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Recommended Citation
Julie Davies, Federal Civil Rights Practice in the 1990's: The Dichotomy between Reality and Theory, 48 Hastings L.J. 197 (1997). Available at: https://repository.uchastings.edu/hastings_law_journal/vol48/iss2/1

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Federal Civil Rights Practice in the 1990’s: The Dichotomy Between Reality and Theory

by

JULIE DAVIES*

I. Introduction

For the last decade, I have been teaching law students about federal civil rights legislation. Together, we have dissected statutory language and pondered the meaning of the United States Supreme Court’s various pronouncements. Over the years, the Supreme Court’s decisions on issues relating to attorneys’ fees and damages have led my students to wonder whether, in the real world, civil rights practice has become so risky that attorneys hesitate to represent potential plaintiffs. Given my perch in academia, detached from practicing lawyers, these were not questions I could answer with any degree of confidence.

My increasing discomfort with the limits of a purely academic focus on these fundamental questions about the viability of civil rights
practice led to the study that is the focus of this Article. Through interviews with civil rights lawyers, I attempted to build on their experiences and perceptions to develop answers to the questions that my students posed. The explanations and strategies of these practitioners offers insight into the state of private enforcement of civil rights legislation in the mid-1990's. With a more concrete understanding of the challenges civil rights lawyers face, legislators, civil rights advocates, lawyers, and courts can more confidently begin to address some of the issues that undercut the promise and ultimate effectiveness of civil rights legislation.

My hypothesis as I began this research was that a series of Supreme Court decisions had severely undermined the policy and intent of the Civil Rights Attorney's Fees Awards Act of 1976 and other fee-shifting statutes in federal civil rights legislation. By those statutes, Congress sought to give lawyers an incentive to represent plaintiffs in civil rights cases by awarding attorneys' fees to the prevailing party. Statutory fees offered the promise that vindicating federal rights could be at least as lucrative as some other types of law practice. In the years since Congress enacted the Attorney’s Fees Awards Act, however, Supreme Court decisions have sanctioned the practice of permitting waivers of attorneys' fees as a condition of settlement, imbued Rule 68 of the Federal Rules of Civil Procedure with enormous impact in civil rights cases, eliminated contingent risk enhancement of fees, and defined the damages available for violations of civil rights in a manner that minimizes the intangible or non-pecuniary character of many of the federal rights in issue. Accustomed as I am to the

2. In all, I interviewed 35 attorneys. Given the small sample size, the portrait that emerges is necessarily incomplete. Nonetheless, it offers a glimpse of civil rights practice in a wide variety of practice settings and substantive areas. For a description of the methodology and content of the study, see infra text accompanying notes 31-37.
4. See infra text accompanying notes 38-49.
7. Contingent risk enhancements, or multipliers, increase the amount of attorneys' fees awarded in a given case to compensate attorneys for the risk entailed in certain types of litigation. The discretion of trial courts to award such enhancements was virtually eliminated in City of Burlington v. Dague, 502 U.S. 107 (1992). See infra text accompanying notes 150-164.
8. Memphis Community v. Stachura, 477 U.S. 299, 307-08 (1986) (holding that compensatory damages in section 1983 cases are to be awarded for actual injury and not for any abstract value attached to a constitutional claim); Carey v. Piphus, 435 U.S. 247, 266 (1978) (holding that damages for violation of constitutional rights are compensatory in nature and that unless actual damages are proven, nominal damages should be awarded). See infra text accompanying notes 192-206.
soothing generalities of academic life, I expected to hear that attorneys for civil rights plaintiffs encounter such obstacles daily, and I hoped to try to ascertain the circumstances in which these consequences were most severe.

But as practitioners know, practice is rarely as neat and compartmentalized as theory, and I found the reality of civil rights practice in the mid-1990’s not nearly as simple as I envisioned at the outset. First, the practices of civil rights attorneys differ so much from one another that asking questions about civil rights litigation in general is often not very productive. The attorneys I interviewed practice in a variety of subspecialties, such as employment, voting rights, police misconduct, civil rights class actions, and prison conditions litigation. The Supreme Court’s decisions on fees and damages affect differently distinct types of practice. Second, even within subspecialties, variations in the practices of participants exist. For example, the employment discrimination attorneys I interviewed ranged from sole practitioners renting tiny offices to members of firms occupying the upper floors of beautiful office buildings to non-profit lawyers in converted warehouses. Fees and damages issues inevitably affect these diverse practices differently. Third, various other factors significantly influence whether an attorney will choose to represent a client. These factors include substantive law, the political and economic climate, and class differences between potential jurors and the prospective client.

Despite finding differences among areas of civil rights practice and the practitioners themselves, I emerged from this project with a clearer picture of how Supreme Court decisions have affected civil rights practice and how other variables enter into the decision about whether to represent a potential client. As I discuss in this Article, a number of factors have coalesced to make some types of civil rights litigation less attractive than other types of law practice. I believe the Supreme Court’s decisions have adversely affected the economic viability of civil rights litigation in several significant ways—albeit not in precisely the ways I had anticipated. Specifically, the Court’s decision regarding waivers of attorneys’ fees has affected settlement behavior, strengthening defendants’ leverage and converting the process of settlement negotiation into the equivalent of a personal injury negotiation. Lump-sum offers are the rule, with fees figured in an amount that is consistent with the amount of damages being offered.9 This practice, along with the Supreme Court’s damages rules, sometimes

9. See infra text accompanying notes 100-108.
leads to undercompensation of plaintiffs' attorneys, and produces disincentives to represent plaintiffs in cases that lack "personal injury"-type damages. These disincentives to undertake representation also exist with respect to some low-income plaintiffs in certain types of litigation. The Supreme Court's decision eliminating contingent risk enhancement has also taken its toll, particularly in cases where multipliers previously compensated for the risk of loss in cases that are very expensive to litigate.

These effects are serious and troubling, and the Supreme Court or Congress ought to address them by broadening availability of expert witness fees, revising the damages rules, or restoring the discretion of trial courts to grant enhancements of fees in certain specified circumstances. Neither I nor the practitioners who participated in the study would view legal reforms as having the power to completely eradicate poverty, discrimination, class bias, and other deprivations that many civil rights plaintiffs experience in their daily lives. Nonetheless, legal reforms should rightfully accompany other means of combating the effects of discrimination and violations of basic constitutional guarantees. This concern is even more urgent when one recognizes that the potential plaintiffs who are most affected by economic disincentives to attorneys are those who are most vulnerable. The poor and the underemployed are often disadvantaged because, to the extent earnings are low, their damages are too low to offer much compensation to an attorney in the event of settlement. The victims of civil rights violations who incur predominantly non-pecuniary damages, such as victims of police misconduct who suffer from minor injuries, are also unlikely to have high enough damages to attract an attorney. These latter claims are also unlikely to be attractive to personal injury lawyers because of the low potential for recovery. For these individuals, restrictions on civil rights attorneys' fees make the promise of civil rights legislation more and more illusory.

10. Personal injury-type damages are the damages for tangible injuries awarded in tort cases. Tort injuries usually consist of physical injury accompanied by emotional distress, or in some instances severe emotional harm alone. DAN B. DOBBS et al., PROSSER & KEETON ON THE LAW OF TORTS 359-60 (5th ed. 1984). Civil rights plaintiffs sometimes have such damages but often do not. Where not otherwise defined by statute, damages in federal civil rights actions are governed by federal common law derived from Anglo-American tort law. Carey, 435 U.S. at 257-58. See infra text accompanying notes 192-202.

11. See infra text accompanying notes 207-226.

12. See infra text accompanying notes 170-191.

13. See infra text accompanying notes 337-357.
To enable the reader to follow the progression of the study, I begin with a description of the work that has been done by others describing civil rights litigation and explain the questionnaire that I developed to conduct the study. Because the central mission of the project was to ascertain the effects of certain Supreme Court decisions on the practice of civil rights law, I then describe in depth each of the cases I asked about and follow that description with a summary of participant responses. Having presented the data in sufficient depth to reveal the bases for my subsequent evaluations, I examine factors other than Supreme Court decisions which, in the view of practitioners, influence the types of cases in which they are willing to agree to represent potential plaintiffs.

I then proceed to evaluate information about the lawyers themselves—their motivations, aspirations, level of job satisfaction and priorities—in light of commonly held assumptions about civil rights lawyers. Civil rights lawyers are sometimes characterized by defense attorneys as greedy maximizers of their own self-interest and by critical legal theorists as unwitting pawns in a high stakes game intended to maintain the status quo. These critiques demand attention and

15. See infra text accompanying notes 31-36.
16. See infra text accompanying notes 38-226.
17. See infra text accompanying notes 257-282.
18. See infra text accompanying notes 283-319.
19. Critical theorists have become increasingly critical of people who believe that antidiscrimination legislation will eventually remedy the effects of racism in society. Some academic literature characterizes people who still believe the effects of a racial caste system and long-standing discrimination against minorities can be addressed by civil rights legislation as “classical liberals.” The authors of a recent civil rights casebook distinguish between classical liberals, who believe formal, equal-opportunity law is a necessary and sufficient basis for addressing societal discrimination, and legal reformists, who believe the traditional application of formal equal opportunity is flawed, even if it is conceptually sound. Roy L. Brooks et al., Civil Rights Litigation, Cases and Perspectives 10-14 (1995) [hereinafter Brooks et al.]. See also Roy L. Brooks, Rethinking the American Race Problem (1989).

Critical race theorist Richard Delgado describes classical liberals as those who “accept[] the dominant paradigm of civil rights scholarship and activism, and urge[] that we work harder—litigate more furiously, press for new legislation, exhort each other even more fervently than ever before—within that paradigm.” Richard Delgado, Enormous Anomaly? Left-Right Parallels in Recent Writing About Race, 91 COLUM. L. REV. 1547, 1547-48 (1991). Some critical theorists believe that by adherence to a myth of rights, liberals (including civil rights lawyers) exaggerate the changes lawyers and civil rights litigation can bring about and interfere with political mobilization that might more effectively bring about social change. See Stephen L. Wasby, Race Relations Litigation in an Age of Complexity 193-99 (1995). For an evaluation of these criticisms, see infra text accompanying notes 291-319.
resolution as a prerequisite to proposing any type of reform intended to perpetuate and increase civil rights litigation. Finally, I conclude the Article by identifying the aspects of existing law that, on the basis of this study, merit serious consideration and reform.

II. A Description of the Study

The landscape of federal civil rights litigation differs depending on who you ask to describe it—academics, judges, defense lawyers or plaintiffs' lawyers. Theodore Eisenberg and Stewart Schwab, co-authors of several studies examining reality and myth about constitutional tort litigation, documented judges' perceptions that federal constitutional tort litigation is an area of law where the number of claims is rapidly increasing and comprising an ever greater portion of their dockets. Based on empirical studies, including district court and appellate court filings, as well as appellate opinions, Eisenberg and Schwab showed that the numbers did not support the judges' impressions. Although they did not dismiss the views of appellate or district court judges, Eisenberg and Schwab suggested that judges' perceptions of the enormity of constitutional tort litigation may be influenced by the different and somewhat conflicting sources of infor-

20. See infra text accompanying notes 320-363.
23. Eisenberg & Schwab, Perceptions, supra note 21, at 501-02; Eisenberg & Schwab, Reality of Constitutional Tort Litigation, supra note 21, at 646-50.
24. Eisenberg & Schwab, Explaining Constitutional Tort Litigation, supra note 21, at 721-22. In fact, the study finds a decline in constitutional tort filings relative to other civil filings after the effective date of the Fees Act and finds that that decline cannot easily be explained by changes in the law. Id. at 780. But see Jeffrey S. Brand, The Second Front in the Fight for Civil Rights: The Supreme Court, Congress and Statutory Fees, 69 Tex. L. Rev. 291, 362-63 (1990) [hereinafter Brand, Statutory Fees] (stating that the passage of the Fees Act resulted in dramatic increases in the volume of civil rights litigation but that such litigation has decreased in response to Supreme Court decisions).
mation about that type of litigation. These indicators may not present an accurate picture. Eisenberg and Schwab's work suggests that constitutional tort litigation is nowhere near as burdensome or expensive as federal judges perceive it to be. As Eisenberg explains, during the 1970's and early 1980's, when concern about the volume of federal civil rights cases was enormous, civil rights filings were not an increasing portion of the federal docket.

On the other hand, data exist that seem to indicate civil rights litigation is exploding. Private employment discrimination claims, as measured by filings in all federal courts, have greatly increased from 344 in 1970 to 15,965 in 1994. Similarly, the number of prisoner claims filed has greatly increased—the vast majority being pro se—withstanding the low success rate of prisoner litigation. Eisenberg's most recent calculations show an increase in the numbers of general civil rights filings in the 1990's to over 35% of the federal docket in 1994. One could look at the numerical data and conclude

25. They suggest that "different stages in federal court litigation lead to different impressions of the volume and nature of federal litigation." An observer of published opinions at the appellate level would have a very different impression of the volume of non-prisoner constitutional tort litigation than would an observer at the district court level. Eisenberg & Schwab, Perceptions, supra note 21, at 504.

26. Id. at 510-30 (concluding that the number of appeals in constitutional tort cases approximated the number of appeals in tort cases; that constitutional tort litigation is not inherently more difficult than other types of litigation; that, on appeal, constitutional tort plaintiffs are less successful than other plaintiffs; that at the district level constitutional tort litigation fares worse than most other litigation in almost every respect). See also Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, 77 Geo. L.J. 1567, 1588 (1989) (finding a 37% success rate nationwide in civil rights cases during the years 1978-1985).


that private enforcement of federal civil rights legislation has never been better. Some might even conclude that civil rights legislation is too successful.

Although the numerical data and the empirical studies by Eisenberg and Schwab transcend purely theoretical predictions, and thus are immensely helpful in assessing the pulse of civil rights litigation, the numbers and tables only go so far. Another view of the landscape of civil rights litigation can be found in the practice experiences of the attorneys who, on a daily basis, litigate federal civil rights claims. While the perceptions and strategies of these lawyers do not yield numerical data about the cases in the legal system and their dispositions, they offer other critical information about the state of private enforcement of civil rights laws.

A. Methodology

The survey that I undertook seeks to answer questions about the viability of federal civil rights litigation by developing data that cannot be found in public records or judicial opinions. I utilized a case-study design consisting of interviews based on a questionnaire. Through a series of interviews with thirty-five practitioners in all types of federal civil rights practice, I sought to assess factors that affect the willingness of attorneys to undertake civil rights litigation and their ability to make a living at it. In all, I requested interviews with forty-five individuals, and thirty-five granted me an interview.

Most of the attorneys I interviewed practice law in the San Francisco Bay area. An active and diverse civil rights bar practices there. I selected participants through use of state bar association referrals, referrals from attorney participants, and lists of attorney panels. I did not know any of the attorneys that I interviewed. As it turned out, the attorneys represented a range of practice settings, including nonprofit and private firms, as well as solo practitioners, offices of moderate size and large firms with groups that do civil rights work. Some participants are highly successful monetarily and some are struggling to survive.

I created the questionnaire with the assistance of Professor Harvey Williams of the University of the Pacific Sociology Department.31 The questionnaire was fifteen pages long and consisted of both yes/no and open-ended questions and response sheets to be completed by the

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31. Professor Williams consulted with me. However, I had ultimate discretion as to the questionnaire's contents.
interview participants. It soon became clear, however, that participants were unwilling to spend the time filling out the sections of the instrument that required them to rate the strength of their response on a Likert scale, and thus, all data was gathered from the interview. Both plaintiff and defense lawyers were asked the same questions with minor changes in wording reflecting their differing litigation postures. The interviews lasted about an hour and in some instances several hours depending upon the interest of the respondent. Because the primary goal of the study was to assess the viability of civil rights litigation, most of the attorneys interviewed represent civil rights plaintiffs. A small number of defense attorneys were included to counterbalance the plaintiffs' attorneys' views about the effects of particular cases and as a means of understanding more fully the motives and strategies that shape civil rights litigation. Nonetheless, the information collected largely reflects the experiences of plaintiffs' lawyers.

In addition to California attorneys, I also interviewed attorneys in Idaho and Florida. Because the study deals with federal civil rights legislation and federal cases, I began with the assumption that attorneys practicing federal civil rights law should have similar experiences no matter where they practice. However, because states have different state civil rights legislation, the effects of certain Supreme Court decisions may be more pronounced in one state than another.

32. A Likert scale is a statement, made in either a positive or negative manner, followed by several categories of answers. The respondents are asked to check one category from among several that best represent their feelings or belief in the statement. James E. Veney & Arnold D. Kaluzny, Evaluation and Decision Making for Health Services 334 (2d ed. 1991).

33. For example, California state law still allows enhanced risk multipliers, which give courts the discretion to adjust attorneys fee awards upward or downward. Cal. Civ. Proc. Code § 1021.5 (West 1980 & Supp. 1996). Richard M. Pearl, California Attorney Fee Awards §§ 13.1, 13.2 (2d ed. 1994 & Supp. 1996). The California legislature amended the statute in 1993 to eliminate enhancement in suits by government entities against other government entities but left multipliers intact in other areas. Id. at § 13.3. Federal law, as described below, has greatly restricted the availability of such enhancements. See infra text accompanying notes 150-164. Thus, in areas covered by California legislation, such as employment discrimination, the lack of a multiplier on a federal level has little significance. Also, in many states, there is no state counterpart to section 1988 that expressly entitles plaintiffs in state constitutional litigation to recover their attorneys fees. John M. Baker, The Minnesota Constitution as a Sword: The Evolving Private Cause of Action, 20 WM. MITCHELL L. REV. 313, 334-35 (1994). As Baker points out, even if the state provides broader protection than is available under the United States Constitution, plaintiffs will be put to a tough choice if attorneys' fees are not provided. Id.; see also Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses 10.02, 10.04 (1993). Another option that may be available to plaintiffs in states without attorneys' fees statutes is to file a federal claim and a state claim in state court. State and federal courts have concurrent jurisdiction over § 1983 actions. Rodney A. Smolla,
The major limitations of the study include possible bias due to the interactivity of the interview format and small sample size. In an interview context, interactivity between the interviewer and respondent always creates potential bias problem.\textsuperscript{34} I used the questionnaire during the interview to try to protect against interactivity by ensuring that the same questions were asked in the same way. Further, the sample size is small, particularly when one considers the wide variety of practice areas of the attorneys interviewed. Thus, the conclusions drawn are not statistically significant.\textsuperscript{35}

The strength of the study method is that the interview format allows for in-depth information-gathering about each practitioner. From the interview format, one can glimpse the inner workings of civil rights practice and understand what factors attorneys consider as they decide whether to accept or reject cases and whether to advise settlement or trial. The interview format permits examination of the reasons certain decisions are made. This data is difficult to derive from other sources. Because the respondents were given the opportunity to respond to open-ended questions, their answers are varied and individualized. Nonetheless, certain themes emerge and, given the broad representation of practice areas and settings, the study produced a fairly well-rounded picture of civil rights practice in the 1990's. I consider this study to be an initial study in that, on the basis of my research, I reach some tentative conclusions that could be explored and verified in a future study.\textsuperscript{36}

\textbf{B. Content}

The questions elicited several types of information: background facts regarding the participant's length and range of practice experience; perception of demand by potential clients for representation and

\begin{footnotes}
34. VENEY \& KALUZNY, supra note 32, at 120.
35. The size of the population being surveyed is undetermined. Given the oral format of the study, with each participant interviewed for approximately one hour, it would be extraordinarily time consuming to gain a sample of the population large enough to obtain statistically significant information. In addition, responses to the questions differed enough within different subspecialties of civil rights law, at least as to some issues, that one would need to survey groups within each specialty separately to obtain a truly significant response. \textit{See generally} EARL BABBIE, SURVEY RESEARCH METHODS (2d ed. 1990).
36. VENEY \& KALUZNY, supra note 32, at 119 (describing case study method and stating that a case study can serve as a good source of initial information that may prove sufficient for decision-making or may provide the basis for further study through a monitoring system or survey research).
\end{footnotes}
assessment of likelihood that potential clients with claims appearing meritorious would obtain representation by counsel; effects of Supreme Court cases affecting fee awards and settlement on respondent's practice and perception of effect of such cases on practitioners generally; methods by which practitioners have adapted to decisions that have affected their practice; and other factors that would influence the respondent's willingness to represent a civil rights litigant.\(^{37}\)

The names of the participants in the study are confidential. Their responses are cited by reference to an interview number assigned to the file.

### III. The Effects of Supreme Court Decisions Regarding Attorneys' Fees and Damages on Federal Civil Rights Practice

This section contains the information that study participants provided regarding the effects of particular Supreme Court rulings on their practices. I begin with a general background section explaining the role of attorneys' fees in federal civil rights litigation. The discussion then turns to the specific rulings that were the subject of the study. First, I provide a description of the Court's decision, and discuss how it was predicted to affect civil rights practice. Then, I summarize the participants' responses.

The basic premise underlying this study is that, in most instances, attorney compensation drives decisions about what cases will be taken and what cases will not be pursued.\(^{38}\) Although many attorneys do pro bono work, attorneys who want to practice civil rights law must be

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37. I specifically enumerated some other factors, such as the difficulty of establishing a prima facie case due to substantive law, low damages, or unsympathetic juries. I also allowed the participants to volunteer others I had not mentioned.

38. The validity of this premise is subject to debate, but I believe it is generally true. Congress agreed when it enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994). Numerous commentators have expressed the view that the availability of attorneys' fees is equally as important as the substantive law. Brand, Statutory Fees, supra note 24, at 296 (1990) ("The value of statutes and case law protecting substantive civil rights is only as great as the plaintiffs' ability to secure competent counsel."); Ray Terry, Eliminating the Plaintiffs' Attorney in Equal Employment Litigation: A Shakespearean Tragedy, 5 THE LAB. LAW. 63, 63 (1989) ("The single most significant development in equal employment law has been the erosion of the ground from under plaintiffs' counsel, particularly in the area of a prevailing plaintiff's recovery of attorneys' fees.") See also Wasby, supra note 19, at 55, 96-97 (noting that after enactment of the Attorney's Fees Awards Act of 1976, "attorneys' fees as a proportion of litigating groups' budgets increased and recouping the experience of firms that have had to reject potentially good cases ... because of the economy and because the courts have not lived up to expectations in implementing the Civil Rights Fee Act"). Certainly we assume that lawyers handling non-civil rights
able to earn a living. Thus, attorney compensation issues are central to gaining an understanding of how private enforcement works in addressing the problems that civil rights legislation was meant to tackle.

When Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, the intent of the legislation was to encourage private attorneys to undertake representation of civil rights plaintiffs, and Congress thought that attorneys' fees would provide the needed incentive. This legislative modification of the "American Rule" cases act on the basis of fees and potential fees, and it does not seem unrealistic to assume the same about civil rights lawyers.

Those who disagree with the premise might do so on the basis that it is difficult to predict or even measure the effect of rules on behavior. See Herbert M. Kritzer et al., The Impact of Fee Arrangement on Lawyer Effort, 19 Law & Soc'y Rev. 251, 253-55 (1985). Alternatively, one might argue that it is possible to verify the effect of the Fees Act and that the Fees Act has not led to an increase in claims. In their 1987 and 1988 studies, Eisenberg and Schwab did not find evidence that "fee awards in civil rights cases are higher or more common than in non-civil rights cases." Eisenberg and Schwab, Reality of Constitutional Tort Litigation, supra note 21, at 688-89 (1987); Eisenberg & Schwab, Explaining Constitutional Tort Litigation, supra note 21, at 755-61 (1988).


40. S. Rep. No. 1011, 94th Cong., 2d sess. 1 at 6 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5909. ("It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be non-pecuniary in nature. . . . These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys"); H.R. Rep. No. 1558, 94th Cong. 2d Sess. 3 at 9 (1976) reprinted in Source Book at 209, 217 ("The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys. The effect of H.R. 15460 will be to promote the enforcement of the federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens.")

41. The "American Rule" requires litigants to bear their own costs. The rule was stated in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). Prior to the passage of the Fees Act of 1976, American courts had fashioned several ways that poor plaintiffs with meritorious cases could bypass the American Rule and recover their attorney's fees. These included the "common fund" theory, which permitted the award of fees to a litigant who successfully preserved or recovered a common fund for a class of citizens; the "bad faith" exception, which allowed courts to levy a fine of the opposing party's attorney's fees on a party who had proceeded in bad faith either prior to or during litigation; and the private attorney general theory, which shifted liability for the plaintiff's attorney's fees to the defendant when the plaintiff succeeded in conferring a benefit upon the class. Margaret Annabel de Lisser, Comment, Giving Substance to the Bad Faith Exception to Evans v. Jeff D.: A Reconciliation of Evans with the Civil Rights Attorney's Fees Awards Act of 1976, 136 U. PA. L. REV. 553, 555-56 (1987).
made attorneys' fees available to prevailing plaintiffs who brought suit under a number of civil rights statutes, including 42 U.S.C. section 1983, which dates from the Reconstruction era, and more modern legislation, such as Title VI of the Civil Rights Act of 1964. Other modern civil rights legislation, such as the Voting Rights Act of 1965, Title VII, and the Americans with Disabilities Act, specifically authorizes attorneys' fees awards under provisions contained in those statutes. While the Reconstruction era civil rights statutes differ greatly from modern civil rights statutes, the economic viability of litigation under these statutes coalesces to the extent that suits under both types of statutes are financed by awards of attorneys' fees paid by losing defendants. In addition, the case law interpreting the Attorney's Fees Awards Act has been applied to the other statutory fee-shifting provisions.

Over the years, since Congress enacted the Attorney's Fees Awards Act, the Supreme Court has decided many cases dealing with

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The Civil Rights Attorney's Fees Awards Act was enacted in response to the Supreme Court decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), which held that the federal courts required specific statutory authority if they were to continue their prior practice of awarding attorneys' fees using a private attorney general theory for cases brought under federal civil rights statutes.

42. The Civil Rights Attorney's Fees Awards Act states that a prevailing "party" may be awarded fees. However, the Supreme Court has interpreted the Act to mean that prevailing plaintiffs should ordinarily be granted fees and prevailing defendants should ordinarily not receive fees. See Christiansberg Garment Co. v. EEOC, 434 U.S. 412, 416-19 (1978).

47. 42 U.S.C. § 12205 (1994). The Americans with Disabilities Act fee provision differs from the Attorney's Fees Awards Act in that it permits recovery of litigation expenses and costs by the prevailing party.
48. The Reconstruction era statutes are extremely broad in language and lack much detail. The Supreme Court has interpreted the language of the statutes, in light of their legislative history and policy, so as to make them usable by modern litigants. See, e.g., Jones v. Mayer Co., 392 U.S. 409, 413 (1968) (concluding 42 U.S.C. § 1982 extends to discrimination against African-Americans by private property owners as well as by public authorities). The modern legislation is far more detailed in every respect, including detailed enforcement mechanisms and administrative remedial schemes. See, e.g., The Fair Housing Act, 42 U.S.C. § 3601 (1994).
49. Brand, Statutory Fees, supra note 24, at 305-06 (1990). Professor Brand notes that following the decision in Alyeska, Congress enacted many fee-shifting statutes. The Fees Act of 1976 was the most important of these statutes because Congress passed it in direct response to Alyeska, with an extensive legislative history. In addition, it applies to a broad swath of cases and has been the subject of most of the Supreme Court cases interpreting federal fee-shifting statutes.
attorneys' fees in civil rights cases, and in recent years, the Court has increased the number of cases it hears dealing with fees, rendering decisions on discrete issues.\textsuperscript{50} Although the Court has furthered fee awards in unanimous or nearly unanimous opinions in some instances,\textsuperscript{51} other decisions reveal deep divisions between the justices and have resulted in majority rulings that seem at odds with Congress' intent to encourage attorneys to take civil rights cases.\textsuperscript{52} The decisions discussed in this Article\textsuperscript{53} are those that seemingly jeopardize the availability of attorneys' fees in federal civil rights actions. Scholars and commentators have predicted that such cases would bring civil rights litigation to a grinding halt.\textsuperscript{54} Among the civil rights practitioners I interviewed, these cases are widely, almost universally, recognized.\textsuperscript{55} Knowing in theory the impact these decisions would have, I designed a study to evaluate whether they have affected the willingness and ability of attorneys to undertake federal civil rights litigation. Rules on damages and the relationship between the relief a plaintiff receives and an award of statutory attorney's fees are the other areas of law that directly influence attorney compensation in federal civil rights actions. The relief a plaintiff will obtain in any given civil rights action depends on any statutory limitations on remedies\textsuperscript{56} and

\textsuperscript{50} Thomas D. Rowe, Jr., \textit{The Supreme Court on Attorney Fee Awards, 1985 and 1986 Terms: Economics, Ethics and Ex Ante Analysis}, 1 Geo. J. Legal Ethics 621, 621, 632-36 (1988) (noting the increase in attorneys' fees cases on the Court's docket and arguing that the Court's decisions during the 1985 and 1986 terms lacked economic sophistication and that the Court could benefit from a more sophisticated economic analysis of the effects of its fee-shifting decisions); see also Brand, \textit{Statutory Fees}, supra note 24, at 316 (a "well-defined body of case law" exists).

\textsuperscript{51} Brand, \textit{Statutory Fees}, supra note 24, at 340 (concluding, for example, that there is unanimity that a party who prevails on a significant issue in the litigation may attain prevailing party status and near-unanimity that counsel must be compensated for work performed in mandatory administrative proceedings).

\textsuperscript{52} Brand, \textit{Statutory Fees}, supra note 24, at 343-44; Rowe, supra note 50, at 637-39; Marjorie A. Silver, \textit{Evening the Odds: The Case for Attorney's Fee Awards for Administrative Resolution of Title VI and Title VII Disputes}, 67 N.C. L. Rev. 379, 381 (1989) (criticizing the Supreme Court's denial of fees in a case involving a successful administrative challenge under Title VI and arguing its inconsistency with the goals of civil rights legislation); Greenhouse, \textit{A Changed Court Revises Rules on Civil Rights}, N.Y. Times, June 18, 1989, § 4 at 1 col. 1 (concluding that recent Supreme Court decisions make discrimination cases harder to bring and to win, and more vulnerable to attack).

\textsuperscript{53} While conceivably other decisions could have been included, I derived my list from research and from a pre-interviewing process in which I elicited feedback from practitioners to help me formulate the questions I would include.

\textsuperscript{54} See infra text accompanying notes 78-78; 134-137; & 162-164.

\textsuperscript{55} See infra text accompanying notes 82-126; 138-149; 165-191; & 207-226.

\textsuperscript{56} The modern civil rights statutes are much more specific regarding remedies than the Reconstruction era statutes. For example, Title VII provides that "[i]f the court finds
on Supreme Court decisions that interpret how damages will be calculated in civil rights actions. Where the remedy sought and received is damages, the Court has said that statutory awards of fees need not be proportional to the damages a plaintiff obtains. A recent decision suggests the Court may retreat from that rule in the future, thereby diminishing the incentives for attorneys to take cases where damages are low. The damages rules also greatly influence the settlement value of cases. Because Supreme Court decisions provide a strong incentive to settle cases (and in fact settlement is a common resolution of civil rights actions), I have sought to understand how the damages rules affect settlement, as well as how they may ultimately affect court-ordered fees.

A. Waivers of Attorneys’ Fees in Settlement

The first case I asked practitioners about was Evans v. Jeff D. In Jeff D., the Supreme Court held that waivers of attorneys’ fees in

that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.” 42 U.S.C. § 2000e-5(g). Based on this language, Title VII had always been construed to preclude compensatory and punitive damages. Smolla, supra note 33, at § 9.10 [1]. The Civil Rights Act of 1991 permits compensatory and punitive damages in cases of intentional discrimination. See infra note 135.

57. The Supreme Court has held that the purpose of damages awards under § 1983 is to compensate for actual injuries, not abstract harm. Stachura, 477 U.S. at 307. However, actual injury includes emotional distress and humiliation if these result from the violation. Carey, 435 U.S. at 254. Stachura has been applied in a Fair Housing Act case. Baumgardner v. HUD, 960 F.2d 572, 581-83 (6th Cir. 1992).


60. Eisenberg & Schwab’s research indicates that non-prisoner constitutional tort actions settled at a 45% rate in the three districts they studied, although prisoner constitutional tort actions settled at a 17% rate. The control group cases settled at a 73% rate. Eisenberg, Civil Rights Legislation, supra note 27, at 538-39. Employment attorneys view settlement as a likely outcome, particularly in lawsuits against certain types of defendants. Interviews 1, 2, 3, & 24. Available data suggest their perceptions are accurate. Professor Michael Selmi has examined the statistics and concluded that the settlement rate in cases filed by the private bar is 60-65%. Michael Selmi, The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law, 57 Ohio St. L.J. 1, 14 (1996). Other studies report the range may vary between 35-80%, depending on which cases are studied. See, e.g., Peter Siegelman & John J. Donohue III, The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis, 24 J. LEG. STUD. 427, 450 (1995) (61.3%-84.6% depending on the time the case was filed).

connection with settlement negotiations between a civil rights plaintiff and a defendant were not inconsistent with the Civil Rights Attorney's Fees Awards Act of 1976. In the case, the attorney for a plaintiff class of disabled children was asked one week before trial to waive statutory attorneys' fees as part of a settlement negotiation in which the class was granted virtually all of the injunctive relief that they requested in their complaint. Because the settlement was so favorable to his clients, the attorney agreed, but then asked the district court to award fees despite the settlement. The court refused, and Idaho Legal Aid appealed to the Ninth Circuit. The Ninth Circuit reversed the lower court and announced a per se rule prohibiting the simultaneous negotiation of the merits and fees in a civil rights action. The Ninth Circuit believed that, except in unusual circumstances, the parties should first agree to relief on the merits and then discuss the issue of fees. The Ninth Circuit stated that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court.

Meanwhile, other federal Courts of Appeal were split on the issue. The Third Circuit, for example, had prohibited simultaneous negotiation of merits and fees because it feared that attorneys would be enticed into recommending that clients accept an inadequate settlement offer accompanied by a high fee award. The D.C. Circuit, in contrast, believed that a plaintiff should have the option of voluntarily relinquishing attorneys' fees in return for a favorable settlement offer. The D.C. Circuit believed, however, that the district court should be required to approve or deny the use of any fee waiver and state the reasons for its decision.

Ultimately, the Supreme Court in Jeff D. accepted the rationale that fee waivers would ultimately promote settlements, thereby assist-
ing civil rights enforcement, and concluded that the Fees Act does not preclude settlements conditioned on waivers of attorneys' fees. Acknowledging that Rule 23(e) requires court approval of the terms of any settlement of a class action, the Court held that the district court did not abuse its discretion in upholding a fee waiver which secured broad injunctive relief for the plaintiffs. Justice Brennan, dissenting in Jeff D., predicted that the decision would jeopardize the willingness of attorneys to undertake civil rights litigation. Unlike the majority, who perceived no conflict between an attorney and a client confronted with a settlement offer containing a request for a waiver of fees, Brennan urged state and local bar associations to declare the practice unethical.

Commentators echoed the concerns of Justice Brennan, predicting that requests for waivers of fees would become common and lead to the demise of civil rights litigation. Practitioners in the public interest area perceived an immediate threat and viewed Jeff D. as "an

73. Jeff D., 475 U.S. at 738 n.30.
74. Id. at 738-39, 742-43.
75. Id. at 755-59.
76. The majority reasoned that attorneys owe an undivided loyalty to their clients, and that, accordingly, they would have an ethical obligation to recommend a settlement favorable to the client even if it contained a fee waiver. Id. at 727-28 & 728 n.14.
77. Id. at 765.

Later articles by prominent writers in the area of attorneys' fees continue to view Jeff D. as a case of extraordinary significance. Charles Silver contends that the case marked the Supreme Court's official rejection of a restitutionary theory, which would justify a fee award to the attorney on the basis that allowing class relief without payment of fees constitutes unjust enrichment. The Court also rejected the central premise of an economic theory which posits that lawyers respond to the incentives of attorneys' fees. Silver goes on to say that in order to reach its decision in Jeff D., the Court had to reject the central premise of the economic theory: that lawyers respond to incentives. Charles Silver, A Restitutionary Theory of Attorneys' Fees in Class Actions, 76 CORNELL L. REV. 656, 666-61 (1991); Brand, Statutory Fees, supra note 24, at 326-29 (Jeff D. and Marek v. Chesny, 473 U.S. 1 (1985), have generated the most controversy of any of the Supreme Court's attorneys' fees decisions).
ominous cloud on the court-awarded attorney fee horizon. In some states, bar associations sought, without success, to make simultaneous negotiation of fees and merits unethical. The Civil Rights Act of 1990, vetoed by President Bush, included a provision which would have overruled Jeff D. in Title VII actions.

I asked plaintiff practitioners whether they had received requests for partial or complete fee waivers, and what strategies, if any, they had developed to blunt the possibility that such requests would result in non-payment or very low payment of their fees. I asked defense


80. In California, for example, public interest attorneys, supported by many local bar associations and by the California State Bar itself, forwarded to the California Supreme Court for approval a proposed rule that prohibited settlement offers conditioned on opposing counsel waiving all or substantially all fees. That proposed rule was rejected by the California Supreme Court without explanation. Elsesser, supra note 79, at 951-53. In 1987, the Ethics Committee of the Association of the Bar 11 of New York City reconsidered a 1981 opinion in which it had determined that it was unethical for defense counsel to propose a settlement agreement conditioned on waivers of attorneys' fees in actions brought under statutes designed to encourage the enforcement of civil rights. After Jeff D., the committee stressed that it did not sanction the conduct it previously believed unethical, but concluded that there was no binding ethical authority forbidding defense counsel from asking for fee waivers. Op. 1987-4 of the Comm. on Prof. and Jud. Ethics of the N.Y. City Bar Ass'n, N.Y.L.J., May 22, 1987, at 6.

81. The Civil Rights Act of 1990 was introduced as Senate Bill 2104 on February 7, 1990 by Senator Edward Kennedy. 136 CONG. REC. S1018 (1990). The provision relating to waivers of attorneys' fees would have required "that courts entering consent decrees settling job discrimination cases must first obtain from the parties and their counsel an attestation that a waiver of attorneys' fees was not compelled as a condition of settlement." Id. at S1021. Jeff D. would have been addressed only in the context of Title VII actions. The need to address Jeff D. was also addressed in hearings before the Education and Labor Committee prior to passage of the Civil Rights Act of 1991. The Committee heard a letter from the Philadelphia Community Legal Services, which stated, "[m]ore and more, defendants in civil rights cases purposely pit plaintiffs against their lawyer. . . . The loss per case may be only a few hundred or a few thousand dollars, but over the course of time it represents a substantial drain of our extremely limited resources." Although the committee found that Jeff D. would discourage plaintiffs' attorneys from taking Title VII cases, the provision to address it was not enacted into law when the Civil Rights Act of 1991 passed. See H.R. Rep. No. 40(I), 102nd Congress, 1st Sess. 84 (1991), reprinted in Act of Oct. 30, 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat.) 549, 621-22. The Committee also recommended overruling Marek v. Chesny, but this proposal likewise did not pass. Id. at 620. See infra text accompanying notes 127-149.
practitioners whether they requested fee waivers, and whether the *Jeff D.* decision influenced their settlement strategy.

In response to questions regarding the effects of the Supreme Court’s decision in *Jeff D.*, and methods developed by attorneys to reduce the risk of non-payment by reason of a waiver, a majority reported that requests for fee waivers were not much of a problem in their practice. After *Jeff D.*, attorneys very quickly developed fee agreements with clients which offer some protection from waivers in the form of financial disincentives. In addition to providing for attorney payment on a contingent fee basis, some agreements provide that if fees are waived in a settlement, the client must pay at the lodestar rate for all the hours the attorney expended, or at 75% of lodestar. Attorneys also discourage fee waivers by exercising caution in client selection and by educating clients about the importance of fees in a civil rights practice to prepare clients in the event of a settlement offer contingent on a waiver.

Despite the absence of many requests for complete fee waivers, some plaintiffs’ attorneys reported being asked to waive fees and a few had done so. Many more think about the possibility even though they do not confront it routinely. In addition, the attorneys reported that, even when waivers are not requested, the Court’s *Jeff D.* decision has influenced settlement behavior. Specifically, the decision has affected the leverage each party brings into negotiations, and, in the process, has led parties to evaluate and negotiate civil rights actions as they would personal injury actions in many instances. The problem with this assimilation is that, because civil rights claims differ from

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82. Interviews f-6, 8-20, 22 & 24-27. As I explained *infra*, *Jeff D.*, has had an impact on civil rights practice, but it is not the same impact that commentators expected.

83. The Supreme Court has held that neither contingent fee agreements nor payment of a contingent fee in excess of a statutory award of fees is inconsistent with the Fees Act. *Venegas v. Mitchell*, 495 U.S. 82, 88-90 (1990). The Court stated that “Section 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer... Section 1988 itself does not interfere with the enforceability of a contingent fee contract.” *Id.* at 90. *See also* *Blanchard v. Bergeron*, 489 U.S. 87, 95-96 (1989) (holding that the existence of a contingency agreement does not limit what may be awarded a prevailing party by the court).

84. The lodestar approach calculates the fee for each attorney and billable legal worker by multiplying each person’s “reasonable” hours by each person’s “reasonable” rate. The “reasonable” rate is based on the court’s determination of the market rate for attorneys or legal workers in the relevant community with comparable experience and skill. *Blum v. Stenson*, 465 U.S. 886, 888, 895 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983).
personal injury claims in significant respects, some categories of civil rights actions simply do not attract legal representation.\textsuperscript{85}

Turning first to the instances in which waivers have been requested, a number of attorneys noted that on rare occasions they have been asked to waive fees completely. Usually they flatly refused.\textsuperscript{86} Participants in the study who had experienced requests for fee waivers reported that such requests do not tend to come from many entity defendants, such as the federal and state governments.\textsuperscript{87} Such entities either have a policy against asking for total waivers,\textsuperscript{88} or are represented by attorneys who view such requests as unethical despite the Supreme Court's statements in \textit{Jeff D.} to the contrary. Some plaintiffs' counsel said that requests for waivers are more likely to come from private defense counsel or counsel representing local public entities.\textsuperscript{89} The perception was that these attorneys often must answer to clients who are unaccustomed to paying attorneys' fees awards.

Several attorneys reported waiving fees entirely to settle a case.\textsuperscript{90} The instances in which the waivers occurred tended to involve financially desperate clients or cases in which the attorney perceived the chances of prevailing on the merits as no better than moderate.\textsuperscript{91} In one instance, a legal services attorney was litigating a claim in an area where the law had not been fully developed, and thus, the settlement offered his client was too attractive to refuse.\textsuperscript{92}

Although attorneys in non-profit organizations seldom place a high priority on obtaining attorneys' fees, they are more vulnerable to requests for waivers than for-profit attorneys.\textsuperscript{93} It is difficult for non-profit attorneys to protect themselves against requests for fee waivers through contingency or other fee agreements because these agree-

\begin{itemize}
\item\textsuperscript{85} See infra text accompanying notes 192-226.
\item\textsuperscript{86} In \textit{Jeff D.}, the Supreme Court made clear that the decision whether to waive fees belongs to the client. \textit{Jeff D.}, 475 U.S. at 728 n.14. While many attorneys I spoke to recognized this and emphasized that the choice remained with the client, several individuals indicated they routinely informed the defendant they would not discuss settlement unless fees were included. Interviews 4, 8 & 22.
\item\textsuperscript{87} Interviews 2, 11, 12 (stating that entity policies differ), 20 (stressing that although the state attorney general's office does not seek waivers, it is very aggressive in negotiating the amount of fees paid) & 29.
\item\textsuperscript{88} Elesser, \textit{supra} note 79, at 952 (noting that by 1987, the California Attorney General's office had already adopted internal attorney fee settlement guidelines that, as a rule, eliminated the practice of seeking fee waivers from litigants against the state).
\item\textsuperscript{89} Interviews 5, 12 & 18.
\item\textsuperscript{90} Interviews 11, 17 & 20.
\item\textsuperscript{91} Interviews 3, 12 & 31.
\item\textsuperscript{92} Interview 11.
\item\textsuperscript{93} Interviews 1, 12 & 29.
\end{itemize}
ments may imperil their tax-exempt status. Although some nonprofit attorneys utilize very limited contingency agreements and still apparently maintain tax-exempt status, one attorney acknowledged the organization had no agreement with clients and no protection from waiver requests and others acknowledged that their type of organization had typically paid little attention to attorneys' fees at all.

Whether or not a fee agreement is signed, attorneys who perceive their clients as vulnerable to requests for waivers place heavy emphasis on client selection and education. Whether the client is committed to the case in principle is a factor they strongly consider. Often, clients are educated regarding the necessity of attorneys' fees from the start of the litigation and sign an acknowledgment that the litigation would be impossible without fees.

In my sample, attorneys practicing civil rights law outside the context of non-profit organizations seem to have felt the effect of Jeff D. largely in terms of a shift in negotiation and settlement strategy. Before Jeff D., attorneys could, and did, demand bifurcated negotia-

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94. Interviews 20 & 29. Under the Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996-29961 (1994), recipients of grants from the Legal Services Corporation are not permitted to compete with private attorneys. Legal Services attorneys are authorized to represent clients in a fee generating case when other adequate representation is unavailable. See 45 C.F.R. §§ 1609.1, 1609.2, 1609.3, 1609.4. Legal Services Corporation's General Counsel Office has interpreted 45 C.F.R. § 1609.5 to allow legal service programs to retain monies as fees only when fees are awarded in addition to compensatory relief. See Stephen Yelenosky and Charles Silver, A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney Fee Provisions, 28 CLEARINGHOUSE REVIEW 114, 118-19 (1994). Under the 1996 amendments to the Legal Services Corporation Act, programs are precluded from representing clients under federal or state fee-shifting statutes, thus substantially reducing the amount of fees that legal services programs can retain. See infra note 193. Attorneys in non-profit organizations not receiving Legal Services Corporation funding previously were not permitted to receive fees directly from clients for services rendered. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 158 (6th ed., 1992). In 1992, the Internal Revenue Service changed the tax-exempt status of public interest law firms. Rev. Proc. 92-59, 1992-2 C.B. 411, 411-12. However, public interest law firms may not consider the likelihood or probability of a fee, whether court awarded or client-paid, in selecting cases. Id. 92-59 § 4 (03) at 412. Once representation has begun, the public interest firm cannot withdraw because of a litigant's inability to pay. Id. 92-59 § 5 (02) at 412. The combination of these limitations makes non-profit law firms less able to protect themselves from waivers than private attorneys. For a review of the 1992 changes affecting public interest law firms, see New Decisions: Public Interest Law Firms May Accept Fees From Clients For Legal Services, 78 J. TAX'N 57, 57 (1993).

95. Interviews 11 & 12.
96. Interview 17.
97. Interviews 11 & 27.
98. Interview 1.
100. Interviews 2, 6, 13, 17, 20, 21 & 29.
tion of fees and merits, on the ground that to combine them would place the plaintiff's attorney in an ethical dilemma. When the Supreme Court rejected that contention in Jeff D., defense attorneys began to offer lump sums routinely, and, as is true in the personal injury context, division of the lump sum was left to the discretion of lawyer and client. Many times, division of the lump sum on a contingency basis in a civil rights action is the equivalent of a partial waiver of fees, because the attorney is paid an amount much lower than the number of hours expended on the case.

Some plaintiffs' attorneys stated that they have requested bifurcated negotiation of fees and merits since Jeff D., but these requests are usually refused. The defense attorneys interviewed concurred that they would make lump sum offers, and would not agree to bifurcate negotiation of fees and merits. By offering a lump sum high enough to be attractive to the plaintiff, defense attorneys can proceed without worrying about how much of the recovery ultimately goes to the plaintiff's attorney. In contrast, several class action attorneys report that they have bifurcated negotiation of fees and merits because the settlement must be approved by the court, and both sides know that they have a better chance convincing the court that a settlement is equitable if fees and merits have been discussed separately.

101. The contention was that the attorney might be tempted to trade off the client's recovery in exchange for a greater fee award. See, e.g., Robert H. Pate III, Comment, Evans v. Jeff D. and the Proper Scope of State Ethics Decisions, 73 VA. L. REV. 783, 784-87 (1987); Steven M. Goldstein, Settlement Offers Contingent Upon Waiver of Attorney Fees: A Continuing Dilemma After Evans v. Jeff D., 20 CLEARINGHOUSE REV. 693, 694 (1986) (arguing that Jeff D. creates at least two situations in which plaintiff counsel's financial interest may conflict with the interest of the client); see supra notes 74-75.


103. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES, CASES AND MATERIALS 884 (2d ed. 1994).

104. Interviews 13 & 15. But see interview 11 (state will honor requests for non-simultaneous negotiation).

105. Interviews 30-32.

106. Interviews 30 & 32.

107. Interview 32.

108. Interviews 1 & 19. Two circuits tried to require that an attorney for the class negotiate the class recovery, obtain court approval, and then negotiate attorneys' fees. Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980) (class members appealed District Court approval of a desegregation settlement plan that closed three schools. Although the Ninth Circuit affirmed the lower court, the Ninth Circuit noted that "while we strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations . . . we do not believe rejection of a resulting settlement in every case is appropriate") (citation omitted); Prandini v. National Tea Co., 557 F.2d 1015, 1017 (3d Cir. 1977) (holding that courts should insist upon settlement of the damage aspect separately from award of statutorily authorized attorney's fees). While this
Piecing together the comments of plaintiffs’ attorneys, there was sentiment that the pre-Jeff D. practice of bifurcating fees and merits gave them a better hope of being paid an amount approximating the hours expended than did a lump sum offer.109 Some noted that despite the Supreme Court’s ruling that lump sum offers do not place attorneys in conflict with their clients, they perceive an ethical conflict.110 Although one attorney had a client who deliberately plotted to deprive him of any payment for his services,111 in most cases, clients settle for the usual reasons: settlement seems a good option considering factors such as the risk of losing, the cost of trial, and the need for money at the time the offer is made. Plaintiffs’ attorneys stressed that while taking part of the settlement proceeds on a contingency basis works in the personal injury context, it is much less likely to lead to a reasonable fee in civil rights cases, where the damages are often lower.112

A number of plaintiffs’ attorneys noted that in the event that a low but feasible settlement offer were made and the client was inclined to accept, they would cut their fees below the amounts stipulated in their retainer agreements to enhance the client’s recovery.113 One attorney explained that for years he had accepted reduced fees in some cases, assuming it would eventually even out.114 Several attorneys who routinely took less than the amount to which they would be entitled in their fee agreement expressed doubts about how long they would be able to continue to litigate for poor clients in low damages cases.115

The Supreme Court’s opinion in Jeff D. justifies requests for fee waivers on the ground that civil rights plaintiffs will benefit by settling greater numbers of civil rights actions.116 This study did not measure whether settlements do in fact occur more frequently now than before

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110. Interviews 15, 16 & 18.
111. Interview 15.
112. Interviews 13 & 25.
114. Interview 14.
It appears that in cases where settlement offers are made, defendants enter the arena with newfound leverage. Given low damages and high litigation costs, plaintiffs’ attorneys often recognize that it is in the best interests of their clients, and indeed themselves, to accept settlements that result in the attorney making an amount much less than his or her hourly rate.\textsuperscript{118}

Despite the apparent incentives to defense counsel to settle claims, in certain practice areas, Jeff D. seems not to have spurred plaintiffs’ or defense attorneys to settle. In the police misconduct area, for example, some plaintiffs’ counsel claim that they have not received reasonable settlement offers until right before trial, if at all.\textsuperscript{119} A number of plaintiffs’ attorneys perceive certain public entity defendants as being unwilling to settle cases under any circumstances.\textsuperscript{120} Plaintiffs’ attorneys offer a host of explanations for this behavior. Private defense counsel, they say, have a personal interest in prolonging litigation because their billable hours increase. They are working for clients who expect to pay by the hour and to spend a lot of money on fees. Attorneys who are directly employed by public entities are said to be enmeshed in hierarchical bureaucracies where political issues predominate, and business sense and honest legal appraisal fall short. The defense attorneys interviewed confirmed that settlements with certain public entities are extremely hard to achieve, although they differ somewhat as to the reasons for this difficulty. A city attorney acknowledged that institutional clients often have a huge amount invested in maintaining an institutional structure intact.\textsuperscript{121} For some of these clients, settlements may be tantamount to political suicide. The defense attorneys interviewed likewise concurred with plaintiffs’ attorneys that some entities are so hierarchical that achieving settlements is difficult and extremely time-consuming.\textsuperscript{122} Unlike plaintiffs’ attorneys, however, the defense attorneys interviewed also cited concerns such as discouraging non-meritorious

\textsuperscript{117} See supra note 58 for data regarding settlement rates generally.

\textsuperscript{118} Cases for low-wage earners are frequently as complex as cases for high-wage earners. Thus, when representing low-wage earners, an attorney can easily put in more hours than the case is ultimately worth. When a low settlement offer is made, the client, who is frequently strapped for cash, may consider the offer attractive. Unless the case is a sure winner, the attorney may also view the settlement as a way of cutting the risk of loss, and complete non-compensation, at trial. These factors make it impossible for a sensible employment lawyer to represent low-wage earners. Interview 13. See also interviews 3 & 21.

\textsuperscript{119} Interviews 15 & 18.

\textsuperscript{120} Interviews 3, 8, 10, 12, 14 & 20.

\textsuperscript{121} Interview 30.

\textsuperscript{122} Interviews 31 & 32.
litigation or the need for caution when recommending the expenditure of tax money, as reasons for failing to settle cases.\textsuperscript{123}

Although the plaintiffs' attorneys found attorneys for private defendants to be much more willing to negotiate than those representing public entities, they still noted a reluctance to settle that seemed to hurt, rather than further, the defendants' best interests.\textsuperscript{124} One plaintiffs' attorney practicing employment law stated that sometimes defendants seem to expect lawsuits no matter what they do and consider them so much a cost of doing business that they do not even try to distinguish a factually meritorious claim from a non-meritorious claim until shortly before trial, when attorneys' fees and costs are astronomical on each side.\textsuperscript{125} The defense attorneys interviewed tell similar stories, featuring plaintiffs with unrealistic demands who refuse to talk seriously or think creatively.\textsuperscript{126} Both sides were careful not to over-generalize or to stereotype, so the instances of complete refusal to compromise should not be overemphasized. Nonetheless, the experiences of practitioners referred to above reveal that despite the settlement incentives the Court sought to give defendants in \textit{Jeff D.}, the dynamics of the process at times remain completely untouched by the decision.

Thus, my conclusion regarding the effect of \textit{Jeff D.} is that fee waivers remain a concern, if not a frequent reality, for non-profit organizations and that the major impact of the decision is felt largely in the settlement context. Although the ability to make a lump sum offer makes settlement unquestionably more attractive to defendants than continuing to litigate, civil rights claims are now treated as the equivalent of torts in the settlement process. Because of fundamental differences between many civil rights claims and torts, however, some potentially meritorious civil rights violations will not be as attractive to lawyers as tort actions.

\textsuperscript{123} Interviews 30 & 32.
\textsuperscript{124} Interviews 13 (tough defense stance sometimes injures client), 18 (private counsel string out litigation just to inflate own fees), 20 (despite greater sense of rationality in private counsel, churning and protracted litigation exists) & 30 (counsel are beneficiaries of protracted litigation because fees increase).
\textsuperscript{125} Interview 13.
\textsuperscript{126} Interviews 30 (plaintiffs with inflated expectations who refused to listen their attorneys), 31 (plaintiffs with inflated expectations) & 32 (plaintiffs bar unreasonable).
B. Civil Rights Attorneys' Fees and Rule 68

Marek v. Chesny^{127} is another case that, when decided, promised to have a potentially large impact on civil rights practice. In Marek, the Supreme Court held that a plaintiff who refuses a Rule 68 pretrial settlement offer that is greater than the final judgment obtained after trial will be denied all post-offer costs, including attorneys' fees under fee-shifting statutes.^{128} Whereas in many types of litigation "costs" do not include attorneys' fees, the Court in Marek construed the Attorney's Fees Awards Act to include attorneys' fees as part of costs.^{129} Although the case applied specifically to fee awards under the Fees Act, the reasoning has been applied by implication to numerous other fee-shifting statutes that authorize attorneys' fee awards as an element of costs.^{130}

The Supreme Court's opinion in Marek expressed the view that civil rights plaintiffs would benefit from the decision because defendants would have an extra incentive to settle: the possibility of capping plaintiffs' attorneys' fee claim as of the time a Rule 68 offer was rejected.^{131} Of course, this cap occurs only in the event that the plaintiff fails to recover an amount more than the amount of the offer, and in calculating the amount of the offer, courts include attorneys' fees as of the date of the offer.^{132} Thus, for a defendant, Rule 68 offers another form of settlement leverage, provided an offer of the right amount is made.^{133}

After Marek was decided, commentators predicted that Rule 68 would provide a strong incentive for plaintiffs to accept settlement offers in civil rights cases. The plaintiffs would be placed in the position of having to assume the cost of post-offer fees even if they prevailed,

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^{128} Id. at 11-12.
^{129} Id. at 8-10.
^{130} Id. at 23-24 (Brennan, J., dissenting) (“Congress has enacted well over 100 attorney's fees statutes, many of which would appear to be affected by today's decision.”). As Justice Brennan pointed out, in a number of other fee shifting statutes, fees are distinguished from costs.
^{131} Id. at 10. The Court noted that Rule 68 favors neither plaintiffs nor defendants, but that some civil rights plaintiffs would benefit because of the overall policy encouraging settlement.
^{132} Maryshow v. Flynn, 986 F.2d 689, 692 (4th Cir. 1993); Corder v. Gates, 947 F.2d 374, 380-81 & n.9 (9th Cir. 1991); Grosvenor v. Brienen, 801 F.2d 944, 948 (7th Cir. 1986).
^{133} Professor Owen M. Fiss has challenged the legitimacy of the policy of promoting settlement. He argues that incentives to settle, such as that embodied by Rule 68, are highly problematic techniques for streamlining dockets, often at the expense of justice. Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1074-75 (1984).
so long as the amount of the award did not exceed the Rule 68 offer. Thus, plaintiffs might potentially be deterred from prosecuting claims that had the potential to expand civil rights protection when such claims were not clearly going to prevail or to result in a predictable monetary award. In addition, Rule 68 offers might be made at such an early date in litigation that plaintiffs might be led to make uninformed settlement decisions. Thus, the consensus was that Rule 68's primary effect would be to give defendants litigating under many civil rights statutes leverage that they would not have under other statutes.

Despite Rule 68's potential to reduce attorneys' fees and induce settlements, in reality, it does not appear to be a major factor in the practices of the civil rights lawyers I interviewed, whether they represent plaintiffs or defendants. Many plaintiffs' attorneys were surprised that they had not received more Rule 68 offers and could count the number of times they had on one hand. Defense attorneys like Rule 68 in theory, but most do not use it frequently in practice.

Despite the infrequency of Rule 68 offers in the practices of the attorneys I interviewed, plaintiffs' attorneys emphasized that a serious

136. Marek, 473 U.S. at 31 (Brennan, J., dissenting); Jay H. Krulewitch, Note, Anatomy of a Double Whammy: The Application of Rule 68 Offers and Fee Waivers of Civil Rights Attorneys' Fees under Section 1988, 37 Drake L. Rev. 103, 114-15 (1987-88) (a consequence of the Marek decision is that plaintiffs will make uninformed decisions; this will deter private parties from bringing meritorious claims).
137. Geoffrey P. Miller, An Economic Analysis of Rule 68, 15 J. Legal Stud. 93, 123-24 (1986) (Rule 68 “redistributes wealth” from the plaintiff to the defendant. The rule allows the defendant to decrease both the plaintiff’s gain from trial and the defendant’s loss at trial); Carol S. Schaefier, Marek v. Chesny: The Inherent Incompatibility of “Offers of Judgment” and the Civil Rights Law, 2 Ohio St. J. on Disp. Resol. 153, 161-62 (Fall 1986) (arguing that Marek enables defendants who may have violated the law to make a rule 68 offer and pressure a plaintiff to accept an unsatisfactory settlement to avoid the cost of litigation before information can be obtained through discovery); Roy D. Simon, Jr., The Riddle of Rule 68, 54 Geo. Wash. L. Rev. 1, 40 (1985) (The threat of waiver would chill zealous advocacy and meritorious litigation by forcing settlements on plaintiffs who could not afford their attorneys fees.) Indeed, the basis of Justice Brennan's dissent in Marek was his rejection of the possibility that Congress intended disparate settlement incentives based "on minor variations in the phraseology of attorney's fees statutes." Marek, 473 U.S. at 44 (Brennan, J., dissenting).
138. Interviews 2-4, 6, 8, 11, 14, 19, 20, 26 & 29.
139. Interviews 30 & 32.
Rule 68 offer provides a big incentive to settle. These offers are most effective in cases that will be very expensive to take to trial or in cases where liability may be fairly clear, but damage is uncertain. Several survey participants, however, emphasized that despite the threat to fees posed by a serious Rule 68 offer, they would proceed to trial if they viewed trial as the most appropriate course of action.

In the course of interviewing the survey participants, I asked why Rule 68 was not a significant factor in their practices. The attorneys offered a variety of explanations. First, it is often difficult for defense counsel to evaluate a case, including plaintiffs' attorneys' fees, to derive an offer that is serious enough to get the plaintiff's attorney's attention. One defense attorney hesitates because he believes even if plaintiffs receive an award that is less than the amount of a Rule 68 offer, their attorneys may inflate their fees so as to exceed the amount of the offer, and the court would not detect the inflation if the amount was not egregious. Both plaintiff and defense attorneys responding noted that at times it is difficult to get a defense client to give permission to make a realistic settlement offer at an early date, even if that offer carries a strategic benefit. Also, Rule 68 offers are public records, so defendants concerned about the confidentiality of offers may be reluctant to use them. In addition, some defendants, particularly public entities, may believe that they have an excellent chance of winning at trial even if the conduct of their employees was wrong. For example, in the context of prisoner litigation, a defense attorney for the State of California noted strong public opinion against prisoner lawsuits.

140. Interviews 12, 13, 15, 17, 18, 21 & 25.
141. Interview 12; see Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981) ("Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability the plaintiff will obtain a judgment but the amount of recovery is uncertain.")
142. Interviews 12 & 25.
143. Interview 32.
144. Interviews 13, 17, 30 & 32.
145. The formal requirements of Rule 68 are that the offer and notice of acceptance, together with proof of service, must be filed, at which point the clerk must enter judgment. Ashley v. Atlantic Richfield Co., 794 F.2d 128, 140-41 (3d Cir. 1986); Mallory v. Eyrich, 922 F.2d 1273, 1279 (6th Cir. 1991).
146. Interview 31. See also Kim Mueller, Comment, Inmates' Civil Rights Cases and the Federal Courts: Insights Derived From A Field Research Project In The Eastern District of California, 28 CREIGHTON L. REV. 1255, 1257 n.5 (1995) (recounting the results of a California statewide survey in which only 21% of a representative sample of registered voters felt inmates' rights to file civil rights suits should be preserved, and 63% said these rights should be abolished. In response to a question about specific kinds of suits, 35% thought inmates should be allowed to file lawsuits alleging constitutional violations based
There is some evidence that City Attorneys' offices have awakened to the possibilities inherent in Rule 68 offers in handling police misconduct cases, and that when civil rights plaintiffs receive these offers, they are forced to evaluate their cases in a very conservative fashion. One police misconduct attorney stressed that because her cases are not popular with juries, they are extremely risky despite their legal merit. She noted that Rule 68 "separates the wheat from the chaff" in terms of ability to evaluate a case.

My conclusion as to the effect of Marek is that, while the decision gives a further edge to defense attorneys in the settlement process and is valuable in a narrow range of cases, the "tool" the Supreme Court provided is, by and large, not as useful as might have been anticipated.

C. Unavailability of Contingency Risk Multipliers

In City of Burlington v. Dague, the United States Supreme Court ruled that contingency risk enhancers (also known as multipliers) are rarely to be permitted under most federal statutes with fee-shifting provisions. Prior to Dague, some circuit courts had permitted prevailing plaintiffs to receive a multiplier in addition to attorneys' fees awards calculated on a lodestar, or hourly, rate, to reflect the risk associated with certain types of litigation. Before Dague, the Supreme Court had recognized that "in some cases of exceptional success, and 33% thought suits alleging excessive force by prison personnel should be actionable. The others either felt otherwise or did not respond.)

147. Interviews 25 & 30.
148. Interview 25.
149. Id.
151. An enhancement is an upward adjustment of the "lodestar" figure. Under fee-shifting provisions, attorneys are entitled to a "reasonable" fee. The Supreme Court has decided that 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 the lawyer's hourly rate. This figure is referred to as the "lodestar." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Blum v. Stenson, 465 U.S. 886, 897 (1984).
152. The Court states that the rule it creates applies uniformly to all fee award statutes that contain language like the statutes at issue in the case. Dague, 505 U.S. at 562. In Dague, the statutes at issue were the State Solid Waste Disposal Act and the Federal Water Pollution Control Act. Other statutes with similar language include 42 U.S.C. § 1988 and Title VII, 42 U.S.C. 2000e-5(k). See Charles Silver, Incoherence and Irrationality in the Law of Attorneys' Fees, 12 Rev. of Ltrg. 301, 305-06 (1993).
153. The Fourth, Sixth, Seventh and Ninth Circuits permitted multipliers, while the D.C. Circuit barred them completely. Other circuits, such as the Third, Fifth, Eighth, Tenth, and Eleventh, permitted multipliers only in exceptional cases. Jack Vining Dell Jr., Case Note, The Demise of Fee-Shifting Statutes: Will Congress Respond? 44 Mercer L. Rev. 1375, 1376 n.12 (1993).
cess, an enhanced award may be justified." In *Dague*, the Court limited judicial discretion to enhance fees based on the contingent risk involved in litigation. This rejection of contingency risk multipliers was based on two primary rationales. First, the Court stated that the lodestar is strongly presumed to be a reasonable fee. Attorneys are already compensated for contingency because the hours spent or the hourly rate charged reflect the complexity of the issues in the case. Therefore, according to the Court, a contingency risk multiplier would constitute a windfall for the plaintiff in the form of overcompensation of the plaintiff's attorney. The Court stressed that the lodestar model, and not a contingent fee model, should govern fee decisions in civil rights cases. Second, the Court feared that if contingency risk multipliers were available, attorneys would be given an incentive to take questionable cases because they would be highly compensated in the event they won. The Court was not persuaded that the contingency risk multiplier was necessary to attract competent counsel. Instead, the Court reasoned that competent counsel would flock to the meritorious cases; the primary reason attorneys choose not to take some cases is that they are too risky from a legal standpoint.

Commentators assailed the Court's opinion as being analytically contradictory to past cases. Whereas in *Jeff D.* and *Marek*, the Court's opinion was at least consistent with statutory language, if not policy, the court in *Dague* propounded a general rule with no statutory authority whatsoever. Some commentators have predicted that certain types of civil rights litigation will become impossible without

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154. *Blum*, 465 U.S. at 887; see also *Hensley*, 461 U.S. at 435. As one treatise writer notes, the Supreme Court did not overrule that language in *Dague*, and since that decision, the lower courts have in some instances made positive and negative adjustments to the lodestar. *Pearl*, supra note 33, at § 13.3.
155. 505 U.S. at 562.
156. *Id.* at 562-63.
157. *Id.* at 563.
158. *Id.* at 562. Justice Scalia believed that if contingent risk multipliers were awarded, a contingent fee model would in essence be grafted onto the lodestar model, forming a hybrid model. By allowing risk “pooling” under a contingent model, the Court would be permitting attorneys to be compensated for cases in which they had not prevailed. This would conflict with the basic premise of the lodestar model. *Id.* at 566.
159. *Id.* at 563.
160. *Id.* at 563-64.
161. *Id.* at 564.
162. *Silver*, supra note 152, at 329-30 (Professor Silver argues that the Court's reasoning is in direct contradiction to Justice Scalia's own jurisprudential views about how judges should construe vague statutes. Silver contends that, following Scalia's own views, the Court should have avoided making a general rule from an admittedly vague statute, and left enhancements to the discretion of the district courts).
contingency risk multipliers because parties will not be able to compete with non-civil rights litigants for legal representation. Their argument is that given the risk involved in some types of civil rights cases and the inability to be compensated for it through an enhancement, attorneys will take only cases where they are assured of compensation. Commentators are quick to point out that the factors that make certain kinds of civil rights cases difficult do not necessarily relate to the substantive difficulty of the case, but rather may center on the lack of jury sympathy for the plaintiff or the unpopularity of particular claims. Given the perceived importance of contingency risk multipliers to at least some attorneys litigating federal civil rights actions, I asked the practitioners I interviewed whether they thought the decision would have an effect on civil rights litigation generally and in their practice in particular.

Survey participants differed in their assessments of the impact of Dague. As I explain, their responses seem to correspond to the type of civil rights litigation they practice. From the defense perspective, the attorneys I interviewed made several observations concerning the Court's condemnation of multipliers in Dague. When plaintiffs had the ability to seek a multiplier, they had greater leverage to seek a higher settlement, and the potential costs of non-settlement were more uncertain. Even though in most cases multipliers were unlikely to be awarded, the possibility could not be discounted for settlement purposes. One defense attorney emphasized that multipliers could raise the hourly rates of attorneys from $300 or $350 per hour, using

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163. See, e.g., Silver, supra note 152, at 332-33 (Given a choice between an unenhanced hourly rate in a fee award case and an equal rate in a case where payment is certain, a lawyer will have strong incentives to decline the fee award case); Kyle R. Kravitz, Note, Denying the Devil His Due: Contingency Fee Multipliers After City of Burlington v. Dague, 38 VILL. L. REV. 1661, 1679-85 (speculating that the riskiness of statutory fee cases will cause attorneys to shun them); but see James D. Cole, Comment, Nonpayment Risk Multipliers: Incentives or Windfalls?, 53 U. CHI. L. REV. 1074, 1106 (1986) (pre-Dague argument that elimination of risk incentives will lead to a uniform and predictable incentive structure).

164. Silver, supra note 152, at 319-20.


166. Using prevailing market rates for an attorney with ample experience in a large urban area. SMOLLA, supra note 33, at § 16.01[3][b]. Many of the attorneys receiving such
a lodestar calculation, to as much as $600-$700 per hour.\textsuperscript{167} Another defense attorney did not believe that the lack of a multiplier has deterred plaintiffs' attorneys from undertaking representation of clients in civil rights cases.\textsuperscript{168} She described most plaintiffs' attorneys as individuals who are committed to civil rights litigation—people who would not be deterred by lack of enhancements.\textsuperscript{169}

Plaintiffs' attorneys were much more diverse than defense attorneys in their analyses of the effect of the Court's decision in \textit{Dague}. Some attorneys did not perceive the loss of a multiplier as significant and noted that they are much more concerned with getting paid for all their hours.\textsuperscript{170} This view was expressed by attorneys doing police misconduct litigation and employment litigation, and by one legal services attorney.\textsuperscript{171} Indeed, one attorney concurred precisely with sentiments expressed by the defense attorneys and stated outright that multipliers are an abuse of the system.\textsuperscript{172} Several others stated that under the lodestar formulation, they are paid at a high hourly rate, and that courts have adjusted for the lack of a multiplier by awarding them a greater percentage of the hours billed.\textsuperscript{173} Thus, although these attorneys noted that \textit{Dague} had lowered the stakes in settlement, they felt the impact of the decision was not too great, particularly because multipliers were not awarded in many cases anyway.

Other plaintiffs' attorneys believe that the absence of multipliers in most federal civil rights cases has had a chilling effect on the practice of civil rights law.\textsuperscript{174} The negative effects described vary. One police misconduct attorney stated that the lodestar would not yield a reasonable fee, especially if the hours billed are disputed.\textsuperscript{175} He said that by the time courts exclude claims that do not prevail and time billed on defendants who are dismissed, it is difficult to receive a statutory fee award high enough to make police misconduct cases worth litigating.\textsuperscript{176} Another attorney, addressing the ramifications of the decision in the settlement context, stated that without the potential for

\textsuperscript{167} Interview 30.
\textsuperscript{168} Interview 31.
\textsuperscript{169} Id.
\textsuperscript{170} Interviews 3, 8, 11, 12, 13, 14 & 22.
\textsuperscript{171} Interviews 11, 13 & 14.
\textsuperscript{172} Interview 3.
\textsuperscript{173} Interview 3, 5 & 25.
\textsuperscript{174} Interviews 5-7, 9, 15, 16, 18-21, 24, 26 & 29.
\textsuperscript{175} Interview 15.
\textsuperscript{176} Id.
multipliers, plaintiffs' attorneys lack the leverage to obtain settlements that provide reasonable fees.\textsuperscript{177} Some plaintiffs' attorneys believe the Court's decision in \textit{Dague} will influence the specific types of cases they undertake. A police misconduct attorney stated that the effect of the decision has been to make cases against cities and counties based on violations of policy or custom unprofitable.\textsuperscript{178} These cases, which are expensive to try and difficult to win, would have been candidates for multipliers before \textit{Dague}. This attorney expressed reluctance about bringing those types of cases after \textit{Dague}.\textsuperscript{179} Another attorney believes that \textit{Dague} will deter "cutting edge" cases and, thus, slow development of the law.\textsuperscript{180} He suggested that the Supreme Court does not realize the difference between frivolous and risky litigation, and he believes that attorneys will be much more careful not to risk litigating undeveloped issues.\textsuperscript{181}

In the area of civil rights class actions, attorneys for plaintiffs described \textit{Dague} as the major factor limiting their practice.\textsuperscript{182} Because class action cases are so expensive to litigate, the possibility of multipliers was a huge incentive to undertake representation.\textsuperscript{183} Where expert witness fees are recoverable, the need for multipliers is admittedly reduced.\textsuperscript{184} In cases that are expert-intensive and in which expert witness fees are not recoverable, however, the lack of a multiplier can be devastating. The primary example, cited by numerous attorneys, is voting rights litigation.\textsuperscript{185} There, even ascertaining the

\begin{itemize}
\item \textsuperscript{177} Interview 20. \textit{Accord} interviews 2 (lower stakes for defendants), 15 & 25.
\item \textsuperscript{178} Interview 18.
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} Interview 16.
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} Interviews 6, 16 & 19.
\item \textsuperscript{183} Class action cases are extremely expensive to litigate because of their administrative complexity. Thus, the risk of losing a case is a significant deterrent to taking one. Class action lawyers explained that multipliers provided the "carrot" of a large pay-off that could offset the risk of an enormous loss. One class action lawyer noted that use of a percentage of a common fund as a basis for awarding attorneys' fees is one way around the lack of multipliers. Interview 29. Attorneys ask the court to award a percentage of the common fund in fees. The Ninth Circuit has approved fee awards in the 25\% range in common fund cases. \textit{In re Pacific Enters. Sec. Litig.}, 47 F.3d 373 (9th Cir. 1995). However, the strategy of seeking a percentage of the common fund only works to offset the risk of loss in cases where relief is primarily monetary and the award is likely to be large. Therefore, in cases that are expensive and risky to litigate, and in which injunctive relief is the primary remedy sought, the lack of multipliers cannot be offset.
\item \textsuperscript{184} Interview 1. Expert witness fees may be reimbursed to prevailing parties in Title VII cases, 42 U.S.C. \S\ 2000e-5(k) and under the Americans with Disabilities Act, 42 U.S.C. \S\ 12205 (West 1991 & Supp. 1996).
\item \textsuperscript{185} Interviews 6, 7, 17, 19 & 20.
\end{itemize}
viability of a claim prior to filing suit can cost between fifteen and twenty-five thousand dollars in expert fees.\textsuperscript{186} Without multipliers, even full compensation at lodestar rates cannot possibly cover the costs of litigation. The attorney mentioned earlier, whose practice focuses exclusively on voting rights, expressed doubts that his practice will survive \textit{Dague}.\textsuperscript{187} Indeed, this attorney recently opened a color printing business to try to subsidize his law practice. He stated that the other private practitioners who used to litigate voting rights cases will not take them now and predicted that no new lawyers will enter the market in California.\textsuperscript{188}

In addition to the voting rights area, other attorneys involved in large-scale impact litigation feel the impact of \textit{Dague} profoundly. Attorneys in non-profit organizations, such as those litigating disability issues or prison conditions cases, indicated that although they feel the effects of \textit{Dague}, they will survive it. Most of these organizations have funding that supplements and indeed surpasses fee awards, as well as attorneys and staff members who are willing to take low salaries because of their commitment to their work.\textsuperscript{189} However, the lawyers for these non-profit organizations caution that private firms attracted to civil rights practice because of the potential to receive multipliers will no longer be willing to participate.\textsuperscript{190} In exchange for the possibility of a multiplier, these private firms have been willing to undertake the enormous costs involved in the litigation and assume the risk of loss. The lack of multipliers removes the incentive, and thus makes it much harder to enlist the support of private firms. Some types of litigation are far too expensive to undertake on a pro bono basis, and private firms will be unwilling to take the risk of loss absent multipliers.\textsuperscript{191}

My conclusion with respect to the rule eliminating court discretion to enhance attorneys' fees is that it will affect some types of civil rights practice—notably the high-cost or high-stakes litigation where recovery at a lodestar rate will not cover costs. When one looks at the universe of civil rights claims, the actual number of cases affected will probably be small, as there is a fairly uniform consensus that most cases would never be candidates for fee enhancement. However, the impact of the rule will fall particularly on the types of cases that I have

\textsuperscript{186} Interview 7.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} Interviews 5, 9 & 24.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} Interviews 19, 24 & 26.
described above and may significantly affect the economic viability of bringing these types of actions.

D. Damages Rules and Their Relation to Fees

Many types of civil rights actions seek damages from the defendant. In the area of constitutional litigation, the Supreme Court held in *Carey v. Piphus* that compensatory damages are to be awarded for constitutional violations only on proof of actual injury.\(^{192}\) Juries may not assume damage or award damages simply to vindicate a right. In employment discrimination cases governed by Title VII, statutory limitations on remedies had the effect of limiting the relief a plaintiff could recover.\(^ {193}\) Under the Civil Rights Act of 1991, the damages available under Title VII have been expanded in cases of intentional discrimination.\(^ {194}\) Nonetheless, damages are primarily compensatory and subject to caps based on the number of persons employed. Thus, in both constitutional litigation and in cases brought under Title VII, a compensatory model is the basis for damage awards.

In theory, constraints on damages should not deter plaintiffs' attorneys from agreeing to represent plaintiffs with low damages. The availability of statutory attorneys' fees should serve to reassure counsel that they will be compensated even if the plaintiff recovers little.

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\(^{192}\) *Carey*, 435 U.S. at 264.

\(^{193}\) Prior to the Civil Rights Act of 1991, plaintiffs in employment discrimination actions could receive monetary relief only in the form of back pay. See supra note 54.

\(^{194}\) When Title VII remedies were limited to backpay and injunctive relief, the problem was even more profound. The 1991 Civil Rights Act expanded the damages available in Title VII actions somewhat. In certain cases based on intentional discrimination, compensatory and punitive damages are available.

Section 102 of the Civil Rights Act of 1991 created 42 U.S.C. § 1981(a), which provides, in relevant part:

Damage in cases of intentional discrimination in employment. (a) Right of recovery.—

(i) Civil rights—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under sections 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complainant party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent . . . . 42 U.S.C. § 1981(a).

Section (b) imposes damages caps. For example, an employer who has more than fourteen and fewer than 101 employees in each of twenty or more calendar weeks in the current or preceding calendar year will not incur compensatory and punitive damages in excess of $50,000. 42 U.S.C. § 1981(b)(3)(A).
The Supreme Court confirmed that attorneys' fees need not be proportional to the plaintiff's damages in City of Riverside v. Rivera. In Rivera, a plurality of the Supreme Court upheld an award of $245,456 in attorneys' fees in a case where the jury awarded only $33,350. The decision was crucial to civil rights litigators because monetary awards in civil rights claims are often lower than claims in tort actions due to the lack of large compensatory damages.

In the context of constitutional litigation, it can be difficult to obtain compensatory damages for what many jurors view as dignitary injuries. The facts of Rivera itself illustrate the point. The damages awarded there were divided among eight plaintiffs, all law-abiding citizens who had hosted or attended a party broken up by a large number of police officers using tear gas and acting without a warrant. Four of the plaintiffs were arrested but no charges were brought. Plaintiffs' attorneys proved the police response was not inconsistent with general hostility to the Chicano community in Riverside. The district judge concluded that the low verdict reflected both the reluctance of jurors to award damages against police officers and the restraint with which the plaintiffs described their injuries. Injuries like those sustained by the Rivera plaintiffs may appear less serious to jurors because they do not involve personal injury or at least not injury of the magnitude that makes for lucrative personal injury claims.

In the area of employment litigation, the problem of low damages is admittedly less of an issue due to the passage of the Civil Rights Act of 1991. However, employment practitioners interviewed unequivocally asserted that the amount of damages is a primary consideration in deciding whether to take a case. It is entirely possible that a low or middle income individual could suffer job discrimination that would create some economic loss and constitute a significant career barrier yet not present enormous emotional distress damage or war-

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196. Id. at 581.
197. See Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 465 (1978) ("Except in the rare case in which a successful plaintiff recovers a substantial award for serious injuries inflicted by excessive force, cases of illegal arrests and searches, even when successful, generally result in very modest awards.").
198. See Nathaniel S. Colley, Civil Actions For Damages Arising Out of Violations of Civil Rights, 17 Hastings L.J. 189, 203-04 (1965) (jury operates in vacuum because it does not share plaintiff's experiences); see infra text accompanying notes 280-281.
199. Rivera, 477 U.S. at 572.
200. Id. at 571.
201. Interviews 1, 2, 10, 12, 13, 16, 19, 20 & 26.
rant punitives. As I explain below, plaintiffs with low value cases may have difficulty obtaining an attorney due to the relationship between fees and damages in the settlement context.

Even in cases where the plaintiff prevails at trial, low damages can bear some relationship to an award of statutory fees. In *Farrar v. Hobby*, the Supreme Court held that in some circumstances a plaintiff who formally “prevails” under 42 U.S.C. section 1988 but receives only nominal damages should receive no attorneys’ fees at all. The Court believed that, in a case like *Farrar*, where equitable relief was not at issue, the plaintiff’s success had to be measured in monetary terms. The jury’s failure to award more than nominal damages thus suggested that the plaintiff was not successful, despite the nominal victory. Although the facts of *Farrar* were somewhat unique, the decision suggests that perhaps the Court is retreating from the non-proportionality rule of *Rivera*. Indeed, two conflicting Ninth Circuit decisions suggest that the *Farrar* decision may have the effect of

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202. As Professor Selmi has noted, it is relevant to consider what dollar amount constitutes a low value case in the employment context. His review of EEOC non-class trial recoveries indicates that median awards were under $10,000. Selmi, supra note 60, at 20. Selmi characterizes these as low value cases. Id. at 32. One of the employment attorneys interviewed characterized a low value case as one under $100,000. Interview 2. Another expressed the view that cases with damages under $30,000 would be difficult to place with an attorney. Interview 13. Clearly there are differences in opinion about what level of damages must be presented to make a case worth taking.

Professor Selmi concurs that when discrimination forms the underlying basis for the claim, there is a great need to ensure an available judicial forum even for small cases. Selmi, supra note 60, at 33. After weighing a variety of considerations, he concludes that, particularly in light of the Civil Rights Act of 1991, low lost wages alone should not be a disincentive to undertake representation. Such cases might be coupled with punitive damages, for example, that would make them attractive to lawyers. Id. at 37.


204. In *Farrar*, the plaintiff filed a lawsuit seeking 17 million dollars from six defendants. After ten years of litigation, including two appeals, he received one dollar from one defendant. The Court found that the suit would benefit no one besides the plaintiff. *Farrar*, 506 U.S. at 106-07.

205. John E. Kirklin, *Recovery of Attorney’s Fees in Section 1983 Cases*, in *SECTION 1983 LITIGATION AND ATTORNEYS’ FEES* 663-64 (1995) (“Although the Court did not suggest an overruling of *Rivera*, the implication is clear that in the district court’s discretion the otherwise reasonable fee award . . . in a case in which only nominal damages were awarded may be reduced to zero or to a low fee award”); David Shub, Note, *Private Attorneys General, Prevailing Parties and Public Benefit: Attorney’s Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 721-22 (1992) (arguing that cases like *Farrar* ignored the private attorney general intent of Congress, as enunciated in *Rivera*).

206. Compare *Wilcox v. City of Reno*, 42 F.3d 550, 556 (9th Cir. 1994) (a lawsuit sparking a change in policy will, in combination with a judgment for nominal damages, support an award of fees) *with Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1995) (no fees where only nominal damages and no tangible results).
making civil rights cases that have low damages much more financially risky for attorneys. In light of the damages rules themselves and the emerging glimmer of doubt regarding the non-proportionality rule in *Rivera*, I asked participants if a plaintiff's low damages would deter them from taking an otherwise meritorious case, and if they thought the decision would have any effect on the practice of civil rights law or in their practice in particular.

The responses of participants in this study indicate that the damages rules profoundly limit the willingness of attorneys to take cases with low damages. This is so despite the non-proportionality rule in *Rivera*. Attorneys not only mentioned their reluctance to handle cases regarding employment, police misconduct, and prisoner litigation, but also expressed such reluctance in connection with First Amendment and other constitutional litigation and cases brought under Title VII. The reason for the apparent disparity between theory (plaintiff's damages should not affect fees) and reality (they do) is that many cases will settle, and despite the Supreme Court decisions, the amount of money allocated for the attorneys' fee award is, in fact, somewhat proportional to the damages in issue. Thus, while defense lawyers add fees to a settlement offer, they figure them as part of a lump sum package, and the lower the compensatory damages in issue, the lower the fee award. While plaintiffs' attorneys, of course, retain and sometimes exercise the prerogative of counseling a client not to accept a settlement offer because any award for fees would be extremely low, ethical constraints, pessimism about the prospects of full payment if fees are awarded by a court, the prospect of lengthy delays in payment, and the risk of not prevailing at all, often lead the attorney to concur that settlement is a better option.

Again, from a theoretical perspective, the fact that these trade-offs are made is not unique to civil rights litigation. Settlements necessarily involve compromise—a goal specifically embraced by the Supreme Court in cases like *Jeff D*. In actuality, the damages rules, combined with the propriety of partial fee waivers, produce a result in some cases that seems contrary to what the Supreme Court intended. Lawyers in a variety of practices unequivocally assert that some types

207. Professor Selmi observes that given the changes in employment discrimination remedies under the Civil Rights Act of 1991, it is more difficult to assess the value of an employment case. Damages will depend not only on lost wages, but also on size of the employer and the nature of the defendant's act. Selmi, *supra* note 60, at 37.

208. Interviews 1, 4, 5, 10, 12, 13, 16, 18-20, 25 & 26. Attorneys for whom the issue is unimportant are discussed *infra* at notes 215-221.
of civil rights cases are not economically feasible and that they will not take them unless they are interested in pro bono work. For example, in the area of employment discrimination, a number of lawyers stated that cases of low wage earners (typically blue collar workers) are not considered economically feasible unless there is excellent proof of emotional distress or a potential for punitive damages. Sexual harassment of a low wage earner might present a promising claim, but denial of a promotion or termination would not. The claim that low damages make it very difficult to represent potential plaintiffs was asserted in differing contexts as well: prisoner litigation, police misconduct litigation, and other types of constitutional litigation.

A number of the attorneys I interviewed indicated that they do represent plaintiffs with low damages. Non-profit organizations litigating for impact clearly take such cases. For them, the significance of rules limiting damages to actual injury is that cases are difficult to refer to the private bar. Class action attorneys also are able to represent people in the working class who have low individual damages claims. However, there are not many firms doing class action work. Barring these options, blue collar workers terminated from employment or people who have suffered police brutality but emerged with soft tissue injuries must find private lawyers who are willing to take their cases despite the low potential recovery. Some lawyers will undertake this work, although I did not encounter many.

The lawyers I met who are willing to represent low wage earners or other plaintiffs with low damages in a non-class action context ap-

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209. Interviews 2, 4, 10, 12, 13, 16, 19 & 20.
210. Under the Supreme Court's decision in Harris v. Forklift Sys., 510 U.S. 17 (1993), damages are available in sexual harassment hostile work environment cases without proof of psychological injury. This component of intangible damages makes the cases worth more money, and hence, more appealing to attorneys, particularly when the plaintiff has suffered significant emotional distress as a result of the harassment.
211. Professor Selmi concludes that lost-wage cases are precisely the kind of cases that ought to be treated as a low priority. Selmi, supra note 60, at 37. In any event, he concludes that attorneys could handle such cases if they desire by increasing the volume of the smaller cases to compensate for the lower likely fees. Id. The responses of participants in the study indicate that many are reluctant to accept the low-damages cases. Interviews 10 & 25. See also supra note 208. One attorney who takes them believes that although the damages are low, the discrimination suffered may constitute an enormous roadblock in the career of a low or moderate wage earner. Interview 13.
212. Interview 5.
213. Interviews 15, 18, 26 & 30.
214. Interview 25.
215. Interviews 2, 5 & 8.
216. Interviews 9, 11 & 12.
217. Interviews 1, 6, 19 & 20.
peared to operate very close to the margin of economic survival. One lawyer willing to take low damages, police misconduct cases operates a completely nontraditional practice. To keep overhead low, she works out of her home and conducts no discovery. An employment lawyer who has specifically chosen to represent low wage earners and poor people is barely able to make ends meet and was exploring other practice options when I met her. Individuals willing to practice law in these circumstances are rare. More commonly, attorneys take a small number of low damage cases on principle or diversify their workload so that they can subsidize the cases that they know will not make money. Despite the existence of individual attorneys whose choice of cases is driven more by ideological commitment than money, the plaintiffs’ damages were a factor many survey participants viewed as extremely important in determining what cases they wanted to accept.

The Supreme Court’s decision in *Farrar v. Hobby* may further decrease the settlement leverage of plaintiffs and increase the reluctance of plaintiffs’ attorneys to litigate low damages cases. Attorneys representing both plaintiffs and defendants agreed that although *Farrar* is very limited factually, it is a significant decision that may provide an opening for the Supreme Court to reevaluate the holding in *Rivera* that fees need not be proportionate to recovery.

If *Rivera* is undermined, attorneys will be even less likely to take cases in which the injuries suffered are not severe and in which damages awarded are not high. As one city attorney defending section 1983 police misconduct cases noted, even in the event of a death, damages may be low because the plaintiffs may have no earning history or other factors to substantiate an award under current damages rules. Attorneys’ fees often comprise the largest part of such claims. If these fees can be reduced, or made proportionate to recovery, civil rights attorneys will have little incentive to bring the cases. Defense attorneys who now settle such cases because the attorneys’ fees component is a wild card may instead opt to try them and hope for the best.

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218. Interview 8. One might well question whether this policy is consistent with her professional obligations as a lawyer.
220. Interviews 2 & 5.
221. Interviews 1, 2, 10, 12, 16, 19, 20, 25 & 26.
222. Interviews 2, 8, 14-16, 17, 20, 22, 25 & 32.
223. Interview 30.
224. Interview 32.
Several attorneys commented that they must make difficult strategic decisions about what claims to pursue given the combination of juror reluctance to award high damages for constitutional violations and the possibility that judges will use \textit{Farrar} to justify a denial of fees.\footnote{Interviews 8, 16 & 25.} One attorney picks only cases that are viable as state tort actions.\footnote{Interview 3.} He finds jurors much more willing to make awards on the basis of the state claims than federal claims. He reasons that even if a court interprets \textit{Farrar} to find that he did not have sufficient success on the federal claims to merit statutory fees, he will be protected by his contingency fee agreement. This strategy, however, excludes from his practice claims that are substantively meritorious but not rich in tort-like damages.

IV. Demand for Representation and Ability of Civil Rights Attorneys to Respond

The prior section's focus on understanding the impact of Supreme Court decisions dealing with fees and damages is one avenue to help explain how and why certain cases are taken and others are rejected. Many other factors, however, contribute to attorney decisions about whether to represent a potential client. In this section, I discuss the participants' perception of demand for representation and some of the barriers to representation the participants identified in explaining their responses.\footnote{Participants were asked about the number of calls they receive from potential clients, the number of inquiries that ultimately develop into cases the attorney will take, and whether they can successfully refer promising cases to other attorneys in the event that this is necessary. There may be some intrinsic bias in favor of asserting that one's services are in demand; I tried to minimize this possibility by asking for concrete facts about the participants' practices.}

Many plaintiffs' attorneys responding to my questions regarding the demand for representation agreed that a huge number of individuals seek representation.\footnote{Interviews 1-4, 6, 8-10, 12, 14, 15, 17-19 & 25.} Some noted that many of those seeking consultations have weak cases.\footnote{Interviews 3, 4, 13 & 25.} Two respondents mentioned that they knew of attorneys who would take any case presented to them.\footnote{Interviews 4 & 25.} They were uniformly critical of these individuals, describing them as doing a disservice to the enforcement of civil rights law.\footnote{\textit{Id.}} Several
attorneys concurred that if a client has a strong case, resources to pay a retainer and costs, and high damages, an attorney can be found, and, indeed, there may even be competition among attorneys to obtain such cases.\textsuperscript{232} The core question relating to demand, then, is whether individuals with plausible cases obtain at least consultation with a competent attorney, and whether attorneys are able to undertake representation in cases that seem capable of success on the merits. Overall, the consensus was that even persons with cases that seem viable or better may not obtain representation.\textsuperscript{233} The explanations for this answer diverged, reflecting the differences among the different practice areas of the attorneys interviewed. It will thus be helpful to evaluate practice areas separately.

In the civil rights class action context, for example, there is higher demand than supply of attorneys because the attorneys can only afford to litigate cases that are virtually guaranteed to win. The costs of litigating class actions are so enormous that few firms can afford to handle the litigation at all, and each firm can only litigate a few cases simultaneously. Therefore, the firms practicing in this area pick and choose carefully. One attorney stated, “we take the winners of the winners.”\textsuperscript{234} The class action attorneys interviewed perceive the market as dramatically underserved.\textsuperscript{235}

\textsuperscript{232} Interview 3 (People with great cases will obtain an attorneys—those with merely decent cases and a lack of resources may have difficulty) & Interview 16 (at least ten attorneys competing for the type of cases he takes).

\textsuperscript{233} Interviews 1, 2, 3, 4, 6, 7, 10, 12, 13, 15, 17-19, 22 & 25. The Eisenberg/Schwab study tends to suggest this same conclusion with respect to constitutional tort litigation. Based on data showing low success rates and “surprisingly low” numbers of “true constitutional tort cases,” Eisenberg and Schwab suggest the data may be evidence of increased official compliance with constitutional norms, or evidence of a marginally effective system in which many valid claims go unremedied. They reach no dispositive conclusion in their 1988 article. Eisenberg & Schwab, Explaining Constitutional Tort Litigation, supra note 21, at 781.

\textsuperscript{234} Interview 6.


Commentators differ in their explanations of why class actions have declined. See, e.g., Bryant Garth, et al., The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation, 61 S. Cal. L. Rev. 353 (1988). These scholars conducted an empirical study of plaintiffs’ class action lawyers to understand how the private attorney general concept has changed over time. Although the array of factors
In the individual employment context, the attorneys interviewed perceive a great deal of demand, but note that factors such as low damages or high costs may make representation infeasible in some instances. In addition, a client's own lack of resources may preclude that client from obtaining an attorney despite the possibility of a fee award. Several attorneys stated that they require clients to make monthly payments toward a retainer and costs. If they cannot, potential clients will not get representation from those attorneys even if they have a decent case.

One employment lawyer stressed that although large numbers of clients contact her office regarding representation, some lack the ability to sell their cases. She recounted instances in which potential clients were simply not articulate enough to provide the details that shape an attorney's perception of the case; some of these cases may be affecting the present role of class action attorneys is quite complex, the authors contend that initially the private attorney general had the appearance of neutrality, a lawyer contributing to a shared vision of progress. By 1980, any neutral justification had lost its consensus, and government subsidies to public interest litigation became characterized as use of tax money for partisan advocacy. Garth et al. view modern class action litigation as keenly grounded in economic incentives, both for the litigants and the attorneys. They attribute much of the decrease in the volume of class action litigation to shrinking federal funding for the Legal Services Corporation and the retreat of private foundations, concluding that "the economic incentives provided by attorney fees do not serve as a substitute motive to bring the class actions previously brought by government subsidized lawyers." See also John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983 (1991), in which the authors documented the virtual disappearance of the class action for employment discrimination. Donohue and Siegelman believe changes in legal rules explain a great proportion of this decline. See, e.g., East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977) (employment discrimination is not assumed to be class discrimination; requirements of Fed. R. Civ. P. 23 must be met); General Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982) (proof of individual discrimination not adequate to certify a class action). Donohue and Siegelman also believe developments outside of employment litigation, such as changes in rules governing attorneys' fees, and notification requirements, may have contributed to the decline. Donohue & Siegelman, supra note 235, at 1012.

The increase in potential damages made available by the 1991 Civil Rights Act, in addition to other factors such as availability of jury trials, have given attorneys renewed incentive to bring employment discrimination claims, although the number of cases filed is far short of where it was in 1976. Myerson, supra note 235, at 10. Employment discrimination class actions still require firms with the financial resources to litigate the cases.

236. Interviews 2, 3, 10, 12, 13, 20 & 26.

237. The advantage of this procedure, according to one attorney, is that the client has a much greater stake in the litigation, and is more rational in making litigation decisions. Interview 3.
legitimate if enough time is spent investigating them, but they may also fall through the cracks.\textsuperscript{238}

Several employment attorneys noted that they had little confidence that they could refer potential clients to other competent attorneys who would take their cases.\textsuperscript{239} One lawyer who receives about ten calls a week from potential clients said that colleagues view referrals suspiciously. Even though he cannot possibly take all the cases offered, other lawyers wonder whether there is something wrong with the case if he does not want it. If he feels that the potential client really deserves help, he has to undertake his own investigation of the case just to be able to refer it to another attorney.\textsuperscript{240} Another attorney doing sexual harassment and gender discrimination litigation receives 300 calls per month. She said that she has the feeling potential clients bounce from firm to firm seeking representation. She characterized the plaintiffs' bar as growing, but still small.\textsuperscript{241}

In the area of police misconduct litigation, practitioners gauged the demand for their services as high, much higher than they could handle in their practices.\textsuperscript{242} However, even cases with plausible or promising constitutional violations are often not desirable from the standpoint of a practitioner. Unless the plaintiffs have suffered physical injuries, such cases often are not economically feasible.\textsuperscript{243} The

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\textsuperscript{238} Interviews 3 \& 25. This factor could also affect the ability of clients seeking representation in other types of civil rights cases or other unrelated fields of law. The less sophisticated the client, the more danger there is that the client may not properly convey the relevant information. In theory, cases brought under federal antidiscrimination statutes that require the filing of a charge with an administrative agency, such as the EEOC, and subsequent agency investigation, should require less investigative work at the intake stage than other types of litigation, because the agency performs an investigative function. The EEOC is so backlogged in its investigations, however, that it takes an average of one year, and often two, to complete an investigation. Selmi, \textit{supra} note 60, at 8. As Selmi discusses, a plaintiff has a statutory right to request a "Notice of Right to Sue" letter after 180 days from the filing of the complaint, and the EEOC must issue the notice, regardless of whether it has completed its investigation. In cases in which such a letter is requested, the EEOC's sole function is to issue the letter. \textit{Id.}

\textsuperscript{239} Interviews 3, 12, 13 \& 18.

\textsuperscript{240} Interview 2.

\textsuperscript{241} Interview 10.

\textsuperscript{242} Interviews 3 (police misconduct cases hard to place, more inquiries than attorney can handle), 14 (more calls than can handle), 15 (receives calls every day from people who at least deserve an assessment), 18 (10-20 calls per day) \& 25 (awesome demand; phone ringing off the hook).

\textsuperscript{243} Interview 25. Physical injuries that would constitute good tort claims are likely to fare well under the damages rules applicable in constitutional tort actions; however, because damages (other than nominal sums) are only awarded to compensate for actual injury, and not to vindicate rights, cases of less severe injury will not lead to high jury awards or settlements that defray litigation costs. See \textit{supra} text accompanying notes 192-226.
cases are also complicated because in many instances, clients bringing police misconduct cases have had past exposure to the criminal justice system—a fact that makes their cases less appealing to jurors, and less desirable for attorneys, regardless of the merits. 244 In the police misconduct area, the attorneys I interviewed were skeptical about their ability to refer cases to other attorneys when they could not take them. Several police misconduct attorneys recounted having to talk their friends into taking the cases, and even then, the friends would only do so if the referring attorney agreed to provide guidance. 245

The prisoners' rights attorneys I spoke with recount enormous demand for legal representation by the prison population and few resources available to respond. 246 Of course, many of the problems prisoners have do not relate to civil rights violations, and often they are problems that are not capable of resolution in the legal system. Still, the overwhelming majority of individual prisoner civil rights claims are brought without legal representation. 247 Pro se prisoners may receive self-help materials from non-profit law firms and possibly advice from law students working through clinics or from other prisoners.

The attorneys included in the survey perceived much need for their services and low availability of attorneys willing to assist. A legal services attorney in Idaho said that under no circumstances could he refer institutional litigation in the corrections area to members of the private bar. 248 The cases are expensive to litigate, difficult to win, and politically unpopular. In California, some private firms have been willing to undertake institutional litigation regarding prison condi-

244. Interview 14.
245. Interviews 15 & 18.
246. Interviews 5 & 24.
247. Interviews 5, 22 & 24. The Eisenberg/Schwab study suggests prisoner litigation is both less successful and less burdensome in the sense of demanding judges' court time than the average non-civil rights case. Eisenberg & Schwab, Explaining Constitutional Tort Litigation, supra note 21, at 734. Schwab and Eisenberg attribute part of the inability of prisoners to obtain counsel to their general inability to pay lawyers. Id. at 770. The study also found that when prisoners are represented by counsel, their cases become almost indistinguishable from non-prisoner constitutional tort claims, in terms of litigation activity and likelihood of success. Id. at 771. Based on their research, Schwab and Eisenberg do not believe that market incentives such as attorneys' fees motivate lawyers to take meritorious prisoner's cases and thus conclude many meritorious cases are unrepresented. Id. at 774.
248. Interview 22.
A number of the attorneys who participated in the study indicated that voting rights is an area of civil rights law that holds almost no attraction to the private bar. For reasons described below, the cases are simply too expensive and complicated to make them financially feasible. The blanket refusal to even consider a voting rights case makes it difficult to use attorneys' experiences as any sort of measure of demand. The one private attorney doing voting rights work in California indicated that he has no shortage of clients and offered his opinion that there are many meritorious cases to be brought. However, his practice is so precarious from an economic standpoint that he cannot afford to take on significant new work.

249. A major class action challenge to conditions at a “state-of-the-art” prison, Pelican Bay, was handled by the private law firm of Wilson, Sonsini, Goodrich & Rosati and the non-profit San Quentin Prison Law Office. As prevailing parties, Wilson, Sonsini received $4.25 million in fees, including $719,000 for the San Quentin Prison Law Office. Wilson, Sonsini, et al. were awarded California’s state pro bono award for representing the inmates in the Pelican Bay litigation. Amy Stevens, The “Pro Bono” Payoff, THE SAN FRANCISCO EXAMINER, Dec. 3, 1995, at A12. The Pelican Bay litigation spawned much controversy regarding the award of attorneys’ fees. The defense attorney for the state dismissed any characterization of the case as “pro bono” work, and, in fact, the state challenged Wilson, Sonsini’s billing records. The firm initially sought $7.6 million in fees, but eventually agreed to the $4.25 million dollar figure to settle the fee dispute. Id. Wilson, Sonsini partners explain the large award as a function of the state Department of Corrections’ defiant litigation position and the state’s refusal to settle the case. Howard Mintz, State to Pay $4.25 Million in Fees for Pelican Bay, THE RECORDER, Sept. 25, 1995, at 1.

250. Inability to seek a multiplier that would offset costs is one disincentive. See supra text accompanying notes 150-191. The Prison Litigation Reform Act of 1995, supra note 29, will further remove incentives to private firm participation in large-scale civil rights litigation by capping attorneys’ fees at 150% of the rates paid to federal court-appointed lawyers. The rates generally paid to court-appointed attorneys are $40/hour for time incurred other than in court and $60/hour for time spent in court. 18 U.S.C. § 3006A(d)(1)(1988). In the Pelican Bay litigation, Wilson, Sonsini et al. billed at hourly rates ranging from $265-$360 per hour for partners, and $135-$210 for associates. The non-profit Prison Law Office billed at hourly rates for partners ranging from $280-$295 and associates from $160-$200. Howard Mintz, Wilson, Sonsini Audit Reveals Heavy Staffing, THE RECORDER, Sept. 26, 1995, at 1. Even if Wilson, Sonsini attorneys received 150% of the court-appointed rate, they would have no incentive to join the Prison Law Office in a major civil rights litigation project.

251. See, e.g., interviews 6, 7, 17, 19 & 20.

252. Interview 7. The fact that there is only one private attorney handling voting rights cases in California speaks volumes about the viability of this practice area. He stated that others used to do voting rights but can no longer afford to. He does not anticipate others will enter the arena.
Several practitioners identified disabilities law as a growth area. An attorney with a major disability rights litigation firm, the Disability Rights and Education Defense Fund (DREDF), attributed this surge to the coming of age of a generation of disabled people who have benefited from civil rights protection, such as the IDEA, during their early years. These individuals are sensitized to discrimination and unwilling to accept it. DREDF has found that many attorneys are willing to take referrals of discrimination cases; however, some attorneys still refuse work under the Americans with Disabilities Act or other federal statutes because they lack experience litigating such claims.

V. Other Factors that Impact the Viability of Civil Rights Practice

As one would anticipate, there are many factors in addition to the fees potential that ultimately shape an attorney's decision about whether to bring a federal civil rights action. I have not attempted to reach conclusions about the relative weight practitioners give these factors. In fact, my guess is that the answer would differ depending on each unique case presented. The following issues—substantive law, political changes, economic environment, and class differences—were the factors most often mentioned by participants in the study.

A. Substantive Law

Time and again, plaintiffs' attorneys interviewed mentioned changes in substantive law as a factor that has made practicing civil
In the area of prisoner litigation, there was agreement in the belief that substantive developments have closed the door on much prisoner litigation. Several attorneys conducting police misconduct litigation focused on qualified immunity as a substantial obstacle, although those practicing in the Ninth Circuit acknowledged the issue was easier to win there than elsewhere. In the employment area, one example of a decision that makes litigation more risky to undertake is the case of McKennon v. Nashville Banner Publishing Co., in which the Supreme Court held that after-acquired evidence terminates backpay liability as of the date an employer learns about employee wrongdoing meriting discharge. In the voting area, Shaw v. Reno, Miller v. Johnson, and the Court’s recent opinions in Bush v. Vera and Shaw v. Hunt indicate a departure

257. Interviews 3, 5, 7, 12, 14, 15, 20 & 24. In addition to changes in the law itself leading to increased complexity, arguably discrimination itself has changed since the enactment of federal antidiscrimination legislation, and this change, in turn, increases the legal burden to establish discrimination. For example, in the employment context, overt discrimination has been replaced by more subtle discrimination, which can be camouflaged in practices that appear to be facially neutral and non-discriminatory, but, in fact, perpetuate past discrimination. WASBY, supra note 19, at 124-25. 258. Interviews 5, 16, 22 & 24. See Susan P. Sturm, The Legacy and Future of Corrections Litigation, 142 U. PA. L. REV. 639, 699-716 (1993) (noting dramatic limitations in prisoner due process and privacy rights as a result of Supreme Court decisions). See, e.g., Sandin v. Conner, 115 S. Ct. 2293, 2294-95 (1995) (limiting prisoners’ ability to state violation of a liberty interest protected by the due process clause to restraint which “imposes atypical and significant hardship”). Legislative action, such as The Prison Litigation Reform Act of 1995, supra note 29, will also dramatically affect the ability of prisoners to raise their substantive claims. 259. Interviews 3, 15 & 18. In 1982, the Supreme Court established an objective standard for qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982). The Court personalized the standard in subsequent cases by permitting courts to take into consideration the circumstances facing the official and whether the “contours” of the right were sufficiently clear to a reasonable official. Malley v. Briggs, 475 U.S. 335, 345-46 (1986); Anderson v. Creighton, 483 U.S. 635, 640 (1987). In 1992, the Supreme Court criticized the Ninth Circuit for allowing a jury to decide if the police officer had acted reasonably and declared that “ordinarily” a court should determine immunity before trial. Hunter v. Bryant, 502 U.S. 224, 227-28 (1992). In Ninth Circuit cases decided after Hunter, juries were allowed to decide qualified immunity issues. The Supreme Court denied certiorari with scathing dissents. Navarro v. Barthel, 952 F.2d 331, 333 (9th Cir. 1991) (per curiam) cert. denied, 504 U.S. 966, 967-68 (1992). See Kathryn R. Urbonya, Qualified Immunity from Damages, Section 1983 Civil Rights Litigation and Attorneys’ Fees 252-57 (1995).

260. 115 S. Ct. 879 (1995). This is because after-acquired evidence can change the damages outlook of a case, making it less valuable than the attorney thought when she accepted it. Interview 19. In fairness, however, one must acknowledge that the Civil Rights Act of 1991 has improved the prospects of employment litigation in significant ways. See supra text accompanying notes 184 & 193-194.


from previously established voting rights analysis. Apart from the fact that substantive requirements have become more onerous in some areas, the law changes so quickly that lawyers often have no idea whether the law in effect at the outset of a case will be the law that governs at trial.

B. Political Change

A number of plaintiffs' attorneys perceive the federal judiciary, with the exception of the Ninth Circuit, and Congress, as having become much more hostile to civil rights litigation. Although the Civil Rights Act of 1991 enhanced civil rights litigation in significant respects, Congress recently decimated the Legal Services Corporation, placing many restrictions on use of Legal Services funds. The funds allocated to the Legal Services Corporation may not be used, for example, to sue the government in any capacity, to bring class action litigation, or to litigate on behalf of aliens or incarcerated persons. Recipients of Legal Services Corporation funds are now prohibited from seeking and collecting attorneys' fees under statutory fee stat-

265. In United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977), a highly divided Supreme Court upheld New York's amended reapportionment plan, which included majority-minority districts that effectively splintered the Hasidic community to which plaintiffs belonged. Despite the absence of a majority, five justices concluded there was no viable argument that the plaintiffs, who were considered members of the white majority, had suffered by having their influence diluted. SMOLLA, supra note 33, at 2.03[2][a]. Beginning with Shaw v. Reno, the Supreme Court has examined whether there are constitutional limits on the extent to which race-conscious decisions may be made in drawing boundaries in voting districts. Id. The Court in Shaw held that strict scrutiny must be applied and that the state must demonstrate its reapportionment plan was narrowly tailored to effectuate a compelling state interest. Shaw, 509 U.S. at 653. In subsequent cases, the Court has continued to require that majority-minority districts be justified under a strict scrutiny standard. Many commentators believe that the Supreme Court's decisions will substantially limit the scope of the Voting Rights Act. See, e.g., Nancy K. Bannon, The Voting Rights Act: Over the Hill At Age 50? 22 Hum. Rts. Q. 10, 12-30 (Fall 1995) (arguing that Shaw and Miller have taken "substantial teeth out of the Voting Rights Act"); Selwyn Carter, African-American Voting Rights: An Historical Struggle, 44 EMORY L.J. 859, 859 (1995) (arguing that recent decisions by the courts of appeal and the United States Supreme Court have limited the scope of the Voting Rights Act).
266. Interview 20.
267. Interviews 8, 11, 12, 14, 16, 17 & 19-22.
270. Id.
utes.\textsuperscript{271} The Prison Litigation Reform Act of 1995, which will make prison condition litigation much more difficult to pursue, is further evidence of Congress' antipathy to some types of civil rights litigation.\textsuperscript{272} Civil rights lawyers in different practice areas seem to be holding their breath, hoping Congress will choose not to amend legislation affecting their cases. For example, one non-profit disability attorney expressed cautious optimism that because disability rights cut across racial, economic, and social strata, Congress will leave the protections of the Americans with Disabilities Act intact.\textsuperscript{273} Needless to say, attorneys already affected by funding cuts or sweeping substantive change are pessimistic about their ability to continue to deliver the same quantity and quality of legal representation.\textsuperscript{274}

\section*{C. Economic Environment}

The economic downturn of the past several years has affected the practice of law in the area of civil rights as well as in other areas. One attorney noted that it is difficult to collect from public agencies which are in some instances virtually bankrupt.\textsuperscript{275} Litigation costs are another factor that make civil rights practice economically difficult for plaintiffs' attorneys. Some attorneys mentioned the high cost of experts and that experts are unlikely to volunteer their services as they might have in years past.\textsuperscript{276} In addition, the length of time involved in taking a case to trial, defense strategies involving delay and paper battles, and the amount of resources that are channeled into collateral litigation such as appeals of attorneys' fees awards make it hard to keep a steady cash flow.\textsuperscript{277}

Several attorneys noted how difficult it is for young lawyers to begin practicing civil rights law today.\textsuperscript{278} They stressed that a civil rights practice is not akin to a personal injury practice. One police misconduct attorney whose firm handles both personal injury and civil

\textsuperscript{271} Id. Thus, recipients of money from the Legal Services Corporation are faced not only with reductions in appropriations, but also with limitations on their ability to surmount those reductions by more aggressively seeking attorneys' fees.

\textsuperscript{272} The Prison Litigation Reform Act, supra note 29.

\textsuperscript{273} Interview 9.

\textsuperscript{274} Interviews 22 & 27.

\textsuperscript{275} Interview 6.

\textsuperscript{276} Interviews 4, 7, 17, 20, 21 & 26.

\textsuperscript{277} WASBY, supra note 19, at 97-98 (recounting the difficulties civil rights organizations have experienced as a result of appeals of fee awards). Participants in this study confirmed that they experienced long delays between receipt of a fee award and payment. Interviews 11, 22 & 27.

\textsuperscript{278} Interviews 14 & 18.
rights cases noted that one can expect the personal injury suits to settle, but the civil rights cases will settle, if at all, only after extensive litigation. In his view, practitioners entering the field have to be prepared to work without a steady cash flow, a luxury few can afford—especially in an era of high tuition debt and housing costs.279

D. Class Differences

One attorney doing a mix of constitutional litigation, including police misconduct cases, explained that the jurors one draws in some jury pools are of such a different socio-economic class from his clients that they cannot relate to the situations that have led to a deprivation of rights. He told of a homeless, disabled man who decided to spend the night at the apartment of relatives who operated a crack house. During the night, the house was raided by police. The homeless man, who says he did not interfere with or threaten the police, was beaten on the head so severely that he lost his hearing in one ear. He contacted the attorney, who was considering taking his case at the time of our interview. The attorney concluded that the case could not be won, even though he believed the homeless man had not threatened the police and was the victim of excessive force. The attorney was convinced that jurors would not understand why a person who was innocent would take refuge in a crack house. The gap between them and the potential client would be just too large.280

Although a number of attorneys referred to class differences among various jury pools and although they clearly pick their forum in large part based on jury pool,281 few described the issue as vividly as the attorney consulted by the homeless man. Yet certainly in the context of police misconduct and prisoner litigation, class differences are a major factor affecting the viability of a case. The defense attorneys interviewed also recognize the potential effect of class differences or similarities on the outcome of a case. One city attorney in a predominantly African-American community indicated that police misconduct cases litigated in front of jurors in the state court start with all assumptions in favor of the plaintiff. This factor induces the defense attorneys to remove cases, whenever possible, into federal court, with its broader and more diverse jury pool.282

279. Interview 18.
280. Interview 14.
281. Interviews 2, 3, 10 & 14.
282. Interview 30.
Although disparities in socio-economic status are not new, and although they undoubtedly affect other types of litigation as well, they do seem to play a large role in determining what types of claims civil rights attorneys believe are palatable to jurors. These disparities help to explain how a person with significant injury, and a claim found believable and meritorious by an attorney, could fail to obtain legal representation.

VI. Testing Assumptions About Plaintiffs' Civil Rights Lawyers and the Role of Civil Rights Actions

This Article has suggested that there are types of civil rights claims which attorneys hesitate to pursue for economic or other reasons. In sections to come, I will expand on my contention that this is cause for serious concern. Prior to doing so, however, I will evaluate study participants' background information and supplemental stories that they shared about themselves in the context of various criticisms of civil rights litigation and the lawyers who perpetuate it. Such an evaluation is necessary as a prerequisite to any suggestion that the status quo be changed.

The historical portrayal of the civil rights lawyer as servant of the poor and downtrodden, if it was ever generally believed, is now challenged from all angles. Defense attorneys I spoke to stress the legitimacy of some civil rights actions, yet perceive that in the 1990's, fewer claims warrant redress and huge numbers are unworthy of any relief. From this viewpoint, plaintiffs' attorneys sometimes appear self-aggrandizing and not sufficiently critical of the claims they pursue. Another criticism of plaintiffs' civil rights lawyers comes from the academic world—from legal scholars who, as mentioned in the introduction to this Article, allege that civil rights lawyers may sometimes "disempower" both their clients and their clients' communities through their narrow focus on litigation and their tendency to view social and economic problems through a legal lens.

284. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 336-43 (1991) (concluding that courts will be ineffective in producing any social change because they are constrained by the following: lack of legal precedent, dependence on political support, and lack of implementation power); William P. Quigley, Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations, 21 OHIO N.U. L. REV. 455, 455-63 (1994) (stating that in the experience of three community organizers, lawyers most often disempower the community by ignoring organization and using litigation as their only problem-solving approach); Paul R. Tremblay, REBELLIOUS LAWYERING, REGNANT LAWYERING, AND STREET-LEVEL BUREAUCRACY, 43 HASTINGS L.J.
The academic critique of civil rights litigation is well explained by critical lawyering scholar Gerald P. López whose work describes characteristics of civil rights litigation that serve to reinforce the subordinated status of people who seek its protection. In the course of a hypothetical dialectic about the merits of constitutional litigation under 42 U.S.C. section 1983, a fictional critic observes that civil rights litigation perfectly reproduces and perpetuates existing social inequalities. He states:

The confrontation is highly regulated and the relevant issues narrowly bounded. Both sides require the assistance of professional representatives (lawyers) and submit to the decision of a third party (judge), who claims impartiality and ignorance and purports to be bound by norms over which s/he has no control. The outcome preserves antecedent social relationships: the rarely losing defendant surrenders only a predictable (and usually trivial) amount of money; the rarely successful plaintiff is even more isolated from his or her group by the grant of compensation.

Other scholars share this disillusionment about the capacity of lawyers to do much of anything positive through civil rights litigation, although this is by no means the prevailing view. Apart
from obstacles posed by the nature of the litigation process, some scholars question whether predominantly white lawyers can understand and adequately represent clients whose culture and social class is so foreign to them.\textsuperscript{289} Other critical scholars have observed that the legal system, and the lawyers who work within it, perpetuate class, race, and sex hierarchies from generation to generation by making such hierarchies appear legitimate and inevitable.\textsuperscript{290}

The criticism of civil rights litigation and of the plaintiffs’ bar described above is substantial enough to merit serious evaluation. Many of the assumptions about civil rights lawyers appear unfounded based on this Article’s sample of survey participants, but some of the academic critiques of civil rights litigation—specifically those that reflect on society and the legal system as a whole—ring true and should be given credence.

The suggestion that civil rights litigation has been degraded by attorneys who accept unmeritorious cases is one that cannot withstand careful scrutiny. Some study participants did acknowledge that many people seeking representation in federal civil rights matters lack meritorious cases.\textsuperscript{291} In the employment context, for example, employees are often unable to distinguish between termination on legal grounds and legally impermissible grounds. This inability to self-assess their predicament is not, one would think, unique to potential civil rights claimants. Some study participants also recognized that certain members of the bar are willing to take bad cases in the hopes of settling

\textsuperscript{289} Richard Delgado, \textit{The Imperial Scholar: Reflections on a Review of Civil Rights Literature}, 132 U. Pa. L. Rev. 561, 574-77 (1984) (arguing that there comes a time when white scholars, as well as white lawyers, need to step back from the forefront and allow the intended beneficiaries of civil rights legislation to develop their own strategies and speak in their own voices).

\textsuperscript{290} Peter Gabel & Paul Harris, \textit{Building Power and Breaking Images: Critical Legal Theory and the Practice of Law}, in \textit{CRITICAL LEGAL STUDIES} 366 (James Boyle ed., 1992) ("The principal role of the legal system . . . is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement."); \textit{GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA} 117-18 (1993) (arguing that minority dependence on the Supreme Court to benefit minority interests ultimately benefits the white majority by preserving a structure in which minority interests can be subordinated to those of the majority with little opposition). \textit{See also} \textit{ROSENBERG, supra note 284}, at 139-40 (describing Dr. Martin Luther King, Jr.’s belief that blacks must not get involved in legalism and needless court fights because to do so is to allow whites to draw out the fight and because litigation would bring only incremental gains).

\textsuperscript{291} \textit{See} interviews 3, 4, 13 & 25.
them. However, the study participants emphasized, and the law itself reinforces, the need to be critical in case and client selection. The plaintiffs' attorneys interviewed repeatedly noted that their economic survival demands high selectivity and careful investigation before undertaking representation of a client. Further, the defense attorneys I interviewed were anything but pushovers. Mainly representing clients with substantial economic power, defense attorneys stressed that refusal to settle unmeritorious or frivolous claims is imperative to effective representation of their clients.

Likewise, the academic critiques about the motives and qualifications of civil rights lawyers should be viewed with skepticism. These critiques do not describe the survey participants. Interestingly, although the group interviewed was extremely diverse in terms of race, age, and gender, the attorneys seemed to speak with one voice on certain issues. First, many of the lawyers said they chose to practice federal civil rights law to help individuals and to bring about organizational or societal change. The following self-descriptions reveal a vision of their work that goes well beyond the piecemeal, individualistic focus emphasized by López' fictional critic. Employment lawyers, for example, volunteered the following motivations: commitment to bringing about positive organizational change, a belief that employment litigation is necessary to make organizations deal with the problems, and commitment to help people without power who are

292. See interviews 4 & 25.
293. Interviews 2, 4, 6, 14, 18 & 25; Fed. R. Civ. P. 11, which provides sanctions in the event an attorney is found to have filed documents that are not "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing laws," is a further disincentive. Rule 11 has been found to have disadvantaged civil rights plaintiffs more than any other category of litigant. The Rule has led civil rights attorneys to advise clients to abandon potentially meritorious claims. Carl Tobias, Civil Rights Plaintiffs and the Proposed Revision of Rule 11, 77 Iowa L. Rev. 1775, 1775 (1992) (arguing that Rule 11 has disadvantaged civil rights plaintiffs more than any other category of litigant); Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943, 971 (1992) (showing that federal courts sanction civil rights attorneys much more frequently than personal injury attorneys); Carl Tobias, Rule 11 and Civil Rights Litigation, 37 Buff. L. Rev. 485, 489-98 (1988/89). Changes to Rule 11 which permit an attorney to withdraw a motion or claim to avoid sanctions may alleviate reluctance arising from the high rate of sanctions in civil rights cases. Selmi, supra note 60, at 45.
294. Interviews 2, 4, 6, 14, 18 & 25. See, e.g., Eric L. Siegel, Building a Civil Rights Practice, Legal Times, Nov. 20, 1995 at 39-40 (describing how the author has built a successful civil rights practice and noting that it is essential to accept the challenge "to select only those matters that are worth your time to pursue").
295. Interviews 30-32.
296. Interview 2.
hurt by those with power. Police misconduct attorneys described their practices as: a labor of love, a vehicle for evolving standards of decency, and a means of bringing about meaningful change in police practices and affecting major policy changes. A prison conditions attorney said that despite small salaries, the attorneys in her office stay because they are committed to the type of work they do. A voting rights lawyer stated his belief that it is incredibly important to society to have responsive leadership, and that voting rights litigation can help in that regard, particularly on the local level.

A second characteristic the attorneys shared was an awareness of the social and economic obstacles that many of their clients face. This awareness made some participants skeptical about what they could achieve through the practice of law, but most remained convinced that civil rights litigation makes a difference in the lives of individuals and in their communities. Some of the participants' stories reveal the level of reflection about societal conditions better than I can describe them.

One of the cynics shared several experiences that made her question her contribution as a civil rights litigator. This lawyer had handled a large prison conditions case, which transformed the quality of medical care in a state prison system. After the case was over, she reflected on how the prison population had grown since that time, and remembered a client she had tried to help obtain care for numerous medical problems. This client, a middle-aged woman with no prior criminal history, had received a 99 year sentence for possession of a tiny amount of cocaine. Under state law, the client was not eligible for parole for approximately twenty years; the attorney did not think she would live that long. The attorney questioned whether medical care makes much of a difference when you will likely spend the rest of your life in prison for such an offense.

297. Interview 13.
298. Interview 18.
299. Interview 15.
300. Interview 25.
301. Interview 24.
302. Interview 7.
303. Interview 13. Most of the existing literature on the impact of litigation on correctional institutions concludes that courts have had a significant and positive, albeit limited, impact. See Sturm, supra note 258, at 652-59 (discussing three case studies of institutional litigation). See also Mark J. Lopez & Dudley P. Spiller, Jr., The New Orleans Jail Litigation (1969-1991), PRISON J., Fall-Winter 1990, at 50, 55 (concluding, as of the date of the article, that years of litigation had led to some improvements in prison conditions but that the defendants had never complied with many critical standards set forth in the federal district court's decision). Professor Sturm also reviews three case studies that are extremely pessimistic about the power of litigation to reach meaningful reform but disagrees with the
This same attorney, now doing employment law, similarly pondered how helpful employment litigation was to her clients. On the positive side, she recalled a client whose job she saved by prompt pre-litigation investigation and intervention with the employer. This result was obtained for a fee of a few hundred dollars paid by the client. The client thanked the attorney "for saving her life." The lawyer, though gratified, noted the fee in no way covered the hours expended. In contrast, the attorney remembered a client who brought suit for sexual harassment, received a settlement from which she retained $125,000, but remained so psychologically distraught that she was unable to put her life back together. 304

A police misconduct lawyer, struggling in a solo practice, observed that justice is elusive for his clients. 305 After years of practicing law, he has come to believe that justice lies in a combination of factors beyond his and his clients' control. He advises them that even with a meritorious case, litigation is a "crapshoot" at best. He continues to represent people who live at the margins of society—who are so likely to have encounters with the police that the best clients are "dead or in jail, because at least then you know where they are." He believes someone needs to do that work and to represent the kind of clients he represents. In part he continues his practice because he thinks his opponents would like to see him give up.

In contrast to the individuals whose stories are highlighted above, most of the attorneys appeared to feel that they were making valuable contributions to society through their practices. 306 One employment lawyer in a non-profit office called his practice a "tremendous outlet" for his energy, and said he feels happy thinking of clients who have jobs, or better jobs, because of his work. 307 A prison conditions attorney stressed the commitment of the attorneys in the office. 308

Authors' conclusions. See Sturm, supra note 258, at 652-59. For a fascinating description of the changes in prison conditions between 1976 and 1986, see Larry W. Yackle, Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System (1989). Professor Yackle concludes that prison conditions, particularly medical care, were greatly improved as a result of prison litigation, he still found equally evident shortfalls.

304. Interview 13.
305. Interview 14.
306. See, e.g., interviews 2 (promoting positive organizational change through employment litigation), 7 (positive role of voting rights litigation), 13 (providing representation to those who are poor and might otherwise not find lawyers), 15 (civil rights law furthers decency of society) & 25 (commitment to, and success at, bringing about changes in police practices).
307. Interview 12.
308. Interview 24.
short, many of the participants believed individuals, and in some instances communities had benefited as a result of their intervention.

As a group, then, plaintiffs’ attorneys professed both commitment to the type of work they do and a belief in its social utility. This commitment was balanced by a pragmatic acceptance of how careful one must be in selecting cases and clients, particularly in private practice. A surprising number of participants indicated a willingness to take cases where they felt that the plaintiff had been wronged, regardless of the fee involved and regardless of Supreme Court decisions that make these cases less likely to turn a profit than in the past.\footnote{309}

But the civil rights bar is by no means monolithic. Other study participants appear to have built practices that serve mostly upper middle-class clients who can afford to pay retainers and monthly fees. These attorneys will take a case on principle once in a great while, but on the whole, they do well without financial sacrifice.\footnote{310}

A third generalization that can be made is that many of the attorneys interviewed are practicing creatively and cooperatively, as described below. Some of the attorneys have begun working in groups or teams to assist each other in assessing and staffing cases or to decide which firm or individual should take control of particular issues.\footnote{311} Some of the attorneys mentioned that they bring in cocounsel frequently, as a means to spread the risk of loss. One class action attorney, for example, began her own firm with expertise about class-action practice, but no bankroll behind her. She found private firms willing to fund the litigation on a contingency basis if she would direct it.\footnote{312} Non-profit organizations doing prison conditions litigation frequently associate with private law firms for the same purpose.\footnote{313} A non-profit attorney views coalition-building among various public interest groups as an important part of his mission,\footnote{314} and several other attorneys echoed this thought.

\footnote{309} Interviews 2, 5, 8, 13, 14 & 21.  
\footnote{310} Interviews 3 (very rarely would attorney take a special case not meeting retainer and cost requirements) & 26 (legal rules have lead attorney to reject cases with high costs and low potential yield).  
\footnote{311} Interview 2 (describing growth in co-counseling practice). Regular contact among civil rights practitioners has long been common and is viewed as essential to planned litigation campaigns. \textit{Wasby, supra} note 19, at 71. Professor Wasby traces the first civil rights bar to the 1830’s, when a small group of lawyers did antislavery work without compensation. \textit{Id.}  
\footnote{312} Interview 1.  
\footnote{313} Interview 24.  
\footnote{314} Interview 17.
With respect to non-litigation alternatives, a number of participants perceived the necessity and desirability of viewing clients in the context of their communities and harnessing community resources to address the client's problems. One attorney with a general constitutional litigation practice said she has used community groups to help build the factual basis for a case, thus saving costs that would be incurred in hiring private investigators or sending an associate to do the work alone. This same attorney reported helping clients utilize civilian review entities in police misconduct cases because often these boards are the key to achieving real change in the police department.315

Among the defense attorneys interviewed, a consciousness broader than individual cases was apparent. A city attorney defending police misconduct claims pondered the dilemma of how to motivate police officers to avoid behavior that becomes the bases of lawsuits. He cautioned that it is difficult to say what brings about change in an institution or that civil rights litigation makes a difference.316 A police misconduct attorney in private practice looks for ways to settle cases that would result in some meaningful change, such as education or training, as opposed to a simple exchange of cash.317

The descriptions offered above indicate that some of the characterizations of civil rights litigators forwarded as part of a critique of "rights" litigation are stereotypes. Whether the lawyers' perceptions of what they do are accurate or a product of self-deception, and whether these attorneys achieve any positive good in society ultimately remains a matter of opinion. My own view is that academics must separate their critique of civil rights lawyers from their critique of civil rights legislation, courts, Congress and other parts of society. A number of study participants appeared fully aware of the inability of legislation, even if enforced, to remedy all societal injustices. They concur with critics who assail judicial decisions as blind to reality.318 Like the police misconduct attorney who ultimately refused to repre-

315. Interview 25.
316. Interview 30.
317. Interview 32.
318. Alan Freeman, Antidiscrimination Law: The View From 1989, in THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE 121, 141 (David Kairys ed., rev. ed., 1990) (arguing that the Court is willfully denying the realities of substantive inequality and white/black relations). This criticism is implicit in the respondents' analyses of some of the Courts' fee decisions. For example, those that criticize the lack of enhancements believe the Court does not understand the differences between litigating a civil rights claim and litigation of other cases where fees are paid as they accrue. See supra text accompanying 163-164.
sent the homeless man who was beaten up in the crack house, they sometimes feel enormous disillusionment about how the legal system handles problems and frustration about the decisions they must make for economic survival. Nonetheless, on balance, they believe civil rights legislation helps and that enforcement of that legislation is a good use of their time.\footnote{319}

VII. Reflections on the Interview Data and Some Proposals

The plaintiffs' attorneys who participated in this study indicated a desire to practice federal civil rights law despite legislative and judicial obstacles and an ability to develop strategies to make civil rights practice more economically feasible. Nonetheless, certain trends that I noted in the course of examining the various types of civil rights practice do not bode well for the future of some types of civil rights litigation.

The chart reproduced below summarizes many of the influences that lead attorneys to decide to reject cases offered by potential clients. As the discussion above has revealed, it would be overly simplistic to suggest that the presence of any one factor or even multiple factors would dissuade attorneys generally from undertaking representation. Some attorneys, for example those practicing in non-profit firms independent of Legal Services Corporation funding, may be undeterred regardless of the number of negative factors present. However, for private attorneys seeking to make a living practicing civil rights law, the greater the number of these influences present, the harder the decision to undertake the case.

\footnote{319. Interviews 2, 7, 13, 15, 18, 24 & 25. These observations do not preclude the possibility that attorney/client interactions could be improved by a variety of means. See Ruth Buchanan & Louise G. Trubek, Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering, 19 N.Y.U. Rev. L. & Soc. Change, 687, 691 (1992) (listing tenets of alternative lawyering, including humanization, politicization, collaboration, and organization); Herbert A. Eastman, Speaking Truth to Power: The Language of Civil Rights Litigators, 104 Yale L.J. 763, 769-72 (1995) (arguing that clients benefit from expanded pleading that tells their stories and lets their voices be heard); López, supra note 285, at 1705 (1992) (arguing that by combining litigation with other strategies, lawyers can challenge the traditional understanding and redefine § 1983 litigation); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1 (1990) (stressing the need to adopt legal strategies consistent with clients' needs and experiences).}
As I reflect on the information gathered from the participants in the study and the impact of factors that make civil rights practice risky, two major trends stand out. These are the increasing financial infeasibility of practice in certain types of cases and the financial disincentives for attorneys to represent plaintiffs of low socio-economic status in some types of civil rights litigation. The Supreme Court's
apparent failure to recognize the impact of certain of its decisions suggests that in the future these disincentives will continue.\textsuperscript{320}

Looking first at the issue of the financial infeasibility of litigating certain types of cases, there is ample proof that while some areas of civil rights practice are steady or growing, others have declined or are declining precipitously. Both statistics and reports from plaintiff and defense attorneys confirm the growth in the number of cases being brought under some areas of federal civil rights law.\textsuperscript{321} Employment law, disability law, and prisoner litigation (the vast majority of which is unrepresented) are examples of growth areas identified earlier. It is just as clear that federal civil rights litigation is shrinking in some areas as well. Civil rights class actions are a rarity.\textsuperscript{322} Voting rights practice in the private sector is not economically viable.\textsuperscript{323} Prison conditions litigation, at least if litigated outside the disability context,\textsuperscript{324} is extremely costly. The private firms that previously participated in prison conditions litigation are less likely to be involved.\textsuperscript{325} Police misconduct cases, according to the attorneys who handle them, are hard to refer and difficult to handle profitably unless the clients have incurred injuries reminiscent of Rodney King’s. Cases that test the boundaries of constitutional law or federal statutory law can pose a risk of devastating financial losses to attorneys should they ultimately not prevail.

When one changes focus slightly to examine potential plaintiffs’ access to legal representation, it is abundantly apparent that despite the existence of the Attorney’s Fees Awards Act and other fee-shifting statutes, persons of low socio-economic status appear less able to attain representation in a federal civil rights case. The study revealed a variety of factors that make representation of persons of low socio-economic status financially difficult and risky for attorneys. As discussed above, low damages, whether in the context of employment or police misconduct claims, have a decided influence on whether an att-

\textsuperscript{320} Congress could, of course, modify the effects of the Supreme Court’s decisions, as it did in passing The Civil Rights Act of 1991. \textit{See supra} notes 193-194.

\textsuperscript{321} \textit{See supra} note 21-30.

\textsuperscript{322} \textit{See supra} note 235.

\textsuperscript{323} \textit{See supra} text accompanying notes 189-191.

\textsuperscript{324} Expert fees are available under the Americans With Disabilities Act, thus making disability litigation in the prison context more viable than non-disability based claims. Interview 24. \textit{See also supra} text accompanying note 184.

\textsuperscript{325} \textit{See supra} text accompanying notes 182-184 & 249-250. Private funding for corrections litigation, which has been provided by The Edna McConnell Clark Foundation, has also been terminated. Sturm, \textit{supra} note 258, at 723 n.396.
Attorney will be willing to take a case. Exceptions exist, of course, but there is good reason to believe that the promise of the Attorney’s Fees Awards Act—enforcement of federal civil rights even though the rights may be non-pecuniary in nature—is sometimes illusory.

Despite the limitations of this study in terms of sample size and the other variables that undoubtedly influence the climate of civil rights litigation, I am convinced that the Supreme Court decisions examined in this Article have contributed to the disincentives noted above. It seems clear that, over the past two decades, the Court, through its opinions in cases such as Evans v. Jeff D., Marek v. Chesney, and City of Burlington v. Dague, has tried to send civil rights lawyers the following messages about litigation tactics and strategy: parties should settle cases when possible and assume certain risks when they refuse reasonable settlement offers; attorneys should be compensated in an amount commensurate to the hours expended; and if a case appears too tenuous to merit assuming a risk of loss, it should be declined. These messages could seemingly apply to any type of litigation and do not, on their face, appear controversial.

The problem with the Court’s approach is that some civil rights cases possess unique characteristics that distinguish them from other types of litigation, such as personal injury practice. While at times the Supreme Court seems to glimpse this distinction and advert to it, more often the Court’s decisions appear to treat civil rights claims as a species of tort claim. Because the injuries in certain types of civil rights cases are so different from traditional personal injury, the

326. See supra text accompanying notes 207-214.
327. See supra text accompanying notes 207-226. Professor John J. Donohue has shown that the cases resulting in the largest awards in any class of employment discrimination suits under the Age Discrimination in Employment Act (ADEA) are those by white, male professionals and managers. According to his calculations, the average monetary judgment per plaintiff was $135,574 in a “pure” ADEA case, i.e., a case in which age was the only basis for discrimination. In non-ADEA cases the average award was $15,206. John J. Donohue III, Employment Discrimination Law in Perspective: Three Concepts of Equality, 92 Mich. L. Rev. 2583, 2587 n.18 (1994).
328. The Court has stated in numerous cases that it generally rejects a contingent-fee model of fee awards in civil rights cases. See Venegas v. Mitchell, 495 U.S. 82, 87 (1990); Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (plurality opinion). Nonetheless, the effect of the Court's attorneys' fees decisions and damages rules has been to give attorneys the incentive to evaluate civil rights cases as though their recovery will be dictated by a contingency fee.
messages that the Court has sent litigators have produced unintended effects.\footnote{329}{The unintended effect is that some categories of civil rights claims are not treated comparably to other types of civil wrongs. \textit{But see} Richard A. Epstein, \textit{Forbidden Grounds: The Case Against Employment Discrimination Law} 29-30 (1992) (asserting that while it is tempting to argue that discrimination victims have at least as good a claim for relief as victims of force, the parallels are not persuasive. In Epstein's view, "[t]he victim of discrimination, unlike the victim of force, keeps his initial set of entitlements—life, limb, and possession—even if he does not realize the gains from trade with a particular person."). \textit{Id.} at 30. Epstein would thus place an employment discrimination claim on a much lower scale of importance than an intentional tort claim. \textit{Id.} The Attorneys’ Fees Awards Act of 1976 and other statutory fee provisions indicate that Congress has not accepted Epstein’s views. \textit{See supra} text accompanying notes 38-38.} The result is that in some cases the normal carrots and sticks that motivate litigation decisions do not apply.

The question of settlements and settlement strategy after \textit{Jeff D.}, for example, illustrates the difficulties in assuming a parallel between civil rights litigation and tort litigation. On the one hand, it is true that plaintiffs’ attorneys have been able to protect themselves from requests for waivers and obtain satisfactory payment from clients on a contingent fee basis in some types of cases. On the other hand, the non-pecuniary character of some damages, combined with factors such as unpopularity of plaintiffs, complexity of the litigation, and institutional disincentives for certain defendants to settle, makes some civil rights litigation much more difficult than tort litigation and less profitable as well. When a number of these factors coalesce, settlements do not produce the same monetary return one would expect in personal injury litigation, and thus, attorneys become reluctant to take certain types of cases. While the Supreme Court’s assumption is that attorneys should refuse cases that are unmeritorious, the attorneys in the study indicated that economic and other concerns caused them to reject cases they thought were meritorious in some situations.

The Supreme Court’s virtually absolute rejection of risk enhancement is another example of a ruling that has produced unexpectedly harsh effects in some types of cases. The notion that the ultimate fee award reflects the number of hours an attorney has expended, and thus includes built-in compensation for the difficulty and complexity of the litigation, works in some cases: those that are neither expert-intensive nor unpopular in which the plaintiff’s level of success on the merits convinces the court that the hours expended were well spent. In those types of cases, even some plaintiffs’ attorneys agree that enhancements would produce windfalls.\footnote{330}{\textit{See supra} text accompanying notes 170-173.} On the other hand, in cases where attorneys are faced with delays in payment and the uncertainty
inherent in litigating risky (but not unmeritorious) claims, the lodestar
rate may undercompensate the attorney. Payment of an hourly rate
following five to seven years of difficult litigation, and then only if one
prevails, is not the equivalent of an hourly rate paid monthly regard-
less of the litigation outcome. Where these adverse factors domi-
nate—in police misconduct cases challenging entity policy or in voting
rights cases, for example—the result is that those areas of practice
become less and less desirable. Voting rights cases in particular seem
affected by every variable that can possibly make them financially un-
tenable for attorneys.

The results of this study suggest that in the 1990’s the practice of
federal civil rights law is at a crossroads. Although Congress and the
Supreme Court have often nurtured the practice of civil rights law,
today the effect of certain Supreme Court decisions and the failure of
Congress to respond to those decisions has negatively impacted the
ability of attorneys to represent civil rights plaintiffs in some types of
cases.

A more comprehensive study, using a larger sample of practition-
ers, should be conducted to further explore the conclusions of this
study. Based on the results obtained here, however, attorneys, judges,
and legislators ought to take a hard look at the areas in which civil
rights litigation is becoming untenable. One need only review post-
Civil War history to find a road to equality paved with good intentions
that were quickly abandoned.331 In addition, the Twentieth Century is
filled with examples of states that undermined efforts by African-
Americans and other minority groups to participate fully in the polit-
ical, economic, and social structures controlled by the majority.332
The subordination of women by state legislation reinforcing lines be-
tween the sexes and by the Supreme Court through deference to state
legislation is equally well-documented.333 Society’s memory of this
history is short, and there is little public perception of the need for
vigilance about enforcement of civil rights legislation, particularly

Rev. 1323, 1336-43 (1952).

332. Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in
(discussing inequalities in southern public schools during the progressive era); Derrick
Bell, Race, Racism, and American Law, 185-200 (3d ed. 1992).

333. See generally John D. Johnston, Jr. & Charles L. Knapp, Sex Discrimination by
Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675 (1971) (reviewing and analyz-
ing cases in which courts have dealt with sex discrimination by law). See also Herma
when it benefits unpopular plaintiffs such as prisoners or people who have interactions with police that give rise to misconduct claims. Those schooled in law and history need to reinforce the collective memory; to recognize that perhaps human nature has not changed, and that regression rather than progression is a possibility.

The question of what ought to be done to address the obstacles to enforcement of civil rights legislation is difficult to answer. One possibility, of course, would be to abandon any pretense that enforcement of civil rights legislation can or will improve the societal problems that exist as a result of the subordination of minorities. One would then address the underlying issues by other means, such as political mobilization or community organization. The other option is to work to bring about governmental reform, such as legislative change or new insight in the judiciary, while continuing to confront societal problems by other means as well.

I favor the second option because, as a number of critical scholars recognize, people likely to bring civil rights actions often do not have the luxury to opt out of civil rights litigation entirely in favor of a better strategy for bringing about social change. Thus, even though reforms in the system may only come slowly, if at all, I believe that civil rights lawyers and other interested citizens must continue to press for reform, while at the same time pursuing other creative ways to address societal problems that find their roots in discrimination.

In assessing the ways in which legislation or judicial decisions might address some of the problems in enforcement of civil rights legislation, it is useful to recognize how important private practitioners are to the enforcement scheme. Cut-backs on federal funding of legal

334. Patricia J. Williams, The Alchemy of Race and Rights: Diary of a Law Professor, 148-65 (1991) (the argument that rights are not useful, or even harmful, trivializes black experience as well as the experience of any person or group "whose vulnerability has truly been protected by rights"); Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 402-05 (1987).

services, restrictions on practice areas of legal services entities, and the financial difficulties of non-profit law centers have increased more than ever the role private practitioners play in enforcement of civil rights legislation. While in recent years private firms have participated in tandem with publicly funded law centers to bring suits, these coalitions are fragile. Given litigation costs, delays in payment, and the myriad difficulties associated with attorneys' fees awards, it is unrealistic to believe private firms will pick up the cases that publicly funded lawyers do not or cannot bring. Thus, given the responsibilities that will fall on the private bar, attorneys' fees awards are of greater importance than ever.

Another factor that influences the types of proposals that might address the problems described above is the diversity and complexity of federal civil rights practice. Rules that have no adverse effects in one practice area can be devastating in another. Thus, when considering how rules and policies affecting that practice ought to be changed, it may be best to consider needed changes in the context of particular practice areas. This narrow focus departs from the Supreme Court's long-standing practice of addressing attorneys' fees issues in broad terms, without reference to how they may play out in various types of civil rights litigation. A narrower focus is necessary, however, because litigation under the assorted civil rights statutes has become so specialized, and practice experiences so divergent from one another, that generalizations have become inaccurate. Congress and the federal courts must take extra steps to address the reasons that civil rights practice has become infeasible or substantially more difficult in certain areas.

A. Expert Fees

Having argued the case for bolstering incentives to private attorneys to become more active in certain types of civil rights practices, I suggest that broadening the availability of awards of expert witness fees in civil rights cases would be an excellent place to start. Expert

336. Professors Eisenberg and Schwab confirm that most civil rights litigation is brought by small private firms and solo practitioners. Eisenberg & Schwab, Explaining Constitutional Tort Litigation, supra note 21, at 768 n.178 (citing J. Casper, Lawyers in Defense of Liberty: Lawyers Before the Supreme Court in Civil Liberties and Civil Rights Cases, 1957-1966 at 207 (unpublished Ph.D thesis 1968)). Professor Selmi demonstrates the importance of private representation in his article as well. The empirical data he presents show that individuals who are able to obtain counsel will have a far greater likelihood of obtaining relief and that relief is likely to be approximately twice as high as that which might be obtained by the EEOC. Selmi, supra note 60, at 57.
witness fees are already permitted under Title VII and under the Americans with Disabilities Act.\textsuperscript{337} Permitting a prevailing plaintiff to recover reasonable experts' fees is an effective way to relieve plaintiffs of the cost burden of litigation without awarding amounts that give a windfall to the plaintiff's attorney.

Voting rights litigation is an example of a practice area in which attorneys cannot afford to undertake representation absent expert fees. Given the high litigation costs, attributable in large part to the need for experts, attorneys' fees awarded at a lodestar rate do not adequately compensate. Damages awards, which in other types of litigation might offset the high costs of experts, will not do so in a voting rights case. The simplest way to assure fair compensation in a voting rights case, and to remove disincentives to representing plaintiffs, would be to allow an award of reasonable expert fees to a prevailing plaintiff.

A similar case can be made for allowing expert fees in prison conditions litigation, which is likewise expert-intensive with a focus on equitable relief. Attorneys practicing police misconduct law also claim that expert fees are an issue in section 1983 policy or custom cases, although in these suits damages might in some instances cover the costs of experts. For simplicity's sake, Congress might choose to place the discretion to award expert fees in the hands of the district courts, accompanied by legislative history recounting the types of cases in which awards ought to be contemplated. Alternatively, Congress might single out particular statutes under which expert fees should be permitted.

Despite the simplicity and common sense of this proposal, I recognize it may be politically unpopular, particularly if the burden of paying expert fees falls on financially strapped public entities. Even in the area of voting rights, which has enjoyed bipartisan political support,\textsuperscript{338} Supreme Court decisions seem to signal a deep ambivalence

\textsuperscript{337} See supra note 183. The House Report on the Civil Rights Act of 1991 recognizes that employment law is expert intensive, and that it is virtually impossible to try an employment discrimination case unless expert fees are covered. The committee found that, "[e]ven [worse], denial of recovery for expenses of experts seriously threatens to deny aggrieved workers access to the courts at all. The vast majority of aggrieved workers are, virtually by definition, unable to afford to pay the significant costs of employing experts out of their own pockets." H.R. Rep. No. 40(I), 102nd Cong., 1st Sess. 137 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 615. The same point is valid in other expert-intensive civil rights actions.

about the ultimate goals of voting rights litigation. This ambivalence may well exist in lawmakers' minds as well. With respect to prison conditions litigation, public and political support seems even more unrealistic. Anything that would enhance the ability to challenge prison conditions is unpopular in today's political climate.

Given the lack of commitment and outright hostility in the minds of judges, legislators, and the public towards certain types of civil rights litigation, the best civil rights organizations and attorneys can hope for is an understanding that meritorious cases do exist, and that attorneys willing to take the risk of bringing such cases should be fairly compensated if they prevail. Risk of loss, particularly when expert fees are huge, will more than adequately deter plaintiffs' attorneys from making imprudent judgments about which cases ought to be brought.

B. Increase attractiveness to attorneys of meritorious low-damage cases

My second suggestion is that the rules regarding calculation of damages in civil rights cases ought to be revised to permit more generous awards in cases where damages, as presently calculated, are too low to attract representation. As noted earlier, low damages in civil rights cases may stem from the tendency of jurors to undervalue constitutional claims and, in cases where lost earnings are part of the damages, from the low socio-economic status of the plaintiff. Many attorneys interviewed for this study concurred in their assessment that plaintiffs with low damages are not as likely to get representation, even for meritorious claims, as plaintiffs with high damages.

Class-based disparities resulting in lower damages for low wage earners are also evident outside the civil rights arena, for example, in

339. See supra notes 261-266.
340. See The Prison Litigation Reform Act of 1995, supra note 29. In addition to the limits on attorneys' fees, the Act restricts challenges to prison conditions by amending 18 U.S.C. § 3626 to limit judicial discretion to award prospective relief, preliminary injunctive relief and prisoner releases. The Act also amends the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a(c), to require exhaustion of administrative remedies in prison condition litigation cases.
341. Certainly the facts regarding disgraceful prison conditions have been brought to the Supreme Court's attention in the past. See, e.g., United States v. Bailey, 444 U.S. 394, 419-31 (1980) (Blackmun, J., and Brennan, J., dissenting). Professor Sturm suggests that in the future, corrections litigation will gain a new focus including greater emphasis on enforcement, informal advocacy, and alternative dispute resolution. Nonetheless, she concludes that attorneys will have a major role to play in maintaining constitutionally acceptable conditions in correctional institutions. Sturm, supra note 258, at 737-38.
343. See supra notes 208-209.
tort litigation. As troubling as this may seem in the tort context, at least there are mitigating circumstances in ordinary tort litigation. First, the typical tort involves personal injury—a context familiar to jurors. Second, even when a personal injury plaintiff has low lost earning capacity, jurors can supplement the award through pain and suffering awards that correspond in a rough sense to the magnitude of injury suffered.344 Third, in some types of cases—notably intentional torts and defamation—damages may be presumed under certain circumstances. Despite the inclination some may have to view civil rights actions as torts, the cases present themselves so differently that the mitigating factors in a tort action do not provide the same safety net in a civil rights case. Given the nature and frequency of settlements in civil rights cases, the promise of fee awards simply is not enough to convince attorneys to represent plaintiffs whose damages are low.

It is not easy to say how the law ought to be changed because not all cases involving low wage earners or poor people are unattractive to lawyers.345 One proposal, forwarded by Professor Jean Love, favors permitting juries to award presumed damages in federal civil rights cases where the injury suffered is intangible.346 Professor Love reads prior Supreme Court decisions to preclude awards based on the "inherent" value of constitutional rights, but not to preclude presumed general damages for "intangible" injuries caused by constitutional violations.347 Common law precedents relied on by Justice Powell have actually permitted presumed damages on several occasions.348 This


345. See supra text accompanying notes 210 & 215-220.


348. In Ashby v. White, 2 Ld. Raym. 938, 953-54, 92 Eng. Rep. 126, 135 (K.B. 1703), the House of Lords reinstated the trial court's damage award of 200 pounds in a case involving the denial of the plaintiff's right to vote. These precedents have been followed by the Supreme Court. See, e.g., Nixon v. Herndon, 273 U.S. 536, 540 (1927) (recognizing the right to proceed where plaintiff sought $5,000 damages for deprivation of the right to vote). These precedents have also been followed in some lower court decisions. See, e.g., Wayne v. Venable, 260 F.64 (8th Cir. 1919). More recently, the district court in Vargas v.
suggestion deserves serious consideration. If presumed damages were available in cases where the injury suffered by the plaintiff is fundamentally intangible, plaintiffs would bring a great deal more leverage to the settlement stage of any litigation. Civil rights attorneys might begin to evaluate low damages claims in a more favorable light.

The disadvantage to this approach is that, while it may be palatable for violations of the 15th Amendment guarantee of the right to vote, it would be difficult to convince Congress or the Court that damages are being awarded because the harm suffered is intangible rather than to compensate for the inherent value of the right deprived.\textsuperscript{349} One might well believe that once the door to presumed damages is open, the settlement value of all federal civil rights cases will increase—even those in which damages are already high enough to attract competent counsel with the promise of a contingency fee or ultimately a fee award. Thus, the specter of presumed damages is either so narrow that it would assist only voting rights plaintiffs with constitutional claims or so broad that as a practical matter it would be legally and politically unrealistic. Nonetheless, courts would do well to recognize that presumed damages are not utterly foreclosed by the Supreme Court’s decisions.

Another proposal to raise the damages recoverable in civil rights actions was forwarded by Judge Jon O. Newman almost twenty years ago.\textsuperscript{350} At that time, Judge Newman questioned the propriety of assessing damages for violations of federal civil rights statutes “against the background of common law tort liability,”\textsuperscript{351} and proposed that liquidated damages should be available in addition to compensatory damages.\textsuperscript{352} That proposal has never been adopted in the context of constitutional litigation, but certainly merits consideration in areas in which compensatory damages are inadequate to attract counsel.\textsuperscript{353}

\textsuperscript{349} Justice Powell expressly refused to award presumed damages for a violation of procedural due process in \textit{Carey}, 435 U.S. at 263-64. Professor Love argues that he did so because he viewed other remedies—injunctive relief and compensatory damages—as adequate to make the plaintiff whole. \textit{Love, supra} note 346, at 90.

\textsuperscript{350} Newman, \textit{supra} note 197.

\textsuperscript{351} \textit{Id.} at 461 (citing \textit{Monroe v. Pape}, 365 U.S. 167, 187 (1961)).

\textsuperscript{352} \textit{Id.} at 465.

\textsuperscript{353} Limited liquidated damages are available in actions under the Age Discrimination in Employment Act. The plaintiff may recover liquidated damages of twice the compensatory damages when she proves a willful violation. See \textit{29 U.S.C. § 626(b)} (1985); Hazen
Yet another way to encourage attorneys to undertake representation of persons whose damages are not high enough to provide a financial incentive would be to restore the power of courts to award fee enhancements in civil rights cases. The Supreme Court's decision in City of Burlington v. Dague virtually foreclosed enhancement based on the contingent risk posed by a case. While the Court believed that the riskiness of a case would be fairly compensated by a lodestar award, state courts such as those in California have recognized that other factors may well influence an attorney's willingness to represent civil rights plaintiffs. Under California law, for example, courts have enhanced the lodestar figure based on the novelty and complexity of the litigation, preclusion of other employment, or, if a case is undesirable, for reasons unrelated to its merits. If courts are given guidance as to what factors may serve as the basis for enhancement, if they recognize that an enhancement need not be given in every case in which it is sought, and if they recognize that enhancements might consist simply of an incremental adjustment of the plaintiffs' fee to a reasonable level rather than an automatic doubling or trebling, fee enhancements should not be the threat that the Supreme Court perceives them to be.

C. Non-traditional suggestions

Many writers have contributed to the discussion and debate about non-legal and non-traditional means of addressing societal problems that result from discrimination. While a comprehensive survey and analysis of various proposals is beyond the scope of this Article, this project made me more keenly aware of the need for fresh ideas about how American society should deal with the problems that stem from discrimination. The proposals of those who challenge the legitimacy and efficacy of current federal civil rights legislation suggest a variety of possible directions. Lani Guinier's work in the voting
rights area imagines a different and more participatory world if voting rights were viewed with different underlying assumptions and perspectives. Roy Brooks has suggested ways in which civil rights law might be made more effective in addressing the needs of African-Americans.

Many scholars move beyond creative legal reform to societal reform. Gerald López stresses community organization. Roy Brooks proposes that African-Americans mentor other African-Americans through working and poverty classes and describes his vision of how such a program would work. Derrick Bell, pessimistic that racism will ever end, has gone so far as to propose a Racial Preference Licensing Act, under which businesses could discriminate if they purchased a license, the proceeds of which would be placed in a fund for African-Americans.

While I do not share Professor Bell's profound disappointment with the ability of federal civil rights legislation to make a difference, certainly some of the ideas suggested by critics deserve careful examination. Many suggestions are entirely consistent with a renewed commitment to enforcement of federal civil rights protection.

### VIII. Conclusion

In this project, I have sought to bridge the often enormous gap between theory and practice and, by doing so, to understand the state of civil rights practice in the 1990's. In the course of this study, I have been privileged to meet many lawyers who work on a daily basis with civil rights legislation, and who have far more insight about how and when litigation works than most academics will ever have. The picture that appears from a synthesis of their contributions is both inspiring and troubling. Anyone who cares about the problems sought to be addressed by federal civil rights legislation would be impressed by the

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360. BROOKS, supra note 335, at 150-73.
361. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 275-339 (1992) (describing "Etta," a citizen activist; describing orthodox organizing and individuals who go beyond orthodox organizing by, among other things, facilitating participation that leaves people able to take credit for the fight and control of their lives).
362. BROOKS, supra note 335, at 131-49.
dedication, compassion, and understanding of many lawyers who practice in this area.

Yet even the most ardent believer in the power of federal civil rights legislation to correct societal injustice must emerge from this project with a deep sense of concern. While it is true that civil rights attorneys are pragmatic and resourceful in responding to precedents that make their jobs more difficult and less profitable, the net result of a number of Supreme Court decisions is that certain types of civil rights practice, and certain types of plaintiffs, have fallen to the bottom of the heap. In these instances, the promise of federal rights legislation, and society's long-standing recognition that "rights" are valuable even if non-pecuniary, have been forgotten.

It is clearly unrealistic to view civil rights legislation as any kind of panacea for society's problems. The attorneys who practice civil rights law would be among the first to acknowledge this. Yet civil rights legislation remains a tool, and a valuable one at that. I hope that the insights of this study, along with the data developed by others, will enable those who are in a position to advocate for legal reforms to make progress in bringing about changes that will help to ensure the effectiveness of civil rights legislation.