. market with various degrees of legal experience.169 Some courts in Michigan have used a survey of Michigan law firm billing rates to determine a reasonable hourly rate for attorneys in their jurisdiction.170 For civil rights cases filed in the Eastern District of Pennsylvania, “The fee schedule established by Community Legal Services, Inc. (“CLS”) ‘has been approvingly cited by the Third Circuit as being well developed and has been found by [the Eastern District of Pennsylvania] to be a fair reflection of the prevailing market rates in Philadelphia,’” and the Third Circuit has approved of using those rates

as reasonable in determining hourly rates in fee award cases, and has denied hourly rates that are inconsistent with them.\textsuperscript{171}

There is no reason why all courts cannot devise similar indexes or schedules for their jurisdictions. Use of such fee schedules would greatly simplify the process of determining an award of reasonable fees. The court would refer to the schedule to determine the reasonable hourly rate in the community for an attorney of a particular level of experience. The court would then only have to determine the number of reasonable hours expended on the litigation and multiply that figure by the rate set forth on the schedule.

An intent to develop such fee schedules is only part of the battle. Courts would still need to obtain data that accurately reflects hourly rates, or at least relative hourly rates being charged in the community. As has been shown, that would be no easy task in this era of ubiquitous use of contingency fee agreements. Even courts that have already developed such schedules would need to revise and update the schedules to accurately reflect reality. Coming up with such schedules once, however, and then revising and updating them would be far easier, less time consuming, and better use of judicial resources than struggling to determine a reasonable hourly rate in case after case, and also would result in much fairer outcomes than relying on opinion evidence that is not based on any fees that were ever actually charged or actually paid.

Courts could rely, as in Michigan, on surveys of billing rates of law firms (and also solo practitioners). Courts could also rely on a source for hourly rates that would be easily determined: the hourly rates charged by defense attorneys to represent their clients in civil rights cases. Some courts have been reluctant to use hourly rates for defense attorneys when determining the reasonable rate for plaintiff attorneys when making an award of attorney fees.

\textsuperscript{171} Maldonado v. Houston, 256 F.3d 181, 187-88 (3\textsuperscript{rd} Cir. 2001), (citations omitted).
These courts have reasoned that, “Plaintiffs’ and defendants’ civil rights work, however, are markedly dissimilar. Attorneys in defendants’ civil rights cases are typically paid regardless of their success in a case and receive payment on a shorter billing cycle. Moreover, defendants’ attorneys are sometimes guaranteed a certain amount of work from insurance pools.”

This reasoning is flawed. The actual work performed by plaintiff attorneys and defense attorneys on a civil rights case cannot be considered “markedly dissimilar.” Both involve the same activities such as drafting pleadings, questioning witnesses, conducting depositions and other discovery, researching and drafting briefs, preparing for and conducting trial and so on. Both also require knowledge of the same area of the law. Both attorneys are essentially performing the same functions.

Not using defense hourly rates because defense attorneys “are typically paid regardless of their success in a case and receive payment on a shorter billing cycle” is also flawed reasoning. That statement is essentially making an argument for a contingency enhancement, arguing that a plaintiff attorney’s hourly rate should be set higher because plaintiff attorneys run the risk of not being paid if they are not successful and are sometimes not paid until the end of the case when an award is made and received. Such an enhancement has been rejected by the Supreme Court and, therefore, should not be a basis for ignoring defense attorney rates when determining a reasonable hourly rate.

The inference that defense attorneys may charge hourly rates to insurance companies in exchange for a guarantee of a certain amount of work may have more merit to it, but the court did not refer to any evidence to support this inference, nor was there any indication of the extent to which defense attorneys lower their rates in such situations. Such a difference, if it does exist,

172 Malloy, 73 F.3d at 1018-19.
173 See e.g., Dague, text accompanying notes 119-126 supra.
could be determined by comparing hourly rates defendants charge to non-repeating or sporadic clients to hourly rates charged to “insurance pools.” At the least, use of hourly rates charged by defense attorneys would be a starting point for developing fee schedules for use in determining reasonable hourly rates.\footnote{Cf. \textit{In re Market Ctr. East Retail Property, Inc.}, 448 B.R. 43, 62 (Bankr. D.N.M. 2011), “[A]ttempting to reward the attorneys by paying them what defense counsel would have gotten paid for the same number of hours is one at least marginally adequate method of compensating counsel.” Using the hourly rates charged by defense attorneys would also serve the purpose of fee-shifting statutes. As stated in \textit{Johnson}, the purpose of fee-shifting statutes is to “enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition . . .” \textit{Johnson}, 488 F.2d at 719. If the same hourly rate is used for plaintiff and defense attorneys, then this purpose is met. Similarly, in one of the district court cases referred to in the legislative history and often cited by the Supreme Court, the court stated, “The rationale of awarding reasonable attorneys fees, after all, springs from the need for placing the legal defense of certain constitutional principles and some congressional policies on an equal footing with the protection of private interests.” \textit{Stanford Daily}, 64 F.R.D. at 681. Thus, awarding plaintiff attorney fees for defending their civil rights based on the hourly rates that defense attorneys charge their clients for protecting their private interests would put the parties on equal footing.} 

Therefore, courts should not hesitate to use hourly rates charged by defense attorneys when developing fee schedules or matrices setting forth the hourly rates for attorneys of various experience in the court’s jurisdiction. Nor should courts hesitate to develop such schedules or matrices. While such a task may be time consuming at first, doing so will save courts from having to determine again and again in every successful civil rights case that comes before it what a reasonable hourly rate should be. Use of such fee schedules will result in fee awards that are fair and more accurately reflect actual hourly rates than relying on affidavits that opine that a rate is reasonable without any reference to rates actually being billed and actually being paid.
CONCLUSION

The goal of fee-shifting statutes in civil rights cases is to provide meaningful access to the courts to persons with civil rights claims by providing prevailing plaintiffs with an award of “reasonable” attorney fees that can be used as a source to pay attorneys, thus encouraging attorneys to represent such plaintiffs, without providing an unfair windfall to plaintiffs’ attorneys. To accomplish this goal, to be a “reasonable” fee, a fee award must approximate what an attorney could earn in the legal market by representing clients in other cases. In developing the law of attorney fee awards, the Supreme Court has followed a sometime tortuous path, misstating or misreading prior case law, and, in ultimately leading to the lodestar method of reasonable hours times a reasonable hourly rate, the Supreme Court has completely rejected any consideration of contingency fee agreements.

In its development of this area of the law, the Supreme Court has viewed the legal landscape as one in which the demand of plaintiffs with claims far exceeds the supply of available attorneys, allowing attorneys to pick and choose which claims will be most profitable and reject the others, and in which contingency fee agreements are used to provide access to the courthouse to poor or low income plaintiffs. This view does not comport to the reality of today’s legal landscape, in which there is a large and ever growing population of attorneys fighting for claims, and in which contingency fee agreements are used primarily as a marketing ploy to attract clients. Because of the current ubiquity of contingency fee agreements in all forms of plaintiff civil litigation, including civil rights litigation, courts are significantly hampered when, in each federal civil rights case, courts try to determine what hourly rate reasonably reflects the market rate that attorneys can earn. Many courts have consequently relied on opinion evidence, usually provided by plaintiff attorneys, that the rate claimed by
plaintiff attorney in a particular case is reasonable, without any supporting factual evidence to show that any attorneys are actually billing at such a rate or that any client is actually paying such a rate. As a result, attorney fee awards have become unhinged from reality.

The Supreme Court and other courts, therefore, must rethink their approach to calculating a reasonable attorney fee in fee-shifting cases. As contingency fee agreements have become so ubiquitous, courts could simply apply standard contingency fee percentages to a plaintiff’s monetary award to determine a reasonable fee. While this approach would seemingly be simple and straightforward, there are problems. A contingency fee method would not be practicable in federal civil rights cases involving only declarative or injunctive relief, or in which a plaintiff’s civil rights have been violated but the plaintiff has sustained limited damages. There is also still the question of whether the risk enhancement, included in a contingency fee to compensate an attorney for time expended representing unsuccessful plaintiffs in other cases, should be imposed on defendants. Importantly, there are serious ethical questions raised about how contingency fee agreements are used and the percentages that are imposed.

Perhaps a better approach is for all courts to do what some courts have done and development matrices or schedules that provide the hourly rates for attorneys of differing experience levels in the court’s particular jurisdiction. Courts could use information from surveys regarding billing rates of law firms and attorneys and should also include the rates defense attorneys charge in representing clients in civil rights cases. Such fee schedules would greatly simply the process of determining a reasonable attorney fee. Developing such schedules may initially be time consuming, but use of such schedules would be far more efficient than struggling to determine an appropriate hourly rate in case after case. Such fee schedules would also return attorney fee awards to reality and would lead to fee awards that are more fair and
more realistic and, therefore, more preferable, to awards that are based on affidavits that simply opine that a particular requested rate is reasonable without any evidence that any attorney ever charged that rate or any client ever actually paid that rate.