Fee-Shifting Shortcuts

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Abstract

Federal fee-shifting statutes, which allow certain prevailing plaintiffs to recover a reasonable attorney's fee from the defendant, are critically important to civil rights enforcement. When it comes to the interpretation of these statutes, however, a wide gap separates the doctrine articulated by the Supreme Court and the decisions issued by lower courts. According to the Supreme Court, the calculation of a fee-shifting award requires a highly contextualized inquiry, specific to the plaintiff's attorneys and claims; in the lower courts, by contrast, judges take a set of well-trodden shortcuts that flatten many of the differences the case law makes relevant.

This Article identifies and analyzes this gap between the Supreme Court and the lower courts. It focuses on three particularly common shortcuts: lower courts' use of standardized hourly rates, reliance on judicial expertise about legal markets, and duplication of previous fee awards. Each of these shortcuts can undervalue attorneys' labor, making it harder for civil rights claimants to find qualified counsel. None is fully consistent with the highly contextualized inquiry that the Supreme Court requires.

Meaningfully narrowing the gap between the Supreme Court and the lower courts would require as much attention to legal culture as to legal doctrine. For example, if a Justice does not appreciate the day-to-day work of the district courts, they will be unlikely to recognize the judicial burdens their fee-shifting decisions have created; and if a judge does not appreciate the logistics and value of plaintiff-side civil rights litigation, they will be unlikely to treat the resolution of fee disputes as a task worthy of their time.

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Introduction

No one should expect federal appellate and district courts to achieve perfect uniformity in the application of federal law,[1] especially as to matters the Supreme Court has not directly addressed. Indeed, appellate courts often disagree with one another, creating circuit splits that the Supreme Court may be called upon to resolve.[2] Once the Supreme Court has spoken, however, one might expect that lower courts would at least *attempt* to decide cases in a manner roughly consistent with its instructions. This Article demonstrates that in the context of federal fee-shifting statutes, lower courts do not meet this expectation.

Congress has enacted hundreds of pro-plaintiff fee-shifting statutes,[3] which aim "to ensure 'effective access to the judicial process'"[4] by enabling a successful plaintiff to recover a reasonable attorney's fee from the defendant.[5] The provisions apply in civil rights litigation and other areas in which

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[1] *See, e.g.*, Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1572 (2008) (arguing that "standardizing federal law is no longer possible as a practical matter").

[2] *See id.* at 1569 (noting that "seventy percent of [the Supreme] Court's plenary docket is devoted to addressing legal issues on which lower courts have differed"); *see also* U.S. Sup. Ct. R. 10 (identifying, as a circumstance that may support a grant of certiorari, that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

[3] *See, e.g.*, Marek v. Chesny, 473 U.S. 1, 43 (1985) (appendix to opinion of Brennan, J., dissenting) (cataloguing more than 100 federal fee-shifting statutes); Sean Farhang, The Litigation State 66 (2010) (finding that Congress enacted 275 pro-plaintiff fee-shifting provisions between 1887 and 2004).

[4] Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, at 1 (1976)).

[5] I focus here on federal fee-shifting statutes that courts have asymmetrically interpreted in favor of plaintiffs, in the sense that a prevailing *plaintiff* "ordinarily is to be awarded attorney's fees in all but special circumstances," but a prevailing *defendant* will not receive fees unless "the plaintiff's action was frivolous, unreasonable, or without foundation." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417, 421 (1978). Because of this asymmetry, I will refer to these provisions as "pro-plaintiff" fee-shifting statutes. *See also* Maureen Carroll, *Fee Shifting, Nominal Damages, and the Public Interest*, 97 St. John's L. Rev. 1, 2 n.10 (2023) (discussing this universe of fee-shifting statutes); Maureen Carroll, *Fee-Shifting Statutes and Compensation*

private enforcement, rather than enforcement by government agencies, forms a central component of the overall statutory scheme. These private enforcement regimes reflect intentional policy choices and political compromises. The enforcement provisions of Title VII of the Civil Rights Act of 1964, for example, came about after "Republicans wielded their veto powers to beat back bureaucratic state-building by liberal civil rights advocates, offering in its stead private litigation with attorney's fees for winning plaintiffs."[6]

Though Congress enacted them at different points in time, the fee-shifting statutes that support these private enforcement regimes all use similar language, authorizing a district court to award a "reasonable" fee to a "prevailing party."[7] The provisions apply to a wide range of substantive areas, "from consumer lending to civil rights abuses to antitrust,"[8] but the Supreme Court has held that they should all be subject to the same standards.[9]

As Part I of this Article explains, those standards contain an internal contradiction that puts district courts in an unenviable position. The Supreme Court has directed that a fee-shifting award must be tailored to the specific circumstances of each particular case. The district court must, among other things, determine a reasonable hourly rate for each of the plaintiff's attorneys based on evidence about the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[10] The Court has recognized that this hourly-rate determination "is inherently difficult," because "[t]he type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively."[11] Yet the Court has also emphasized repeatedly that "[a] request for attorney's fees should not result in a second major litigation."[12]

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for Risk, 95 IND. L. J. 1021, 1022 n.2 (2020) (same). State legislatures have also enacted numerous pro-plaintiff fee-shifting statutes; those provisions are beyond the scope of this Article.

[6] FARHANG, *supra* note 3, at 95.

[7] *See, e.g.*, 42 U.S.C. § 1988 ("In any action or proceeding to enforce [the enumerated civil rights statutes,] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

[8] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1151 (2012).

[9] *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 602-03 & n.4 (2001) ("We have interpreted these fee-shifting provisions consistently, and so approach the nearly identical provisions at issue here." (citing *Hensley*, 461 U.S. at 433 n.7 (1983)). *But see* Fogerty v. Fantasy, Inc., 510 U.S. 517, 524-25, 534 (1994) (holding that, even though a pro-plaintiff standard applies under other fee-shifting provisions that use the "prevailing party" language, "[p]revailing plaintiffs and prevailing defendants are to be treated alike" under the fee-shifting provision applicable to copyright claims).

[10] Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984).

[11] *Id.*

[12] *Id.* at 902 n.19 (quoting *Hensley*, 461 U.S. at 437). The Court has repeated this exhortation no fewer than ten times since the 1980s. *See* CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 435 (2016); Fox v. Vice, 563 U.S. 826, 838 (2011); *Buckhannon*, 532 U.S. at 609 (2001); City of Burlington v. Dague, 505 U.S. 557, 566 (1992); Comm'r, I.N.S. v. Jean, 496 U.S. 154, 163 (1990); Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 766 (1989); Pierce v.

As the D.C. Circuit recently put it, "district judges . . . frequently find themselves whipsawed between seemingly discordant instructions" that the Supreme Court has provided: engage in case-specific, evidence-based fee determinations, but do not spend a great deal of time on those determinations.[13] As a means of dealing with those competing directives, district courts have adopted a set of shortcuts,[14] which save time by eliminating some of the case-specific analysis the Supreme Court requires.[15]

Part II examines three shortcuts that district courts take with particular frequency—often with appellate courts' approval, and often in ways that undermine the purpose of fee-shifting statutes. In one, lower courts rely on artificially standardized rates, such as a fee matrix that establishes an attorney's hourly rate based solely on the year of their graduation from law school or admission to the bar.[16] Some of those fee schedules are infrequently updated, and many judges fail to adjust them for inflation or other changes in market conditions, causing the hourly rates used in fee-shifting awards to stagnate over time.[17]

In another type of shortcut, judges rely on their own presumed expertise about the market for legal services.[18] But because few federal judges represented civil rights plaintiffs during their time in practice and their time on the bench does not generally give them a window into prevailing market rates, most do not actually possess the relevant knowledge.[19] Moreover, when judges rely on knowledge about hourly rates from before they took the bench, that information is often years or even decades out of date.

In a final type of shortcut, district courts flatly duplicate the hourly rates awarded in prior cases.[20] This practice fails to account for the passage of time, differences in the difficulty or complexity of the cases, and other factors that limit the probative value of prior fee-shifting awards.[21] It also

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Underwood, 487 U.S. 552, 563 (1988); Webb v. Bd. of Educ. of Dyer Cnty., 471 U.S. 234, 244 n.20 (1985); *Blum*, 465 U.S. at 902 n.19 (1984); *Hensley*, 461 U.S. at 437 (1983).

[13] *See* DL v. D.C., 924 F.3d 585, 587 (D.C. Cir. 2019).

[14] *See, e.g.*, *id.* ("To reconcile [the competing] directives, district courts often turn to a fee matrix—that is, a chart averaging rates for attorneys at different experience levels."); *see also infra* section II.A (discussing district courts' use of fee schedules).

[15] *See infra* Part II.

[16] *See, e.g.*, *DL*, 924 F.3d at 587 ("For decades, courts in this circuit have relied on some version of [a fee matrix] known as the *Laffey* matrix.").

[17] *See infra* section II.A.2.

[18] *See, e.g.*, Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988) ("The [district] court . . . is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.").

[19] *See infra* section II.B.

[20] *See, e.g.*, Smith v. Phila. Hous. Auth., 107 F.3d 223, 226 (3d Cir. 1997) ("By simply relying on the hourly rate set by the court for [the plaintiff's attorney] in previous cases in which he has appeared, the district court failed to exercise its responsibility . . . to settle upon a reasonable hourly rate based solely upon a factual record.").

[21] *See infra* section II.C.

causes fee-shifting awards to stagnate, falling behind the rates that attorneys can earn from paying clients.

When judges award fees that fall below prevailing market rates, they make it more difficult for civil rights claimants to find qualified counsel. Attorneys, like other professionals, have an economic incentive to turn down Client A if they can make more money by representing Client B.[22] As the Tenth Circuit put it, "if a court's compensation is not adequate to match what the market will bear for a lawyer's services, then competent lawyers will go elsewhere to offer their services. Such a result would do irreparable damage to our system of private enforcement of federal civil rights."[23]

Congress intended for fee-shifting awards to be "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case," thereby enabling private enforcement.[24] A number of Supreme Court decisions about fee-shifting statutes have already undermined the representation incentives that Congress sought to create.[25] In 1992, for example, the Court prohibited compensation for risk-bearing services.[26] This prohibition means that, although an attorney can receive a fee-shifting award only if her client prevails, the amount cannot be greater than she would have received from a client who agreed to pay without regard to whether they won or lost.[27] An economically rational attorney would thus choose to represent the client paying out of pocket rather than the one offering the possibility of a fee-shifting award.[28] When lower courts deviate from the case law to award below-market rates, they reduce the incentives to represent fee-shifting clients even further.

Part III turns to the interconnected questions of how the federal judiciary got to this point and how it can move forward. In doing so, it identifies three

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[22] *See generally* Charles Silver, *Unloading the Lodestar: Toward A New Fee Award Procedure*, 70 Tex. L. Rev. 865 (1992) (arguing that fee-shifting awards will create a disincentive to representation unless they compensate attorneys for their opportunity costs).

[23] Robinson v. City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998); *see also* Tolentino v. Friedman, 46 F.3d 645, 653 (7th Cir. 1995) ("Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law.").

[24] Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 552 (2010) (citations omitted).

[25] *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598 (2001) (rejecting the "catalyst theory," which had allowed a plaintiff to recover fees if their lawsuit caused the desired change in the defendant's conduct); Evans v. Jeff D., 475 U.S. 717 (1986) (authorizing judicial approval of settlement agreements conditioned on the plaintiffs' waiver of their entitlement to attorney's fees); *see also* Nancy Leong, Katelyn Elrod & Matthew Nilsen, *Pleading Failures in* Monell *Litigation*, 73 Emory L.J. 801, 836-37 (2024) (noting that the Supreme Court's "restrictive decisions [about fee shifting] have attracted a great deal of criticism from both courts and commentators, and many believe they have limited lawyers' willingness to represent civil rights plaintiffs").

[26] City of Burlington v. Dague, 505 U.S. 557 (1992).

[27] *See* Carroll, *Compensation for Risk*, *supra* note 5, at 1024.

[28] *See id.* at 1025 (arguing that, because of *Dague*, claimants "face a structural impediment to securing representation in civil rights cases and other fee-shifting cases").

relevant structural factors. There are no quick fixes for any of the underlying issues, but there are steps that reformers can take to improve matters.

First, federal judges' attitudes about fee shifting may make them more willing to cut corners when resolving fee disputes.[29] Some appear to view fee-shifting petitions as a nuisance—not a crucial component of a socially beneficial enforcement regime, but an irritating chore that benefits only attorneys and is not worth judges' time. These views cannot be changed overnight, but advocates and scholars can counteract them by emphasizing the historical origins of fee shifting and the judicial role in implementing, rather than subverting, the intentional choices that Congress made when enacting fee-shifting statutes.

The second structural factor relates to the composition of the federal judiciary—both across the board, and at the Supreme Court specifically.[30] Across the board, a significant majority of federal judges are former corporate or government attorneys; very few did plaintiff-side civil rights work.[31] As a result, the typical federal judge is far more likely to have opposed a fee-shifting petition during their time in practice than to have drafted one. At the Supreme Court specifically, over the last few decades very few justices have had experience as a district court judge.[32] The Court's fee-shifting case law imposes heavy burdens on district court judges, but, because most justices have never performed that role, they have not been in a good position to appreciate the difficulties that their doctrinal choices have caused. To address this reality, presidential administrations should change the composition of the federal judiciary by appointing more federal judges with plaintiff-side civil rights experience and more Supreme Court justices with district court experience.

The final structural factor relates to the complexity of the fee-shifting inquiry at the district court level.[33] Many district courts face enormous docket pressure, which may tempt them to cut corners, especially when it comes to tasks they view as more burdensome than important. Congress should lessen those docket pressures by increasing the number of authorized district court judgeships. In the meantime, district courts should promote the expeditious resolution of fee-shifting disputes without taking problematic shortcuts. They can do so by discouraging petty and unsupported objections to fee-shifting petitions. Not only would that approach be more consistent with Supreme Court doctrine, but it would also be more faithful to the structure and goals of federal fee-shifting statutes.

I. The Doctrine of Case-Specific Fee Awards

This Part examines the Supreme Court doctrine that governs a district court's resolution of a fee-shifting dispute. The case law can be summarized

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[29] *See infra* section III.A.

[30] *See infra* section III.B.

[31] *See infra* section III.B.1.

[32] *See infra* section III.B.2.

[33] *See infra* section III.C.

in deceptively simple terms: A plaintiff is a "prevailing party" when she receives court-ordered relief,[34] and a "reasonable" fee is one that reflects the market value of the time her attorneys spent on the litigation.[35]

That summary might make the doctrine sound coherent and straightforward, but as explained below, it is often neither. The Supreme Court has given the lower courts a factually and normatively complex task, but its decisions have largely failed to acknowledge that complexity.[36] To the contrary, the Court has repeatedly asserted that lower courts need not—and should not—spend much time on the resolution of fee-shifting disputes.[37]

A. Prevailing-Party Status

Compared to what is required for the determination of a fee *amount*, a district court's task in determining fee *eligibility* is relatively simple. If the parties reach an agreement as to whether the plaintiff is a "prevailing party," that agreement will govern. Otherwise, a plaintiff will be deemed a prevailing party only if she obtains court-ordered relief,[38] such as a judgment on the merits or a consent decree.[39] Relief obtained by way of private settlement[40] or capitulation,[41] even if that relief consists of everything the plaintiff asked for, is not enough to qualify a plaintiff as a prevailing party.[42]

The bright-line requirement of court-ordered relief, notwithstanding its implications for the efficacy of fee-shifting statutes,[43] is usually

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[34] *See infra* section I.A.

[35] *See infra* section I.B.

[36] *See infra* section I.C.

[37] *See supra* note 12 and accompanying text.

[38] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 605 (2001) (holding that prevailing-party status requires a "judicially sanctioned change in the legal relationship of the parties").

[39] *Id.* at 604 (explaining that "enforceable judgments on the merits and court-ordered consent decrees" confer prevailing-party status). The magnitude of the relief does not matter; "even an award of nominal damages suffices under this test." *Id.* (citing Farrar v. Hobby, 506 U.S. 103 (1992)).

[40] By private settlement, I mean one that a court has not incorporated into an enforceable order, which would make it functionally equivalent to a consent decree. *See, e.g.*, Labotest, Inc. v. Bonta, 297 F.3d 892, 895 (9th Cir. 2002) ("[W]e hold that a plaintiff who obtains a court order incorporating an agreement that includes relief the plaintiff sought in the lawsuit is a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988."); *see also* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82 (1994) (discussing a court's authority to embody the terms of a settlement agreement in an order of dismissal, in which case "a breach of the agreement would be a violation of the order").

[41] By capitulation, I mean a situation in which the defendant responds to a lawsuit by repealing the challenged statute or otherwise ceasing to engage in the challenged behavior. *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. Rev. 1087, 1091 (2007) (discussing the relationship between prevailing-party status for plaintiffs and "strategic capitulation" by defendants).

[42] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 600 (2001).

[43] Although not the focus of this Article, the prevailing-party standard undermines claimants' ability to secure representation by making a fee-shifting award unavailable to some counsel

straightforward for district courts to apply. In the context of a plaintiff who prevails by obtaining nominal damages, however, the Supreme Court's interpretation of the "prevailing party" standard merely pushes the complexity into the next stage of the analysis. The Court has held that a plaintiff who obtains nominal damages qualifies as a prevailing party, but in some circumstances, the only "reasonable" fee for such a plaintiff will be "no fee at all."[44] The Court has not clearly defined those circumstances, and the ambiguity has led to a great deal of confusion in the lower courts.[45]

B. Calculation of the Fee Amount

As with prevailing-party status, if the parties reach an agreement as to the amount of a fee-shifting award, that agreement will govern.[46] Otherwise, once a district court has determined that a plaintiff qualifies as a prevailing party, it must determine what amount would be "reasonable." In a limited set of circumstances, the court may deny fees to a prevailing party entirely.[47] The rest of the time, the court must use the lodestar method to calculate the fee amount.[48]

As explained below, the lodestar method involves an initial calculation followed by consideration of certain enhancements and reductions.[49] A district court calculates the initial lodestar value by multiplying each attorney's reasonable hourly rate by the number of hours the attorney reasonably

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who secure relief on a plaintiff's behalf. *See* Carroll, *Compensation for Risk*, *supra* note 5, at 1029-31; *see generally* Albiston & Nielsen, *supra* note 41.

[44] Farrar v. Hobby, 506 U.S. 103, 105, 115 (1992).

[45] *See generally* Carroll, *Nominal Damages*, *supra* note 5 (discussing lower courts' difficulties with determining whether to award fees to a plaintiff who prevails by obtaining nominal damages).

[46] *Cf.* Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("Ideally, of course, litigants will settle the amount of a fee."). Such an agreement will govern even if it waives the plaintiff's entitlement to attorney's fees altogether. *See* Evans v. Jeff D., 475 U.S. 717, 729-30 (1986).

[47] As noted previously, in some circumstances a district court may deny a fee-shifting award to a plaintiff who has obtained only nominal damages. *See supra* notes 44-45 and accompanying text. A district court should also deny fees if "special circumstances would render such an award unjust." Lefemine v. Wideman, 568 U.S. 1, 5 (2012) (quoting *Hensley*, 461 U.S. at 429). Courts have interpreted this "special circumstances" exception narrowly. *See* Carroll, *Nominal Damages*, *supra* note 5, at 24 n.182.

[48] *See Hensley*, 461 U.S. at 433-34. The Court held in *Hensley* that fee amounts should be based on "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," *id.* at 433, but it did not use the term "lodestar" to refer to that calculation in a majority opinion until a few years later. *See* Libr. of Cong. v. Shaw, 478 U.S. 310, 312 n.1 (1986) ("The lodestar component of an attorney's fee is the product of 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'") (quoting *Hensley*, 461 U.S. at 433).

[49] Courts tend to refer to the initial calculation as the "lodestar amount" (or the "lodestar figure," or simply the "lodestar") and the overall process as the "lodestar method" (or the "lodestar approach"). *See, e.g.*, Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 553 (2010) (using the terms "lodestar figure" and "lodestar method" in this manner); Blanchard v. Bergeron, 489 U.S. 87, 94 (1989) (using the terms "lodestar amount" and "lodestar approach" in this manner).

expended on the litigation.[50] Depending on the circumstances, the court may be permitted to enhance the fee for reasons like an attorney's superior performance,[51] and it may be required to reduce the fee for reasons like the plaintiff's partial success.[52]

1. Initial Lodestar Calculation

Because of its central role in fee-shifting determinations, the Supreme Court has referred to the lodestar as "the guiding light of our fee-shifting jurisprudence."[53] As explained below, however, the Supreme Court's case law has loaded the two components of this calculation—the reasonable hourly rate, and the number of hours reasonably worked—with more weight than they can bear.

When the Supreme Court first adopted the lodestar method in 1983, it cautioned that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry," because "[t]here remain other considerations that may lead the district court to adjust the fee upward or downward."[54] Ten months later, the Court held in *Blum v. Stenson*[55] that the lodestar does not represent merely a "useful starting point,"[56] but a "presumptively reasonable fee."[57] The Court also clarified that, when determining a reasonable hourly rate, the district court must look to "prevailing market rates in the relevant community"[58] for "similar services by lawyers of reasonably comparable skill, experience and reputation."[59]

The district court in *Blum* had awarded an enhancement—an increase in the fee award relative to the initial lodestar amount—to reflect "the quality of representation, the complexity of the issues, the riskiness of success, and the 'great benefit to the large class' that was achieved."[60] The Supreme Court, however, concluded that most of the factors bearing on the amount of a reasonable fee—including those cited by the district court in support of the enhancement—were already captured in the lodestar itself.[61] For example,

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[50] *See* cases cited *supra* note 49; *see also infra* section I.B.1.

[51] *See infra* section I.B.2.

[52] *See infra* section I.B.3.

[53] City of Burlington v. Dague, 505 U.S. 557, 562 (1992); *Perdue*, 559 U.S. at 551 (2010) (quoting *Dague*, 505 U.S. at 562); Gisbrecht v. Barnhart, 535 U.S. 789, 801 (2002) (same).

[54] Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); *see also id.* at 433 (referring to the lodestar as a "useful starting point" and "an initial estimate").

[55] 465 U.S. 886 (1984).

[56] *Hensley*, 461 U.S. at 433.

[57] 465 U.S. at 901 n.18. The composition of the Court did not change between the decisions in *Hensley* (in May 1983) and *Blum* (in March 1984), and Justice Powell authored both opinions.

[58] *Id.* at 895.

[59] *Id.* at 895 n.11.

[60] *Id.* at 891 (quoting Stenson v. Blum, 512 F. Supp. 680, 685 (S.D.N.Y. 1981)).

[61] *Id.* at 898.

the Court posited that "the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates."[62] A plaintiff could overcome the presumption that the unenhanced lodestar already reflected all relevant information, but only with "specific evidence" showing that an enhancement was necessary.[63] Because the plaintiffs in *Blum* had not introduced such evidence, the Court rejected the enhancement that the district court had awarded.[64]

In its 1992 decision in *City of Burlington v. Dague*, the Supreme Court further constrained a district court's ability to increase the fee amount beyond the initial lodestar value.[65] Fee-shifting awards are inherently contingent,[66] because a plaintiff must qualify as a "prevailing party" in order to obtain one.[67] Accordingly, even after the Court's decision in *Blum* constrained other types of enhancements, district courts routinely increased the lodestar to reflect the risk-bearing services that the plaintiff's counsel provided.[68] In *Dague*, however, the Supreme Court categorically prohibited contingency enhancements.[69] Among other things, the Court asserted that "the difficulty of establishing [the legal and factual] merits [of the claim] . . . is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so."[70] Accordingly, the Court wrote, "[t]aking account of it again through lodestar enhancement amounts to double counting."[71]

Pursuant to the foregoing case law, whenever a plaintiff qualifies as a "prevailing party" and the parties do not agree on the amount of the fee-shifting award, the district court must calculate an initial lodestar value that reflects a long list of attorney- and case-specific factors. Those factors include the complexity of the issues presented, the difficulty of establishing the plaintiff's factual and legal contentions, the skill and experience of the plaintiff's counsel, and the prevailing market rates in the relevant community among attorneys of similar skill, experience, and reputation.[72]

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[62] *Id.*

[63] *Id.* at 898-901.

[64] *Id.* at 899-900.

[65] 505 U.S. 557 (1992). For a detailed discussion of this decision and its impact, see Carroll, *Compensation for Risk*, *supra* note 5.

[66] *Cf.* Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 Rev. Litig. 301, 333 n.112 (1993) ("Whether based on a percentage of the gain or lodestar hourly rates, fee awards are contingent on success in litigation.").

[67] *See supra* section I.A.

[68] See Carroll, *Compensation for Risk*, *supra* note 5, at 1039-42.

[69] *Dague*, 505 U.S. at 559 (prohibiting adjustments to the lodestar "to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services").

[70] *Id.* at 562.

[71] *Id.* at 563.

[72] To be precise, the Supreme Court has held the unmodified lodestar is intended to reflect those factors *in statutory fee-shifting cases*. When courts use the lodestar method to calculate

Even if the district court devoted a great deal of time and effort to the inquiry, it is doubtful that the hourly-rate and hours-worked components of the lodestar could accurately capture all of those aspects of any particular case. It is possible, though extremely difficult, to determine the range of hourly rates charged by attorneys in a particular area.[73] But it is not possible to quantify a particular attorney's skills, the complexity of the issues presented by a particular case, or the difficulty of establishing a particular plaintiff's factual and legal contentions—let alone to quantify the extent to which each of those factors drives the hourly rate that an attorney can command on the legal market. A judge can nudge an attorney's hourly rate upward to reflect a case's relative complexity, for example, or it can nudge the rate downward to reflect its relative simplicity, but no one should mistake that process for an accurate analysis of prevailing market conditions.[74]

2. Permissible Enhancements

As explained above, the Supreme Court has prohibited enhancements based on the contingent nature of the fee-shifting award, and it has established a presumption that the unenhanced lodestar captures all relevant information.[75] Notwithstanding those limitations, some lodestar enhancements remain permissible. Most significantly, the Court has held that the lodestar may be increased to reflect a delay in payment.[76] District courts routinely apply current hourly rates to prior years' work in order to achieve that adjustment.[77]

In theory, the Court also allows fee enhancements for an attorney's superior performance. In practice, it has never encountered a situation in which it has deemed a performance enhancement warranted.[78] In a 2010

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common-fund awards in class actions for monetary relief, enhancements for several of these factors remain available. *See* Federal Judicial Center, Manual for Complex Litigation § 14.13 (4th ed. 2004) (discussing the "[e]nhancements available in common-fund cases" that "are not appropriate enhancements in a statutory-fee award case"); *see also* Carroll, *Compensation for Risk*, *supra* note 5, at 1054-56 (evaluating whether differences between common-fund awards and statutory fee-shifting awards justify permitting contingency enhancements in the former context but not the latter).

[73] *See infra* section I.C (discussing the opacity of hourly rates actually charged by law firms).

[74] *See infra* section I.C (discussing the factual and normative complexity of the lodestar inquiry); *see also* Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 247 (1986) (criticizing the lodestar method for "*creat[ing] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law*").

[75] *See supra* section I.B.1.

[76] *See* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 556 (2010).

[77] *Id.*; *see also* Missouri v. Jenkins, 491 U.S. 274, 284 (1989) ("[A]n appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of the [fee-shifting] statute.").

[78] *See Perdue*, 559 U.S. at 560-61 (Thomas, J., concurring); *see also* Note, *Performance-Based Enhancements*, 124 Harv. L. Rev. 350, 359 (2010) (arguing that the Court in *Perdue* "nominally preserv[ed] performance enhancements while rendering them virtually unobtainable").

decision reversing a district court's award of such an enhancement, the Court emphasized that "circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation . . . are indeed 'rare' and 'exceptional,' and require specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'"[79]

3. Required Reductions

Even as it has prohibited some types of enhancements[80] and required "specific evidence" for others,[81] the Supreme Court has held that some circumstances require a district court to reduce a fee award below the initial lodestar calculation. One such circumstance involves Rule 68 of the Federal Rules of Civil Procedure, which allows a defendant to serve on the plaintiff "an offer to allow judgment on specified terms."[82] Under some fee-shifting statutes, if a plaintiff ultimately recovers a judgment less favorable than a defendant's earlier offer of judgment, the district court must exclude any attorney's fees the plaintiff incurred after the offer was made.[83] Because this type of reduction usually turns on objective and knowable facts, such as the date on which the defendant made the offer in question, it tends not to overly complicate the fee-shifting inquiry.

Reductions for the "degree of success obtained" are a different story.[84] On one hand, the Supreme Court has held that a "fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."[85] On the other hand, the Court has held that if "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount."[86] In those circumstances, the district court may be required to reduce the fee-shifting award, even if "the plaintiff's claims were interrelated, non-frivolous, and raised in good faith."[87]

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[79] *Perdue*, 559 U.S. at 554.

[80] *See supra* section I.B.1.

[81] *See supra* section I.B.2.

[82] Fed. R. Civ. P. 68. If the plaintiff accepts the offer, the clerk must enter judgment on the specified terms. *Id.* If the plaintiff does not accept the offer, but later recovers a judgment that "is not more favorable than the unaccepted offer," the plaintiff "must pay the costs incurred after the offer was made." *Id.*

[83] *See* Marek v. Chesny, 473 U.S. 1 (1985). Specifically, because the rule is written in terms of "costs," the district court must exclude fees for post-offer work if "the underlying statute defines 'costs' to include attorney's fees." *Id.* at 9.

[84] *See* Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). *But see* 5 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 15:51 (6th ed. 2024) (arguing that, instead of viewing them as downward adjustments, "it may be more accurate to see partial success cases as situations in which counsel is being fully rewarded, but only for its successful hours").

[85] *Hensley*, 461 U.S. at 435.

[86] *Id.* at 436.

[87] *Id.*

The Court has explained that "[t]here is no precise rule or formula for making these determinations,"[88] and a district court "necessarily has discretion in making this equitable judgment."[89]

Another common basis for reducing the lodestar relates to the fee petition itself. The Supreme Court has held that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates."[90] This burden includes the obligation "to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[91] It also includes the obligation to maintain and present detailed records of all of the time spent on the litigation.[92] If a district court determines that a plaintiff's documentation falls short in some way, it may reduce the fee-shifting award accordingly.[93]

C. Administrability

As the foregoing discussion suggests, the Supreme Court's fee-shifting case law imposes significant burdens on the district courts, even as it frustrates their ability to award fully compensatory fees. Although the lodestar method is often expressed as a mathematical formula, it does not require merely technocratic determinations. Instead, the doctrine requires a highly contextualized evaluation of multiple facets of each case. As the Second Circuit put it, "[t]he net result of the fee-setting jurisprudence here and in the Supreme Court is that the district courts must engage in an equitable inquiry of varying methodology while making a pretense of mathematical precision."[94]

At best, a district court's task in determining the hours-worked and hourly rate components of the lodestar involves a great deal of evidentiary complexity.[95] Yet the Supreme Court has also stressed judicial economy in

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[88] *Id.* at 436.

[89] *Id.* at 437. The guiding principle is that the district court "should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440.

[90] *Id.* at 437.

[91] Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984).

[92] *Hensley*, 461 U.S. at 437 & n.12.

[93] *Id.* at 433.

[94] Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 189 (2d Cir. 2008); *see also* COURT AWARDED ATTORNEY FEES: REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237, 247 (1986) (criticizing the lodestar method for "creat[ing] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law").

[95] *Cf.* Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 489-90 (1986) ("The time and rate issues . . . require extensive factual development in every single case."); John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 495 (1981) ("[N]either the fair market value nor the number of hours can be known precisely.").

fee-shifting determinations, repeatedly cautioning that a request for attorney's fees "should not result in a second major litigation."[96] For the most part,[97] the Court has dealt with this tension—between the amount of time the task demands and the amount of time it advises lower courts to expend—by claiming that it does not exist. In 2010, for example, the Court asserted that "the lodestar method is readily administrable . . . [and] objective, and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results."[98]

Far from sharing that rosy view, district judges regularly complain about the burdens involved in reviewing lodestar-based fee petitions,[99] which are often "voluminous."[100] For the hours-worked component alone, a petition should include a description of every compensable task that each of the plaintiff's attorneys undertook throughout the entirety of the litigation process, along with a record of the amount of compensable time the attorney spent on the task.[101] For a civil rights claim that requires the labor of multiple attorneys and takes several years to resolve, the time entries alone can amount to hundreds of pages of documentation. In addition to those time entries, a petition must include evidentiary support for the reasonableness

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[96] *Hensley*, 461 U.S. at 437; CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 435 (2016); Fox v. Vice, 563 U.S. 826, 838 (2011); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 609 (2001); City of Burlington v. Dague, 505 U.S. 557, 566 (1992); Comm'r, I.N.S. v. Jean, 496 U.S. 154, 163 (1990); Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 766 (1989); Pierce v. Underwood, 487 U.S. 552, 563 (1988); Webb v. Bd. of Educ. of Dyer Cnty., 471 U.S. 234, 244 n.20 (1985); *Blum*, 465 U.S. at 902 n.19; *see also supra* note 12 and accompanying text.

[97] *But see Blum*, 465 U.S. at 895 n.11 ("We recognize, of course, that determining an appropriate 'market rate' for the services of a lawyer is inherently difficult.").

[98] Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 551-52 (2010) (citations and internal quotation marks omitted).

[99] *See, e.g.*, Planned Parenthood of Cent. N.J. v. Att'y Gen. of N.J., 297 F.3d 253, 261 (3d Cir. 2002) ("Consideration of fee petitions is often an extremely involved and time-consuming exercise that can be burdensome to a busy district court . . . ."); *In re* Lloyd's Am. Tr. Fund Litig., No. 96 CIV.1262, 2002 WL 31663577, at *25 (S.D.N.Y. Nov. 26, 2002), *aff'd sub nom.* Adams v. Rose, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) (referring to the "the wasteful and burdensome process—to both counsel and the courts—of preparing and evaluating fee petitions"); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1270 (D.C. Cir. 1993) (noting "the heavy workload of most district court judges" and that "[t]he lodestar procedure requires detailed involvement by the District Court, evaluating the reasonableness of expenditure of attorney time and effort, and making comparative inquiries on reasonable rates for those services"); *In re* Union Carbide Corp. Consumer Prod. Bus. Sec. Litig., 724 F. Supp. 160, 170 (S.D.N.Y. 1989) (referring to the "largely judgmental and time-wasting computations of lodestars and multipliers" that "often seem to take on the character of so much Mumbo Jumbo"); *see* COURT AWARDED ATTORNEY FEES: REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237, 258 (1986) (describing the lodestar process as "cumbersome, enervating, and often surrealistic").

[100] Indeed, "voluminous" fee petitions are common enough that multiple circuits have adopted standards governing their review. *See, e.g.*, Loranger v. Stierheim, 10 F.3d 776, 783 (11th Cir. 1994) ("Other circuits have grappled with the question, and have almost uniformly held that where a fee application is voluminous, an hour-by-hour analysis of a fee request is not required.").

[101] *See* Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

of each attorney's claimed hourly rate.[102] Satisfying that burden can require dozens more pages of documentation, including practitioner affidavits, expert declarations, and bar studies.[103]

The difficulty of establishing "reasonable" hourly rates (which must be based on the "prevailing market rates in the relevant community" for "similar services by lawyers of reasonably comparable skill, experience and reputation"[104]) is particularly hard to reconcile with the Court's claims of administrability. Many plaintiff-side law firms do not bill their attorneys' time by the hour.[105] Among those that do, some set their rates based on considerations other than profit maximization, such that their actual hourly rates fall below prevailing market rates.[106] Even in the context of a profit-maximizing law firm that bills its clients hourly, defendants often argue that the attorneys' actual rates are not their "reasonable" rates—because the attorneys provide different services to their paying clients,[107] for example, or because there are other attorneys who charge less.[108] Because "[t]here is no 'standard quality' of legal services,"[109] nor any obvious way of measuring the skill that a particular attorney demonstrated or a particular case required, factual and normative complexities abound.

Some of the factual complexities result from the difficulty of obtaining complete and accurate information about the hourly rates that law firms charge their paying clients. One cannot simply google law firms' hourly

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[102] *See Blum*, 465 U.S. at 895 n.11 (1984) ("To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.").

[103] *See, e.g.*, Ne. Ohio Coal. for the Homeless v. Husted, 831 F.3d 686, 724 (6th Cir. 2016) ("[P]reparing and supporting a fee application is more strenuous than invoicing an hourly client in the marketplace because much more detail and proof is required under § 1988. Unlike privately paid attorneys, civil rights attorneys must support their bills with expert affidavits, distinguish between time spent on successful and unsuccessful claims, defend their billing rates, and compare them to similar attorneys.").

[104] *See Blum*, 465 U.S. at 895 & n.11.

[105] *See* Carroll, *Compensation for Risk*, *supra* note 5, at 1052-53. For example, some firms charge contingent percentage fees, and some charge flat fees; and some attorneys, such as In-house counsel, are directly employed by their clients. *See* Nicholas N. Nierengarten, *Fee-Shifting: The Recovery of in-House Legal Fees*, 39 WM. MITCHELL L. REV. 227, 237-38 (2012).

[106] The Supreme Court has squarely held that hourly rates "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum*, 465 U.S. at 895.

[107] *See, e.g.*, Cooper v. Casey, 97 F.3d 914, 920 (7th Cir. 1996) (vacating award of attorneys' fees and remanding for further proceedings in a civil rights case because "[t]here is no evidence that the plaintiffs' lawyers practice in the area of civil rights, are seeking a smaller total award than civil rights lawyers charging lower hourly rates would obtain, or achieved substantially better results than civil rights lawyers would have achieved").

[108] *See, e.g.*, Lamar Advert. Co. v. Charter Twp. of Van Buren, 178 F. App'x 498, 502 (6th Cir. 2006) (affirming a fee-shifting decision in which the district court refused to award an attorney his actual hourly rate of $310 to $370 and instead awarded him the average billing rate in the Ann Arbor/Detroit area, which the court set at $200).

[109] Silverman v. Motorola Sols., Inc., 739 F.3d 956, 958 (7th Cir. 2013).

rates; far from posting the information on their websites, individual law firms tend to be extremely tight-lipped about what they charge for their attorneys' time. Some state bar organizations publish statewide surveys about hourly rates, but the results usually reflect only voluntary responses from individual attorneys, and the response rates and sample sizes are often quite low.[110] One private company offers a more comprehensive report, which includes average hourly rates for individual law firms.[111] For the 2024 version of that report, a single user license cost $49,995,[112] an amount that likely reflects the difficulty of gathering the data and the extent to which the information is otherwise unavailable.

Even if a court had access to complete and accurate hourly rates at one particular point in time, that information would not directly establish the hourly rates prevailing at a subsequent point in time. Hourly rates can change a great deal from year to year, and those changes are themselves heterogeneous across time and place. For example, according to economic surveys conducted by the Oregon State Bar,[113] the median hourly billing rate for attorneys in private practice in that state increased by 15.6% between 2012 and 2017.[114] Economic surveys conducted by the Florida State Bar

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[110] *See* Sara K. MacWilliams & Todd R. Mendel, *Recovering Attorney Fees and Costs: What You Need to Know*, MICH. B.J. 34, Sept. 2014, at 34, 36 & n.21. Consider a trial court's discussion of the "significant limitations" of the State Bar of Texas 2015 Hourly Fact Sheet:

> [I]t is uncertain that even [an up-to-date] Fact Sheet would accurately represent the reasonable hourly rate for the El Paso legal community. . . . [The plaintiffs' expert, Dr. Pearson,] stated the Texas Bar survey underlying the Fact Sheet data suffered from the fatal defects of a limited sample size, selection bias, and suboptimal methodology. Moreover, the hourly rates listed on the Fact Sheet do not distinguish between reported billing method: hourly fees, flat rates, contingency fees, or discounted fees for volume clients. Dr. Pearson concluded the Fact Sheet does not reliably reflect the hourly rates of attorneys in Texas. Tellingly, the Texas Bar itself warns against using the Fact Sheet to set attorney fees.

Diocesan Migrant & Refugee Servs., Inc. v. U.S. Immigr. & Customs Enf't, No. EP-19-CV-00236-FM, 2021 WL 289548, at *12 (W.D. Tex. Jan. 28, 2021).

[111] *See Valeo 2024 Law Firm Hourly Rate Report*, RESEARCH AND MARKETS, https://www.researchandmarkets.com/reports/5860942/valeo-law-firm-hourly-rate-report [https://perma.cc/8GAN-DC2P] (last visited Sept. 20, 2024).

[112] *Id.*

[113] As noted previously, *see supra* note 110 and accompanying text, these types of bar studies have significant limitations. But other sources show similar variation across time and place. Consider the Real Rate Report, which is "an analysis of legal invoices sourced directly from corporations' and firms' e-billing software." Andrew Maloney, *Where are Big Law Billing Rates Growing the Fastest?*, ALM (Jan. 24, 2024, 3:52 PM), https://www.law.com/2024/01/24/where-are-big-law-billing-rates-growing-the-fastest/ [https://perma.cc/VRS8-XRQM]. According to the most recent version of that report, "[n]early a third of timekeepers saw no change in what they billed in 2023," while "close to 10% of timekeepers saw their rates increase by 20% or more." *Id.* "[I]ndustries like consumer and financial services and health care saw some of the highest rate increases," and "[m]arkets such as Dallas and Houston also saw notable, above-average billing rate increases." *Id.*

[114] Debi Elliott, Kelly Hunter & Amber Johnson, OREGON STATE BAR 2017 ECONOMIC SURVEY 12 (2018) (reporting an increase in median hourly rates for attorneys in private practice from $225 in 2012 to $260 in 2017).

suggest that the median hourly billing rate in that state increased by at least 20% over roughly the same period.[115] By contrast, the cumulative rate of inflation between 2012 and 2017 was only about 6.5%.[116]

Moreover, even if a court had access to complete and accurate hourly rates for the appropriate time period, that information would not directly establish the reasonable hourly rates for the attorneys who represented the prevailing plaintiff in a particular fee-shifting case. As the Court acknowledged decades ago, "[t]he type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely."[117]

That assessment holds true today. For example, according to the Oregon State Bar, attorneys in that state charged as little as $30 per hour and as much as $850 per hour in 2016.[118] Variability in attorneys' actual hourly rates will likely persist into the future, due in part to increasing specialization and stratification within and among law firms.[119] The challenges involved in determining reasonable hourly rates—and the inaccuracy of the Supreme Court's assertions about the administrability of the lodestar method—are likely to persist as well.

II. The Reality of Homogenizing Shortcuts

The Supreme Court's case law requires district courts to calculate fee-shifting awards in an evidence-based and case-specific manner.[120] At the same time, the Court has repeatedly cautioned against allowing a fee

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[115] Florida did not publish an economic survey covering the year 2017, but its surveys for 2016 and 2018 both show a median hourly rate of $300, as compared to the 2012 median hourly rate of $226 to $250. Florida State Bar, Results of the 2018 Economics and Law Office Management Survey 8 (Mar. 2019) (showing a median hourly rate of $300 in 2018); Florida State Bar, Results of the 2016 Economics and Law Office Management Survey 8 (Feb. 2017) (showing a median hourly rate of $300 in 2016); Florida State Bar, Results of the 2012 Economics and Law Office Management Survey 7 (Feb. 2013) (showing a median hourly rate of $226 to $250 in 2012).

[116] *CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/4GRV-6Q2T] (last visited Sept. 21, 2024). The CPI Legal Services Index increased by approximately 8.5% over the same period, and the Producer Price Index for Offices of Lawyers increased by approximately 8.8%. *See Consumer Price Index (CPI) Databases*, U.S. Bureau of Labor Statistics, https://www.bls.gov/cpi/data.htm [https://perma.cc/HRC3-YCTN] (last visited Sept. 21, 2024); *Producer Price Indexes*, U.S. Bureau of Labor Statistics, https://www.bls.gov/ppi/ [https://perma.cc/LF95-BG2P] (last visited Sept. 21, 2024).

[117] Blum v. Stenson, 465 U.S. 886, 895 (1984).

[118] Oregon State Bar 2017 Economic Survey, *supra* note 114, at 38. The study further reported a 25th percentile rate of $210 and a 75th percentile rate of $335. *Id.* As discussed *infra* section II.A.2, the District of Oregon "uses the most recent Oregon State Bar Economic Survey as its initial benchmark" in determining reasonable hourly rates. *See* D. Or. Local Rule 54-3.

[119] *See generally* Ann Southworth, *Our Fragmented Profession*, 30 Geo. J. Legal Ethics 431 (2017) (discussing the "growth, specialization, and stratification of the profession" over the previous three decades); George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. Rev. 1635 (2006).

[120] *See supra* Part I.

dispute to turn into a "second major litigation."[121] Notwithstanding the tension between the Court's emphasis on judicial economy and the complexity of the inquiry it requires, one might expect that district courts would generally attempt to apply the doctrine as articulated. One might also expect that, if a district court failed to do so, reviewing courts would generally deem such a failure to be an abuse of discretion.

Often, however, something entirely different occurs: A district court eschews the contextualized analysis that the Supreme Court requires, and an appellate court either approves or tolerates the district court's methodology. To illustrate the forms these shortcuts can take, as well as the ways in which they can undermine the efficacy of fee-shifting statutes, this Part examines three that are particularly well-trodden: the use of artificially standardized rates,[122] the reliance on illusory judicial expertise,[123] and the duplication of previous hourly rates.[124]

It bears emphasis that these shortcuts tend to reduce fee-shifting awards, and by doing so, they make it more difficult for civil rights claimants to find qualified counsel.[125] The risk is not that an attorney will suffer economic hardship if he is awarded fees at $300 per hour instead of $350 per hour.[126] Rather, the risk is that an attorney will be less likely to represent fee-shifting clients at $300 per hour if he can make $350 per hour representing clients who pay out of pocket.

A. Use of Artificially Standardized Rates

When determining an attorney's reasonable hourly rate, the Supreme Court has held that a district court should consider the nature of the services provided, the skills and experience of the attorney, the complexity of the legal issues presented, and the difficulty of establishing the factual and legal merits of the plaintiff's claims, among other things.[127] As explained below, instead of conducting that case-specific analysis, courts sometimes rely on a standardized table of hourly rates.

1. The Laffey *Matrix*

One of the most common shortcuts involves a fee schedule from a case brought more than half a century ago. In 1970, Mary Pat Laffey sued

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[121] *See supra* section I.C; *see also supra* note 12 and accompanying text.

[122] *See infra* section II.A.

[123] *See infra* section II.B.

[124] *See infra* section II.C.

[125] *See supra* notes 22-27 and accompanying text.

[126] *See infra* notes 249-257 and accompanying text (discussing an attorney who was awarded fees at $300 per hour instead of the requested $350 per hour).

[127] *See supra* section I.B.1.

Northwest Airlines on behalf of a class of female flight attendants, alleging violations of Title VII and the Equal Pay Act.[128] In 1982, after prevailing on the merits, the plaintiffs filed a petition for a statutory fee-shifting award.[129] The petition proposed the use of a "matrix of hourly rates for lawyers of differing levels of experience,"[130] which has since come to be known as the *Laffey* matrix.

Pursuant to the proposed fee matrix, each of the plaintiffs' attorneys would be assigned one of five hourly rates, based on the length of time that had passed since they graduated from law school. The hourly rate would be $175 for an attorney who graduated more than twenty years ago; $150 for an attorney who graduated eleven to nineteen years ago; $125 for an attorney who graduated eight to ten years ago; $100 for an attorney who graduated four to seven years ago; and $75 for an attorney who graduated one to three years ago.[131] The District Court for the District of Columbia awarded fees at the rates set forth in the matrix, deeming them to fall "within the range of rates that prevail in the Washington, D.C. area for lawyers of comparable qualifications who handle cases of this sort."[132]

The evidence the plaintiffs presented in support of their proposed rates is similar to the evidence attached to countless other fee petitions,[133] yet the *Laffey* matrix has somehow taken on talismanic importance in many courts' fee-shifting decisions.[134] When calculating fee awards in "complex federal litigation,"[135] district courts routinely determine hourly rates by looking to an updated version of the matrix and assigning attorneys one of the five

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[128] Laffey v. N.W. Airlines, Inc., 572 F. Supp. 354, 359 (D.D.C. 1983), *aff'd in part, rev'd in part*, 746 F.2d 4 (D.C. Cir. 1984).

[129] *Id.* at 360.

[130] *Id.* at 371.

[131] *Id.*

[132] *Id.* at 374.

[133] The plaintiffs supported the proposed rates with "twenty-five attorney affidavits secured specifically for this litigation, information gleaned from affidavits filed in other cases, and fee data reflected in previous judicial decisions." *Id.* at 371-72. "Fee petitioners generate that type of data regularly based on current billing information in the relevant legal market . . . ." RUBENSTEIN, *supra* note 84, at § 15:43.

[134] *See* RUBENSTEIN, *supra* note 84, at § 15:43 ("[T]he extraordinary efforts courts take to employ the *Laffey* matrix—updating it, CPI-adjusting it to different parts of the country, etc.—imply that there is something magical about the *Laffey* matrix data.").

[135] *See, e.g.*, Reed v. District of Columbia, 843 F.3d 517, 525 (D.C. Cir. 2016) (noting that the *Laffey* matrix "presumptively applies" to "complex federal litigation," though "the case law provides little guidance to litigants attempting to demonstrate" that their case falls under that umbrella). As one court put it, the *Laffey* matrix "has served as a guide in nearly every conceivable type of case," including cases about employment discrimination, the Administrative Procedures Act, civil rights, the Freedom of Information Act, and the Clean Air Act. Miller v. Holzmann, 575 F. Supp. 2d 2, 14 (D.D.C. 2008), *amended in part*, *vacated in part sub nom.* United States *ex rel.* Miller v. Bill Harbert Int'l Const., Inc., 786 F. Supp. 2d 110 (D.D.C. 2011); *see also* U.S. Attorney's Office for the District of Columbia, Civil Division, *The Fitzpatrick Matrix*, https://www.justice.gov/usao-dc/page/file/1189846/download [https://perma.cc/GMY6-N22K] (last visited Sept. 21, 2024) (noting that "caselaw establishes [complex federal litigation] as encompassing a broad range of matters tried in federal court").

hourly rates based on the number of years since they graduated from law school.[136] Almost as routinely, litigants spar over what method the court should use to update the decades-old matrix, adjust it for a different geographical area, or both.[137]

All told, federal courts have relied on the *Laffey* matrix in hundreds (if not thousands) of cases.[138] In some circumstances, using the matrix as corroborating or comparative evidence about an attorney's reasonable hourly rates could be consistent with the Supreme Court's case law; however, directly applying the hourly rates contained in the matrix is not. Other than Mary Pat Laffey, whose litigation concluded decades ago, the hourly rates set forth in the *Laffey* matrix are not specific to any particular plaintiff's attorneys or claims—at least, not unless the plaintiff has presented evidence establishing that case-specific connection.[139]

Some district courts do attempt to tailor the *Laffey* matrix to the case before them, often by starting with an hourly rate taken from the matrix and then applying a percentage-based reduction.[140] This tailoring generally drives hourly rates downward, rather than upward. In the D.C. Circuit, for example, "the rates contained in the Laffey Matrix are typically treated as the *highest* rates that will be presumed to be reasonable when a court reviews a petition for statutory attorneys' fees."[141] This approach means that the *Laffey* matrix acts not as an estimate or starting point, but as a ceiling.

Moreover, courts seldom articulate a clear justification for the specific percentage by which they reduce the *Laffey* rate, and that lack of justification can make the reductions appear haphazard or arbitrary. For example, if an attorney actually receives the full *Laffey* rate from paying clients, why would 92% of that rate be more appropriate than 95%, 98%, or even

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[136] *See* RUBENSTEIN, *supra* note 84, at § 15:43.

[137] *Id.*; *see also* Webster v. U.S. Dep't of Just., No. CV 02-603, 2021 WL 4243414, at *10 (D.D.C. Sept. 17, 2021) ("Two competing *Laffey* matrices have emerged [in the D.C. Circuit]—the Legal Services Index ('LSI') Matrix and the United States Attorney's Office ('USAO') Matrix—each adjusting for inflation in different ways." (citation and internal quotation marks omitted)).

[138] RUBENSTEIN, *supra* note 84, at § 15:43 ("In the 10-year period from December 1, 2011 through December 1, 2021, the term 'Laffey matrix' appears in 967 reported federal cases on Westlaw; 356 of these references are in the District of Columbia courts, but courts in many circuits have utilized the matrix.")

[139] For example, an attorney could establish that case-specific connection through evidence that she has matched her hourly rates for paying clients to a particular version of the matrix. *See, e.g*, Hammond v. District of Columbia, 183 F. Supp. 3d 145, 154 (D.D.C. 2016) (noting that the plaintiff presented evidence that his attorney and two others, all of whom litigated similar cases in the same geographical area, "charge[d] the USAO *Laffey* rate when they represent[ed] both paying and non-paying clients").

[140] *See, e.g.*, Jay v. District of Columbia, 75 F. Supp. 3d 214, 221-22 (D.D.C. 2014) (concluding "that it is appropriate to award the plaintiff's attorney eighty percent of the *Laffey* rate" because the case was "relatively straightforward," but the defendant increased the complexity of the litigation by refusing to engage in negotiations, and the plaintiff ultimately received "nearly all of the relief requested").

[141] Rooths v. District of Columbia, 802 F. Supp. 2d 56, 61 (D.D.C. 2011) (emphasis added).

100%?[142] If a judge deems a case insufficiently complex to warrant the full *Laffey* rate, why would that lack of complexity require hourly rates set to 75% of the *Laffey* rate, rather than 65% or 85%?[143] In a case involving multiple administrative proceedings, how could a court establish that the plaintiff's attorney should receive 65% of the *Laffey* rate for one of those proceedings, but 75%, 80%, 85%, 90%, and 95% of the *Laffey* rate, respectively, for the others?[144] Decisions taking this approach often set forth a list of case-specific circumstances before announcing a specific percentage that has no obvious relationship to those circumstances (except that the court deems them to warrant something less than the full *Laffey* rate). Percentage-based reductions can thus compromise a fee matrix's chief benefits—clarity and consistency[145]—without truly grounding the assigned hourly rate in the facts of the particular case.[146]

The Supreme Court has not specifically prohibited district courts' use of the *Laffey* matrix. In a 2010 case about performance enhancements, however, it disapprovingly noted the *Laffey* matrix's flat approach:

> [A]n enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors.[147]

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[142] *See Hammond*, 183 F. Supp. 3d at 154-55 (awarding "92% of the USAO *Laffey* rate for [the attorney's] services" notwithstanding the attorney's declaration that she "'currently matches [her] hourly rates to those in . . . the USAO adjusted *Laffey* matrix and has had several paying clients that have paid these rates'" (second alteration in the original)).

[143] *See Rooths*, 802 F. Supp. 2d at 62-63 (awarding fees at 75% of *Laffey* rates because "[t]his litigation does not much resemble the sort of complicated cases in which a plaintiff's counsel is appropriately awarded fees at the maximum allowable rate"); *see also* Hall & Assocs. v. EPA, No. CIV.A.1:10-cv-00228, 2011 WL 13373978, at *6 (D.D.C. Nov. 4, 2011) (awarding fees at 85% of *Laffey* rates to "reflect[] the lack of complexity in FOIA appeals and in this appeal specifically, and [one of the plaintiff's attorneys'] lack of experience in undertaking such appeals").

[144] *See* Salmeron v. District of Columbia, 195 F. Supp. 3d 153, 166, 169 (D.D.C. 2016) (awarding an attorney 90%, 85%, 80%, 75%, and 65% of the *Laffey* rate for work on various administrative proceedings).

[145] *See, e.g.*, Brief for Amicus Curiae Professors of Legal Ethics, the Legal Profession, and Special Education Law in Support of Plaintiff-Appellant at 27, D.P. v. N.Y.C. Dep't of Educ., No. 22-259(L) (2d Cir. Aug. 30, 2022) ("The key benefit of the fee-schedule approach is not the specific rates cited, but the overall clarity and consistency that the approach provides.").

[146] Moreover, particular percentages may themselves become somewhat standardized over time, further distancing the resulting hourly rates from the circumstances of a particular case. *See, e.g.*, Brown v. District of Columbia, 80 F. Supp. 3d 90, 98 (D.D.C. 2015) ("When the underlying administrative proceeding in an IDEA matter does not concern complex matters, courts in this Circuit often have awarded 75% of the full *Laffey* rate for legal work completed."); Means v. District of Columbia, 999 F. Supp. 2d 128, 132 (D.D.C. 2013) ("Sister courts have previously used 50% of the *Laffey* rates as a reasonable per hour charge for non-complex litigation over attorney's fees.").

[147] Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 554-55 (2010).

This passage is worth unpacking. The Court's case law has long required district courts to base fee-shifting awards on "'the prevailing market rates in the relevant community.'"[148] Here, the Court asserts that "a formula that takes into account only a single factor (such as years since admission to the bar)"—that is, a formula like the *Laffey* matrix[149]—is a method that "*does not adequately measure the attorney's true market value*."[150] In other words, the *Laffey* matrix does not adequately do what the Court's case law requires district courts to do. It is remarkable that many lower courts have continued to rely on the matrix, in hundreds of cases,[151] in the years since the Supreme Court wrote this passage.[152]

Recently, some D.C. district court judges have begun to apply "a spin-off of the *Laffey* Matrix"[153] known as the Fitzpatrick matrix.[154] These courts concluded that the Fitzpatrick matrix avoided some of the pitfalls involved in applying the *Laffey* matrix, such as the latter's reliance on fee data from the 1980s.[155] Instead, the Fitzpatrick matrix relies solely on the rates requested in certain fee petitions filed in D.C. district courts between 2013 and 2020.[156] Yet the Fitzpatrick matrix does not resolve the problem

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[148] *Id.* at 551 (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984)); *see also supra* section I.B.

[149] Had there been any ambiguity about whether the Court was referring to the *Laffey* matrix, the Court made its meaning clear by citing two cases: the 1983 district court decision in *Laffey* and a 2000 district court decision that deemed the *Laffey* matrix sufficient to establish market rates: *Perdue*, 559 U.S. at 555 n.6 (citing Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C.1983), *aff'd in part, rev'd in part*, 746 F.2d 4 (D.C. Cir. 1984), *and* Salazar v. District of Columbia, 123 F. Supp. 2d 8 (D.D.C. 2000)).

[150] *Perdue,* 559 U.S. at 554-55 (emphasis added).

[151] *See supra* note 138 and accompanying text.

[152] Then again, at least one of those lower-court judges has since ascended to the Supreme Court. *See* Eley v. District of Columbia, 793 F.3d 97, 105 (D.C. Cir. 2015) (Kavanaugh, C.J., concurring) ("[I]n my view, the United States Attorney's Office *Laffey* matrix is appropriate for IDEA cases.").

[153] Brackett v. Mayorkas, No. CIV.A. 17-988, 2023 WL 5094872, at *2 (D.D.C. Aug. 9, 2023); *see also, e.g.*, J.T. v. District of Columbia, 652 F. Supp. 3d 11, 36 (D.D.C. 2023). In some cases, the plaintiffs requested rates based on the Fitzpatrick matrix. *See, e.g.*, Naumes v. Dep't of the Army, No. CIV.A. 21-1670, 2023 WL 4350786, at *6 (D.D.C. July 5, 2023) (noting that the defendant did not dispute the plaintiff's proposed rate, which was based on the Fitzpatrick matrix); Elec. Priv. Info. Ctr. v. Internal Revenue Serv., No. 1:18-cv-902, 2023 WL 4892712, at *15 (D.D.C. June 2, 2023) (same); WP Co. v. Dep't of Homeland Sec., No. 1:20-cv-1487, 2023 WL 1778196, at *4 (D.D.C. Feb. 6, 2023) (same); Vollmann v. Dep't of Just., No. CIV.A. 12-0939, 2022 WL 1124814, at *7 (D.D.C. Apr. 14, 2022) (noting that both parties agreed to use Fitzpatrick matrix rates but disagreed about which year's rates should apply).

[154] *See generally* U.S. Attorney's Office for the District of Columbia, Civil Division, *supra* note 135.

[155] *See, e.g.*, *Brackett*, 2023 WL 5094872, at *5 (agreeing with another district judge that "the Fitzpatrick Matrix (1) relies on more recent data, thereby minimizing the distorting effects of forecasting current rates from decades-old survey data, (2) draws from a larger and more transparent dataset, and (3) breaks rates out into more precise gradations (providing rates for 36 experience levels where the LSI Matrix [the plaintiff's preferred version of the *Laffey* matrix] employs only five)").

[156] *See* U.S. Attorney's Office for the District of Columbia, Civil Division, *supra* note 135, at 1. The data set used to create the Fitzpatrick matrix excluded "rates that did not appear to be free

the Supreme Court identified with the *Laffey* matrix, because it still constitutes "a formula that takes into account only a single factor (such as years since admission to the bar)."[157] As a result, the Fitzpatrick matrix flattens the range of rates for all attorneys with a particular level of experience into a single value. Some district courts may view those flattening effects—despite being contrary to the case-specific analysis the case law requires—as a feature rather than a bug. For example, when one plaintiff pointed out that a case in the Fitzpatrick matrix's data set involved rates higher than she was seeking, the court lauded the matrix for "avoid[ing] exactly this kind of cherry picking."[158]

Perhaps district courts' ongoing use of the *Laffey* matrix (or their more recent use of the Fitzpatrick matrix) could be viewed as an understandable response to the case law's conflicting directives about specificity, evidentiary support, and judicial economy.[159] As the D.C. Circuit explained, "district courts often turn to a fee matrix—that is, a chart averaging rates for attorneys at different experience levels" as a means of reconciling the Supreme Court's "seemingly discordant instructions" about the calculation of fee-shifting awards.[160] These fee matrices do not truly reconcile the Court's instructions, however, because the attorneys admitted to the bar in a particular year (or even all such attorneys who work on complex federal litigation)[161] do not all provide "similar services" or possess "reasonably comparable skill, experience and reputation."[162] Accordingly, although using the *Laffey* matrix may help lower courts to comply with the exhortation against

market transactions, including cases explicitly or implicitly based on an existing fee matrix." *Brackett*, 2023 WL 5094872, at *5 (internal citation omitted).

[157] Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 554-55 (2010). The Fitzpatrick matrix offers a single hourly rate based on "an attorney's years of experience practicing law." *See* U.S. Attorney's Office for the District of Columbia, Civil Division, *supra* note 135, at 2. As the USAO explains, "[n]ormally, an attorney's experience will be calculated based on the number of years since an attorney graduated from law school. If the year of law school graduation is unavailable, the year of bar passage should be used instead." *Id.*

[158] *Brackett*, 2023 WL 5094872, at *5. As with the *Laffey* matrix, see *supra* notes 140-146 and accompanying text, some courts have compromised any benefits resulting from this aspect of the Fitzpatrick matrix by applying percentage-based reductions. *See* Louise Trauma Ctr. LLC v. U.S. Dep't of Homeland Sec., No. 1:20-cv-01128, 2023 WL 3478479, at *4-5 (D.D.C. May 16, 2023) (awarding "an hourly rate equal to 80% of the Fitzpatrick rate" after concluding that the plaintiff "has not shown that this case qualifies as complex federal litigation such that the Fitzpatrick Matrix presumptively applies.").

[159] *See supra* section I.C.

[160] DL v. District of Columbia, 924 F.3d 585, 587 (D.C. Cir. 2019).

[161] *See supra* note 135 (discussing the broad range of cases deemed to constitute "complex federal litigation" for purposes of applying the *Laffey* matrix).

[162] *See* Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). To the contrary, the Court has acknowledged that "[t]he type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely." *Id.*

turning fee disputes into a "second major litigation,"[163] it does not comply with the Court's requirements as to case-specific tailoring.[164]

2. Other Fee Schedules

Although none is as popular as the *Laffey* matrix, federal courts have employed a number of other fee schedules for purposes of determining reasonable hourly rates. Those fee schedules vary a great deal, not only in terms of their consistency with the Supreme Court's fee-shifting doctrine, but also in terms of the extent to which they support or undermine the purposes of fee-shifting statutes.

On the more problematic end of the spectrum lies a fee schedule embedded in the Local Rules for the District of Maryland.[165] The court adopted the fee schedule in 1997, based on the work of an ad hoc committee convened "to consider the formulation of rules and guidelines for addressing attorney's fee awards in the District of Maryland."[166] In its initial form, the fee schedule included only two bands of hourly rates: one for attorneys who had been admitted to the bar for less than eight years, and one for attorneys who had been admitted to the bar for more than eight years.[167]

The judges who added the fee schedule to the Local Rules appear to have envisaged case-specific tailoring and regular updates. In an article published the year the schedule was adopted, a Maryland district judge[168] wrote that "the applicable case law must control in a particular case," but "the ranges established in the *Rules and Guidelines* are nevertheless intended to

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[163] *See id.* at 902 n.19 (internal citation omitted). Indeed, because of its potential to reduce the burdens of fee-shifting petitions and generate predictable results, some version of a fee schedule may be a better fee-setting mechanism than the inquiry the Supreme Court requires. *Cf.* Brief for the Professors of Legal Ethics, the Legal Profession, and Special Education Law as Amicus Curiae, *supra* note 145, at 25-27 (noting the benefits of fee schedules); Silver, *supra* note 22, at 960 ("Local fee schedules might be more attractive than the lodestar method for several reasons, perhaps most importantly because they would reduce litigation over rates and encourage settlement of fee disputes.").

[164] RUBENSTEIN, *supra* note 84, at § 15:43 ("Given the ancient origin and quotidian nature of the fee survey at the heart of the *Laffey* matrix, it appears a poor practice for any court—even one in the District of Columbia—to continue to employ it as a basis for ascertaining the prevailing rates in a community at present."); Andrew P. Sutor, IV, Covington v. District of Columbia*: Judicial Clouding of A Once Clear Burden of Proof in Awards of Attorney Fees Under 42 U.S.C. Section 1988*, 41 VILL. L. REV. 825, 859-60 (1996) ("*Blum* requires specific evidence, not the existence of a matrix that rigidly stratifies rates according to years of practice.").

[165] *See* D. MD. LOCAL RULES, App'x B ("Rules and Guidelines for Determining Attorneys' Fees in Certain Cases") (2023), https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf [https://perma.cc/GU4N-LZFP].

[166] Catherine C. Blake, *Rules and Guidelines for the Management of Attorney's Fees*, 27 U. BALTIMORE L. REV. 1, 4-5 (1997).

[167] *Id.* at 19 (quoting D. MD. LOCAL RULES, App'x B (1997)). For "[l]awyers admitted to the bar for less than eight years," the Rules and Guidelines listed a range of $135 to $170 per hour; for "[l]awyers admitted to the bar for more than eight years," the range was $190 to $225 per hour. *Id.* (quoting D. MD. LOCAL RULES, App'x B (1997)).

[168] *See* Blake, *supra* note 166, at 1 n.† (identifying the author as a judge on the United States District Court for the District of Maryland).

provide some practical guidance in order to narrow the debate over the range of reasonable rates."[169] A footnote in the Local Rules made similar points.[170] The judge also wrote that "as reasonable market rates change, the court will periodically need to reevaluate the specific dollar amounts enumerated in the Rules and Guidelines."[171]

Notwithstanding this recognition of the need for periodic updates, the hourly rates listed in the Local Rules have not changed since 2018.[172] The current version of the fee schedule sets forth five bands of hourly rates,[173] rather than the initial two, but the ranges listed in those bands have been surprisingly stagnant. Consider an attorney with seventeen years of experience. In 2008, the fee schedule set forth a range of $275 to $400 for an attorney with that level of experience.[174] Six years later, in 2014, the range for an attorney with that level of experience changed to $275 to $425[175]—an increase of $25 per hour at the upper bound, and no increase at all at the lower bound. And since 2014, the range for an attorney with that level of experience has not changed at all. By way of contrast, if the 2008 version of the fee schedule had been adjusted for inflation using the Consumer Price Index ("CPI") Legal Services Index, by 2023 the upper bound for an attorney with seventeen years of experience would have been about $609[176]—more than $180 per hour higher than the upper bound actually in effect.

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[169] *Id.* at 13.

[170] *See* Blake, *supra* note 166, at 19 n.5 (quoting D. Md. Local Rules, App'x B (1997)) ("These rates are intended solely to provide practical guidance to lawyers and judges when requesting, challenging and awarding fees. The factors established by case law obviously govern over them. However, the guidelines may serve to make the fee petition less onerous by narrowing the debate over the range of a reasonable hourly rate in many cases.").

[171] *Id.* at 5 n.21.

[172] *Compare* D. Md. Local Rules, App'x B (2018), https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules-2018.pdf [https://perma.cc/ZF9W-9289], *with* D. Md. Local Rules, App'x B (2023). The Local Rules themselves were last changed in July 2023. *See* United States District Court for the District of Maryland, "Local Rules," https://www.mdd.uscourts.gov/local-rules [https://perma.cc/GU4N-LZFP] (last visited May 28, 2024).

[173] *See* D. Md. Local Rules, App'x B, "Guidelines Regarding Hourly Rates" (2023) at 127 (listing a range of hourly rates for lawyers admitted to the bar for less than five years; five to eight years; nine to fourteen years; fifteen to nineteen years; and twenty years or more).

[174] D. Md. Local Rules, App'x B, "Rules and Guidelines for Determining Attorneys' Fees in Certain Cases" (2008) at 84.

[175] *See* D. Md. Local Rules, App'x B, "Guidelines Regarding Hourly Rates" (2014) at 122. The 2014 version of the fee schedule listed the range as "$275-400425 [sic]," which I assume was intended to mean $275-425.

[176] *See Consumer Price Index (CPI) Databases*, U.S. Bureau of Labor Statistics, https://www.bls.gov/cpi/data.htm [https://perma.cc/HRC3-YCTN] (last visited Sept. 21, 2024) (showing an increase from 226.211 in January 2008 to 405.211 in January 2023 using a base of 100 in December 1986 for area "U.S. city average" and item "Legal services"). Using the Producer Price Index for Offices of Lawyers instead of the LSI, the hourly rate would have been even higher, at about $664. *See Producer Price Indexes*, U.S. Bureau of Labor Statistics, https://www.bls.gov/ppi/ [https://perma.cc/LF95-BG2P] (last visited Sept. 21, 2024) (showing an increase from 159.9 in January 2008 to 265.508 in January 2023 using a base of 100 in December 1996 for industry "Offices of lawyers" and product "Offices of lawyers").

The stagnation of the rates listed in the fee schedule might not matter much if judges in the District of Maryland treated them as less important than the parties' evidence, or even if they were willing to adjust the rates to account for inflation. The Local Rules explicitly contemplate such modifications: Since 2014, the fee schedule has stated that "an increase in the cost of legal services since the adoption of the Guidelines" is a "factor that would support an adjustment to the applicable range."[177] Moreover, the current version of the fee schedule states that "there are attorneys for whom, and cases for which, the market rate differs from these guideline rates."[178] But in many cases, judges have instead treated the fee schedule as mandatory and fixed, even when it conflicts with the parties' evidence.[179]

Some judges have refused to deviate from the fee schedule even slightly. For example, in August 2022, a judge in the District of Maryland refused to award fees at a local attorney's requested hourly rate of $435.[180] The plaintiff argued that the proposed rate was "effectively within the Local Rules guideline range when those rates are adjusted for inflation, [that it was] the regular rate that her counsel charges paying clients, and [that it was] at or below the rates charged by other firms in the area doing similar work."[181] The court refused to adjust the fee schedule for inflation, stating that it "has not typically adjusted these rates for inflation, and [the plaintiff] has not

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[177] D. Md. Local Rules, App'x B, "Rules and Guidelines for Determining Attorneys' Fees in Certain Cases" (2014) at 122 n.6. From 2008 until the adoption of the 2014 version of the local rules, the fee schedule stated that "an increase in the cost of legal services since the adoption of the Guidelines" is a "factor that *might* support an adjustment to the applicable range." D. Md. Local Rules, App'x B, "Rules and Guidelines for Determining Attorneys' Fees in Certain Cases" (2008) at 84 n.6 (emphasis added).

[178] D. Md. Local Rules, App'x B, "Rules and Guidelines for Determining Attorneys' Fees in Certain Cases" (2023) at 127 n.*.

[179] *See, e.g.*, Parker v. Reema Consulting Servs., Inc., No. CIV.A. 17-1648, 2022 WL 2905475, at *3 (D. Md. July 21, 2022) (reducing two attorneys' hourly rates "from $475—the high end of the 20-plus year experience range—to $425, because these attorneys' 23 years of experience place them at the lower end of that range," notwithstanding the court's acknowledgement that "these figures are lower than these attorneys' standard billing rates"); Carrera v. EMD Sales, Inc., No. CIV.A.17-3066, 2021 WL 3856287, at *5 (D. Md. Aug. 27, 2021) (reducing the plaintiffs' attorneys' requested hourly rates "to comply with the Appendix B rates," notwithstanding that "the Appendix B rates were set seven years ago" and the plaintiffs presented evidence that the requested rates were "below both prevailing market rates for employment attorneys in the Baltimore area and the rates that they charge fee-paying clients"); Teamsters Loc. 639 Emps. Health Tr. v. Boiler & Furnace Cleaners, Inc., No. CIV.A. 15-3053, 2016 WL 7391516, at *4 (D. Md. Dec. 19, 2016) ("The Court accepts the proposed hourly rates, with the exception of the associate hourly rate, which will be reduced to $225, in accordance with this Court's Guidelines."); *see also* Ramnarine v. Rainbow Child Dev. Ctr., Inc., No. 17-cv-02261, 2022 WL 16709764, at *6 (D. Md. Nov. 4, 2022), *report and recommendation adopted*, No. 17-2261, 2023 WL 1416031 (D. Md. Jan. 31, 2023), *appeal dismissed*, No. 23-1293, 2023 WL 5992757 (4th Cir. Aug. 16, 2023) (noting that the court has "rejected attempts to significantly depart upwards beyond the rates provided in the guidelines").

[180] Gonzalez v. N.Y. Mart MD, Inc., No. CIV.A. 20-0020, 2022 WL 3577394, at *2-3 (D. Md. Aug. 19, 2022).

[181] *Id.* at *3. In support of the proposed hourly rate, the plaintiff submitted a declaration from a local employment law practitioner. *Id.* The defendant did not "submit[] any similar evidence arguing for a lower rate." *Id.*

provided sufficient facts to support the specific adjustment requested."[182] It awarded fees at an hourly rate of $425 "because the $435 figure is outside of the Local Rules range for attorneys with 15-19 years of experience."[183]

The District of Oregon has taken an approach that lies at a more innocuous point along the spectrum. Rather than create its own fee schedule, it has announced "that it will use the Oregon State Bar Economic Survey as its initial benchmark" for setting reasonable hourly rates.[184] Until March 2023, the most recent Economic Survey had been published in 2017,[185] reflecting hourly rates for 2016.[186] Unlike courts in the District of Maryland, however, courts in the District of Oregon regularly adjust the OSB Survey data to account for inflation,[187] and the District of Oregon's "Message from the Court Regarding Fee Petitions" explicitly refers to inflation as a potential basis for adjustment.[188] Those adjustments limit—though they do not eliminate[189]—the divergence between market rates and survey rates in the years between updates.

The District of Oregon's approach also compares favorably to the District of Maryland's in other ways. For example, instead of reporting hourly rates only in terms of experience levels, the OSB Survey provides more granular data, including tables with rates broken down across geographical areas and practice areas.[190] The survey also employs a transparent methodology, which enables courts and litigants to evaluate the strength

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[182] *Id.*

[183] *Id.*

[184] U.S. District Court for the District of Oregon, *Message from the Court Regarding Fee Petitions*, https://ord.uscourts.gov/index.php/rules-orders-and-notices/notices/fee-petitions [https://perma.cc/M3PG-KC9A] (last updated May 21, 2024) ("As for the reasonable hourly rate, the Court has determined that it will use the Oregon State Bar Economic Survey as its initial benchmark."); *see also* D. Or. Local Rule 54-3, Practice Tip, https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/civil-procedure/1805-lr-54-bill-of-costs-and-attorney-fees [https://perma.cc/AC5Q-GDDE] (last updated June 1, 2023) (directing practitioners to the "Message from the Court Regarding Fee Petitions" and incorporating portions of the Message).

[185] Oregon State Bar, *Surveys and Research Reports*, http://www.osbar.org/surveys_research/snrtoc.html [https://perma.cc/J4ZJ-LSAL] (last visited Dec. 15, 2023).

[186] Oregon State Bar 2017 Economic Survey 38 (Dec. 26, 2017), https://www.osbar.org/_docs/resources/Econsurveys/17EconomicSurvey.pdf [https://perma.cc/C9P2-GAGJ].

[187] *See, e.g.*, Langvin v. Portland, No. 3:21-cv-01595, 2022 WL 4592550, at *2-3 (D. Or. Sept. 30, 2022) (using the Bureau of Labor Statistics CPI Inflation Calculator to adjust the hourly rates listed in the 2017 OSB Survey); MacCartney v. Gordon, Aylworth, & Tami, P.C., No. 3:18-cv-00568, 2022 WL 1462821, at *3 (D. Or. Apr. 19, 2022), *report and recommendation adopted*, No. 3:18-cv-568, 2022 WL 1462657 (D. Or. May 9, 2022) (same); Coos Bay RV Invs., LLC v. Wheelhaus Inc., No. 3:21-cv-00448, 2022 WL 508818, at *3 (D. Or. Feb. 3, 2022) (same).

[188] *See Message from the Court*, *supra* note 184 ("Attorneys may argue for higher rates based on inflation, specialty, or any number of other factors. However, the Court requests that fee petitions address the Economic Survey and provide justification for requested hourly rates higher than reported by the Survey.").

[189] *See supra* notes 114-116 and accompanying text (noting that successive OSB surveys showed a rate increase of 15.6% during a period when the cumulative rate of inflation was about 6.5%).

[190] Oregon State Bar 2017 Economic Survey, *supra* note 186, at 38-43.

of the data.[191] Most importantly, consistent with the Supreme Court's case law,[192] courts in the District of Oregon appear to treat the OSB Survey as a source of relevant evidence rather than a fixed and mandatory range. Courts have sometimes suggested that the 75th percentile imposes an upper limit,[193] but in practice, they have exceeded that marker when they deemed the evidence sufficient to justify a higher rate.[194]

At the end of the spectrum most congruous with the Supreme Court's case law lies a fee schedule developed by the Office of Special Masters (OSM).[195] OSM developed the fee schedule for use in National Vaccine Injury Compensation Program cases filed in the United States Court of Federal Claims in Washington, D.C.[196] Prior to its adoption, special masters had "expressed frustration with the inaptness of most of the evidence presented" about hourly rates in such cases, "because most of it did not reflect knowledge of the practice in the Vaccine Program or have sufficient similarity to Vaccine Program cases to intelligently inform the decisions."[197] To address that problem, the OSM began publishing the Attorneys' Forum Hourly Rate Fee Schedule in 2015,[198] and it publishes an updated version of the fee schedule every year.[199]

The OSM fee schedule is specific to a particular location, court, type of claim, and time period. It also lists a range of hourly rates, rather than a single rate, for attorneys at each of six bands of experience.[200] Moreover,

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[191] *Id.* at 9.

[192] *See supra* section I.B.

[193] *See, e.g.*, MacCartney v. Gordon, Aylworth, & Tami, P.C., No. 18-cv-00568, 2022 WL 1462821, at *2 (D. Or. Apr. 19, 2022), *report and recommendation adopted*, No. 18-cv-568, 2022 WL 1462657 (D. Or. May 9, 2022) ("Typically, this court limits the hourly rate requested to the 75th percentile of the 2017 OSB Survey."); Prison Legal News v. Umatilla Cnty., No. 12-cv-01101, 2013 WL 2156471, at *4 (D. Or. May 16, 2013) ("If the rate requested exceeds the average rate reported in the OSB Survey, the burden is on the prevailing party to justify that higher rate. Even when such justification is present, the court usually limits the hourly rate to the 75th percentile of the OSB Survey.") (citation omitted).

[194] *See, e.g.*, United States v. W. Radio Servs. Co., No. 11-cv-00638, 2014 WL 1281050, at *5 (D. Or. Mar. 27, 2014), *aff'd sub nom.* United States v. W. Radio Servs. Co., Inc., 671 F. App'x 460 (9th Cir. 2016) (awarding rates above the 75th percentile listed in the relevant portion of the OSB 2012 Survey).

[195] Congress created this office within the U.S. Court of Federal Claims through the National Childhood Vaccine Injury Act of 1986. *See* 42 U.S.C. § 300aa-12(c).

[196] Office of Special Masters, Attorneys' Forum Hourly Rate Fee Schedule: 2024.

[197] McCulloch v. Sec'y of Health & Hum. Servs., No. 09-293, 2015 WL 5634323, at *14 (Fed. Cl. Sept. 1, 2015).

[198] The 2024 version of the schedule explains that "[t]he 2015-16 schedule adopted the ranges set forth in *McCulloch*, which has been endorsed by all sitting special masters as of October 24, 2016." Office of Special Masters, *supra* note 196, ¶ 2 (citations omitted).

[199] *See, e.g.*, *id.* ¶ 1 ("The schedule above applies to work performed for the calendar year 2024."); *see also OSM Attorneys' Forum Hourly Rate Fee Schedules*, U.S. Court of Federal Claims, https://www.uscfc.uscourts.gov/node/2914 [https://perma.cc/6H49-2VBS] (last visited Sept. 19, 2024) (providing fee schedules for 2015 through 2024).

[200] For example, the 2024 version of the schedule lists a range of $475 to $563 for attorneys with 20 to 30 years of experience in practice. Office of Special Masters, *supra* note 196, at 1.

the notes to the schedule state that "[i]ndividual facts and circumstances may warrant an adjustment to the schedule."[201] The schedule thus appears to operate within the constraints of the Supreme Court's fee-shifting doctrine by incorporating a significant degree of specificity and accommodating further case-specific tailoring. At the same time, it promotes some of the benefits of standardization, such as predictability and the reduction of judicial workloads.

B. Reliance on Illusory Judicial Expertise

Although there are problems with some fee schedules, the information those schedules contain is at least publicly available. The same cannot be said for another common shortcut, which relies on information that resides only in a judge's head. District courts take this shortcut when they rely on what they presume to be their own expertise about legal markets, rather than the evidence presented by the parties,[202] when resolving fee-shifting disputes.

1. Types of Presumed Expertise

At the outset, it is important to distinguish between two types of expertise that district courts sometimes offer as support for their fee-shifting decisions. In one, a judge might assert that her ringside view of the litigation gives her special insight into certain aspects of the case. The Supreme Court has approved of that idea, writing that "trial courts may take into account their overall sense of a suit," when resolving fee disputes, and "appellate courts must give substantial deference to these determinations, in light of the district court's superior understanding of the litigation."[203]

A district court's reliance on this type of expertise will often make a great deal of sense. For example, it would be very strange for a district court to require expert testimony about the quality of an attorney's performance at oral arguments in her own courtroom. At the same time, there are limits on the usefulness of a district court's observations. As Judge Posner once put it, the weight placed on a district court's familiarity with the proceedings

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[201] *Id.* ¶ 8.

[202] In some cases, district courts note that their knowledge of the relevant legal market is consistent with the evidence presented by the parties. *See, e.g.*, Cloud v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, No. 20-cv-1277, 2022 WL 2805527, at *2 (N.D. Tex. July 18, 2022), *rev'd and remanded on other grounds*, 83 F.4th 423 (5th Cir. 2023), *withdrawn and superseded by* 95 F.4th 964 (5th Cir. 2024), *and rev'd and remanded*, 95 F.4th 964 (5th Cir. 2024) (finding the plaintiff's proposed hourly rates, which the defendant did not contest and for which the plaintiff offered evidentiary support, to be reasonable in light of the court's "vast personal knowledge of rates charged in the Dallas-Fort Worth legal community for services by individuals with the level of skill, competence, and ability of Plaintiff's lawyers and staff"). Doing so is far less troubling than relying on personal knowledge as a basis for rejecting the parties' evidence.

[203] Fox v. Vice, 563 U.S. 826, 838 (2011) (citation and internal quotation marks omitted).

"has to be tempered by the fact that most of the lawyers' activity [is] conducted outside the courtroom (and so the judge's observation)."[204] Moreover, even under an abuse of discretion standard, the district court must make the reasoning behind a fee-shifting award clear enough to enable "meaningful appellate review."[205] Overall, though, it seems reasonable for higher courts to give some amount of deference to a district judge's assessment of the proceedings that occurred in her own court, to the extent that the doctrine makes such an assessment relevant.[206]

Judges make a different and far more troubling claim of expertise when they assert their own knowledge of legal markets as a basis for the resolution of a fee-shifting dispute. Some appellate courts have rejected this approach and instead require district judges to base their fee-shifting decisions on record evidence,[207] but several others have expressly approved of it.[208] The Ninth Circuit, for example, has held that "judges are justified in relying on their own knowledge of customary rates and their experience concerning reasonable and proper fees."[209] Similarly, the Eleventh Circuit has held that the district court "is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees."[210]

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[204] Matter of Cont'l Ill. Sec. Litig., 962 F.2d 566, 570 (7th Cir. 1992), *as amended on denial of reh'g* (May 22, 1992) (discussing a common-fund award).

[205] *See* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 558 (2010).

[206] *See supra* section I.B (discussing the doctrine governing fee-shifting awards).

[207] *See* League of United Latin Am. Citizens v. Roscoe Indep. Sch. Dist., 119 F.3d 1228, 1234 (5th Cir. 1997) ("The hourly fee awarded must be supported by the record; the district court may not simply rely on its own experience in the relevant legal market to set a reasonable hourly billing rate."); Bell v. United Princeton Properties, Inc., 884 F.2d 713, 720 (3d Cir. 1989) ("[T]he district court, in counsel fee litigation, can never serve as an 'expert witness' and may only serve as fact witness when the facts at issue are wholly within its personal knowledge [such as the duration of a particular hearing over which the court presided]. Thus, with respect to factual issues, the court must be presented with evidence and must make findings based on the evidence.").

[208] *See* Ferrari v. U.S. Equities Corp., 661 F. App'x 47, 50 (2d Cir. 2016) ("A district court is permitted to take into account its own familiarity with the relevant legal market in determining the rate a reasonable client in that market would willingly pay." (citing Farbotko v. Clinton Cnty., 433 F.3d 204, 209 (2d Cir. 2005)); Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011) (agreeing with "[o]ther circuit courts [that] have held that judges are justified in relying on their own knowledge of customary rates and their experience concerning reasonable and proper fees"); State Indus., Inc. v. Mor-Flo Indus., Inc., 948 F.2d 1573, 1582 (Fed. Cir. 1991) ("Judges have experience in determining what are reasonable hours and reasonable fees for the work lawyers perform and may rely on that experience to set an award[.]"); Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988) ("The court . . . is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value."). Taking an intermediate approach, the Tenth Circuit allows a district court to "use its own knowledge to establish the appropriate rate," but only if "the evidence of prevailing market rates before the court is inadequate." United Phosphorus, Ltd. v. Midland Fumigant, Inc., 205 F.3d 1219, 1234 (10th Cir. 2000).

[209] *Ingram*, 647 F.3d at 928.

[210] *Norman*, 836 F.2d at 1303.

It is difficult to determine the extent to which district courts actually rely on this asserted expertise, but case citations paint a worrisome picture: In the Ninth Circuit, district courts have cited the foregoing passage more than 150 times since 2011.[211] In the Eleventh Circuit, district courts have cited the relevant passage more than 1,700 times since 1988.[212]

Judges' reliance on this type of presumed expertise is especially troubling when it supplants relevant, competent evidence presented by the parties.[213] For example, consider the evidence that a California attorney presented in support of his request for a $750 hourly rate. The attorney attested to various pieces of relevant information, including his level of experience and a previous decision in which a court had awarded him a $700 hourly rate.[214] He also presented a declaration from another attorney, whose office had recently conducted "a survey of the rates charged by civil rights attorneys in the area."[215] Based in part on that survey, the declarant opined that the requested rate was "reasonable and appropriate."[216] But the district court determined that the plaintiff "did not submit any credible evidence to support the hourly rate sought, such as a declaration from an attorney with expertise in attorney's fees."[217] The judge instead awarded fees at $600 per hour, based on "[her] own knowledge of customary rates and [her] experience concerning reasonable and proper fees."[218] The Ninth Circuit affirmed, noting that it was "settled" that judges could rely on such knowledge.[219]

2. The Dubiousness of Presumed Expertise

The practice of supplanting the parties' evidence with a judge's own asserted knowledge of legal markets would be troubling even if most federal judges actually possessed the relevant knowledge. But that is not the case. To the contrary, federal judges, as a group, have poor visibility into the hourly rates that should be used in fee-shifting awards.

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[211] As of November 8, 2024, Westlaw citing references for *Ingram* narrowed to district courts in the Ninth Circuit and cases that include the phrase "their own knowledge of customary rates" yields 162 district court cases.

[212] As of November 8, 2024, Westlaw citing references for *Norman* narrowed to district courts in the Eleventh Circuit and cases that include the phrase "its own knowledge and experience concerning reasonable and proper fees" yields 1,744 district court cases.

[213] *Cf. In re* Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 854 (3d Cir. 1994) ("[A bankruptcy judge] should carefully consider relevant, competent evidence submitted with the fee application, provided as a supplement to the fee application, or presented at a hearing, . . . even if the evidence directly contradicts the court's own judgment.").

[214] A.A. v. Cnty. of Riverside, No. 14-cv-02556 (C.D. Cal. Nov. 30, 2018), Dkt. 183-3 at 8.

[215] A.A. v. Cnty. of Riverside, No. 14-cv-02556 (C.D. Cal. Nov. 30, 2018), Dkt. 183-12 at iv.

[216] *Id.*

[217] A.A. v. Cnty. of Riverside, No. 14-cv-02556, 2020 WL 5541077, at *4 (C.D. Cal. Aug. 13, 2020), *aff'd*, No. 20-55960, 2022 WL 822187 (9th Cir. Mar. 18, 2022).

[218] *Id.* (quoting Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011) (alterations added)).

[219] A.A. v. Cnty. of Riverside, No. 20-55960, 2022 WL 822187, at *1 (9th Cir. Mar. 18, 2022) (citing *Ingram*, 647 F.3d at 928).

According to the Supreme Court, the relevant hourly rates are those "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[220] But few federal judges worked in a practice setting that would have given them insight into the going rates for services similar to those involved in fee-shifting cases.[221] Many took the bench after working as prosecutors,[222] and prosecutors have no particular reason to become familiar with prevailing hourly rates in civil cases.

Among those judges who did represent private clients during their time in practice, most worked for corporate law firms,[223] and corporate lawyers have little reason to be familiar with the hourly rates prevailing in plaintiff-side civil rights litigation (or other practice areas covered by fee-shifting statutes.) To be sure, some likely opposed fee-shifting petitions filed against their clients, which offers a modicum of familiarity with their opposition's hourly rates. Cognitive bias will limit the value of that familiarity, however, because attorneys overwhelmingly perceive their own client's position to be the correct one.[224] This "partisan role bias"[225] means that an attorney respon-

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[220] Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984).

[221] *See generally* Joanna Shepherd, Jobs, Judges, and Justice: The Relationship Between Professional Diversity and Judicial Decisions (Demand Justice 2021), https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf [https://perma.cc/TH54-SZDJ] (discussing the professional backgrounds of federal judicial nominees).

[222] Numerous studies have confirmed the finding that former prosecutors are disproportionately represented on the federal bench. *See, e.g.*, Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, Cato Institute (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates (last updated May 27, 2021) (collecting studies and reporting corroborating data). For example, 21% of the federal district judges appointed by President George W. Bush and 18% of the federal district judges appointed by President Barack Obama held jobs as prosecutors before they joined the bench. *See* Albert Yoon, *Federal Judicial Tenure*, in The Oxford Handbook of U.S. Judicial Behavior 70, 72 tbl. 4.1A (Lee Epstein & Stefanie A. Lindquist, eds. 2017).

[223] As with the finding about former prosecutors, numerous studies have confirmed the large proportion of corporate lawyers appointed to the bench. For example, a 2021 report found that 44.3% of President Obama's district court nominees and 58.5% of President Trump's district court nominees had corporate backgrounds. Shepherd, *supra* note 221, at 13 tbl. 3. According to a 2014 report, among President Obama's judicial nominees, "[a]pproximately 85% have been either corporate attorneys or prosecutors (and in some cases both)." Alliance for Justice, *infra* note 318, at 6. As for the appellate bench, according to a 2019 analysis, "nearly 60 percent" of federal appellate judges "were once corporate-law partners." Fallon & Kang, *infra* note 318.

[224] "Studies of legal advocacy repeatedly find that lawyers adopt too favorable a view of the merits of the cases that they argue." Zev J. Eigen & Yair Listokin, *Do Lawyers Really Believe Their Own Hype, and Should They? A Natural Experiment*, 41 J. Legal Stud. 239, 239 (2012). This phenomenon "is not merely a selection effect associated with advocates choosing sides in which they a priori believe." *Id.* at 241. Rather, "[s]ubstantial optimism bias persists among lawyers even when they are randomly assigned to sides of a case." *Id.*

[225] James H. Stark & Maxim Milyavsky, *Towards A Better Understanding of Lawyers' Judgmental Biases in Client Representation: The Role of Need for Cognitive Closure*, 59 Wash. U. J.L. & Pol'y 175, 216 & n.3 (2019). Researchers have used a variety of terms for this cognitive error, including "partisan bias," "myside bias," "allegiance bias," "adversarial allegiance bias," "overconfidence," or "optimism bias." *Id.*; Eigen & Listokin, *supra* note 224, at 240.

sible for opposing a fee petition will tend to believe that the requested fee is too high, regardless of the underlying market conditions.

To the extent that some federal judges did gain relevant knowledge about hourly rates during their time in practice, that information is likely to be seriously outdated by the time the judge adjudicates a fee-shifting dispute.[226] Among active and senior district judges,[227] the median judge has been on the bench for more than fifteen years, and greater than a quarter have been on the bench for more than twenty-five years.[228] Limiting the analysis to include only active judges, the median district judge has been on the bench for about eight years, and nearly a fifth have been on the bench for longer than fifteen years.[229] Even the sharpest memories can fade over that amount of time, and market conditions can change dramatically over far shorter periods.[230]

This distance from the current market can lead some judges to react with surprise or disbelief at the rates claimed by plaintiffs' counsel in fee-shifting litigation. In a 1984 dissent, for example, Justice Powell noted that recent fee awards reflected a "precipitous rise in hourly rates" and marveled that "hourly rates of $95 to $105 for second- and third-year associates [had been] found to be the 'prevailing rates' in the community."[231] At the time, Justice Powell had been on the bench for more than twelve years.[232] Before he took the bench, he "had spent a career representing corporations, banks, and business interests."[233]

It bears emphasis that a federal judge's time on the bench does more to deprive them of information about current market rates than it does to provide them with that information. Judges are not permitted to practice

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[226] I calculated the numbers discussed in this paragraph using data made available by the Federal Judicial Center as of July 10, 2024. *See Biographical Directory of Article III Federal Judges*, Federal Judicial Center, https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export [https://perma.cc/5SEN-S6Y5] (last visited Nov. 30, 2024).

[227] Senior judges can opt for a reduced caseload, but overall, they "handle about 20 percent of the total district and appellate caseload." *About Federal Judges*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/about-federal-judges [https://perma.cc/9B4W-3WJ4] (last visited Sept. 19, 2024).

[228] As of July 2024, among all sitting federal district judges (both active and senior status), the average time on the bench was 17.48 years, and the median was 15.70 years. Three hundred twenty six of the 1,118 judges had been on the bench for more than twenty-five years, and 560 had been on the bench for more than fifteen years. *See supra* note 226 and accompanying text.

[229] As of July 2024, among active federal district judges, the average time on the bench was 9.34 years and the median was 8.00 years. Twenty nine of the 627 judges had been on the bench for more than twenty five years, and 118 had been on the bench for more than fifteen years. *See supra* note 226 and accompanying text.

[230] *See infra* section II.C.

[231] Pulliam v. Allen, 466 U.S. 522, 556 n.17 (1984) (Powell, J., dissenting) (citing Blum v. Stenson, 465 U.S. 886 (1984)).

[232] *See Lewis F. Powell, Jr.*, Oyez, https://www.oyez.org/justices/lewis_f_powell_jr [https://perma.cc/6AMW-YVDE] (last visited Sept. 19, 2024) (noting that Justice Powell was sworn in on January 6, 1972).

[233] John C. Jefferies, Jr., Justice Lewis F. Powell, Jr. 2 (1994). Indeed, Powell initially withdrew himself from consideration for an appointment to the Supreme Court, fearing that his "business-oriented background" would draw too much opposition. *Id.* at 4.

law,[234] and district courts seldom have reason to learn about the hourly rates charged by the attorneys who appear before them, let alone the hourly rates that prevail in the community more broadly.[235] Although nearly all states have ethical rules limiting the amounts that attorneys can charge their clients, those rules tend to be enforced (if at all) in state courts and nonjudicial forums such as state bar disciplinary hearings and attorney-client arbitration proceedings.[236]

When federal judges do examine the amount a particular law firm should receive for representing a particular client, that inquiry tends to occur in the context of court-mediated fees, such as common-fund awards for class counsel or common benefit fees for lead counsel in multidistrict litigation (and, of course, statutory fee-shifting awards).[237] To the extent that a judge's experience with court-mediated fees imparts knowledge about market rates, a judge can draw upon that knowledge by directly citing and discussing their own prior decisions.[238] Such experience does not justify reliance on a bare assertion of insight into the hourly rates that law firms charge their clients.[239]

While some judges demonstrate an appropriate level of humility about their personal knowledge of legal markets,[240] others seem not to appreciate

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[234] The ethical rules applicable to the federal judiciary contain a straightforward prohibition: "A judge should not practice law." Code of Conduct for United States Judges, Canon 4(A)(5) (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/A362-MDQ4].

[235] *See* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 379 (2014) (asserting that "judicial review of the fee arrangements of the attorneys appearing before the court is not only controversial but unpleasant"); Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 Geo. J. Legal Ethics 59, 83 (2013) ("[J]udicial intervention in privately negotiated fee contracts to prevent attorneys from earning excessive fees is an exceptional event, often to protect unusually vulnerable plaintiffs.").

[236] *See generally* Gabriel J. Chin & Scott C. Wells, *Can A Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases*, 41 B.C. L. Rev. 1 (1999) (discussing the enforcement of ethical prohibitions on charging excessive fees).

[237] *See* Ratner, *supra* note 235, at 81-83.

[238] As explained *supra* section I.C, problems can arise when courts engage in the outright duplication of prior fee awards. To the extent that courts relying on their own knowledge of legal markets are actually drawing on prior fee awards, the problems involved in such duplication can occur without the parties being able to detect or object to them.

[239] Consider the following explanation for a fee reduction: "Based on the evidence of local billing rates that I routinely receive in civil-litigation matters before me, I find that the current local rate for paralegals is between $125 and $175 per hour, so the $200 rate that [the defendant] seeks is too high." Branch-Noto v. Sisolak, 618 F. Supp. 3d 990, 995 (D. Nev. 2022), *appeal dismissed sub nom.* Branch-Noto v. Clark Cnty. Sch. Dist., No. 22-16302, 2022 WL 17972182 (9th Cir. Nov. 23, 2022) (determining the amount of a fee award to a defendant based on a finding that the plaintiff's claims were "frivolous, unreasonable, or without foundation"). Because the district court did not reference particular cases or evidence, the defendant (and any reviewing court) had no ability to evaluate whether there were any significant differences between the instant case and the cases on which the district court relied.

[240] In the context of reviewing the hours-worked component of the lodestar, for example, one judge wrote that "having been removed from the practice of law for over twenty-five years, I find it difficult in reviewing attorney fee submissions to be second guessing, or in hindsight finding, that Counsel spent too much time doing this or that legal work." Monohon v. BNSF Ry. Co., No. 4:14-cv-00305, 2022 WL 2129134, at *3 (S.D. Iowa June 14, 2022).

the extent of their removal from the practice of law. Consider the district judge who reduced an attorney's hourly rate from $750 to $600 based on "[her] own knowledge of customary rates and [her] experience concerning reasonable and proper fees."[241] At the time of that reduction, the judge had been on the bench—and thus not actively engaged in the practice of law—for approximately 25 years.[242]

As with the *Laffey* Matrix,[243] the Supreme Court has not specifically prohibited district courts' reliance on their own presumed knowledge of legal markets. The practice, however, resembles the "impressionistic" decision-making the Court criticized in its 2010 decision in *Perdue v. Kenny A.*[244] In support of its decision to award a performance enhancement in that case, the district court wrote that the plaintiffs' attorneys had demonstrated "a higher degree of skill, commitment, dedication, and professionalism . . . than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench."[245] The Supreme Court objected that the district court "did not employ a methodology that permitted meaningful appellate review" insofar as it "relied on a comparison of the performance of counsel in this case with the performance of counsel in unnamed prior cases."[246] A district court similarly relies on information about "counsel in unnamed prior cases" when it bases fee decisions on its own asserted knowledge of hourly rates without identifying the attorneys who charged those rates or the matters in which they were charged. Accordingly, judges who base fee decisions on their own presumed expertise about legal markets also run afoul of the Court's admonition to employ a methodology that permits meaningful appellate review.

C. Duplication of Previous Hourly Rates

When assessing the reasonableness of a proposed hourly rate, district courts frequently tie their decisions to hourly rates awarded in previous fee-shifting decisions. Not every reference to a previous decision represents an unwarranted shortcut; to the contrary, a prior award can usefully inform a case-specific inquiry, especially if the court treats it as one data point among

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[241] A. A. v. Cnty. of Riverside, No. 20-55960, 2022 WL 822187, at *1 (9th Cir. Mar. 18, 2022) (quoting Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011)); *see also supra* notes 214-219 and accompanying text (discussing *A.A.*).

[242] *See Phillips, Virginia A.*, Federal Judicial Center, https://www.fjc.gov/node/1391071 [https://perma.cc/4L9E-NPN4] (last visited Sept. 19, 2024) (noting that Judge Phillips became a magistrate judge in 1995 and a district judge in 1999).

[243] *See supra* section II.A.1.

[244] 559 U.S. 542, 558 (2010).

[245] *Id.* at 548-49 (quoting Kenny A. *ex rel* Winn v. Perdue, 454 F. Supp. 2d 1260, 1289 (N.D. Ga. 2006)).

[246] *Id.* at 558 (citation omitted). The Court went on to assert that "when a trial judge awards an enhancement on an impressionistic basis, a major purpose of the lodestar method—providing an objective and reviewable basis for fees—is undermined." *Id.*

many and recognizes that its probative value will change over time.[247] Too often, however, courts simply duplicate previously awarded hourly rates outright, disregarding other evidence and failing to account for the passage of time. And "even assuming that the prior opinion got the facts right, the pursuit of fairness is undermined if 'consistency' becomes an excuse for ossification and generalization, despite changes on the ground."[248]

Consider an attorney who represented plaintiffs in Fair Debt Collection Practices Act (FDCPA) cases in the Eastern District of Wisconsin. In a fee petition filed in 2016, the attorney sought fees at a proposed rate of $300 per hour.[249] The defendant did not challenge the proposed hourly rate, and the district court used it to calculate the fee-shifting award.[250] Two years later, in another FDCPA case in the same district, the same attorney sought fees at a proposed rate of $350 per hour.[251] This time, the defendant contested the proposed hourly rate, and the district court rejected it.[252] Instead, the district court decided to use the previously awarded rate of $300 per hour "in an effort to achieve some level of consistency."[253]

That one-time duplication might not sound so bad. But in 2019, in another FDCPA case in the same district, the same attorney again sought fees at a proposed hourly rate of $350 per hour.[254] The attorney attested that his paying clients actually paid that rate, and a fee survey showed it to be the median hourly rate for attorneys working on the same type of claim in the same geographic area.[255] Moreover, unlike the cases connected to the 2016 and 2018 fee petitions, this one was a class action (and thus could be deemed more complex than the others.)[256] Yet the court, relying solely on the 2016 and 2018 decisions, again awarded fees at a rate of $300 per hour.[257]

As this example suggests, rate duplication can have a snowballing effect, as later cases duplicate the rates from earlier cases that themselves involved rate duplication. That snowballing can lead to a continuously widening gap

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[247] *See, e.g.*, B & G Min., Inc. v. Dir., Off. of Workers' Comp. Programs, 522 F.3d 657, 664 (6th Cir. 2008) ("As a general proposition, rates awarded in other cases do not set the prevailing market rate—only the market can do that. Rates from prior cases can, however, provide some inferential evidence of what a market rate is, just as state-bar surveys of rates provide evidence of a market rate, but themselves do not set the rate.").

[248] Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. Rev. 1619, 1641 (2020).

[249] Gagliano v. State Collection Serv., No. 14-cv-1512, 2016 WL 2853538 (E.D. Wis. May 13, 2016). The complaint in this case was filed on December 4, 2014.

[250] *Id.* at *2.

[251] Strohbehn v. Weltman Weinberg & Reis Co., No. 16-cv-985, 2018 WL 1997989 (E.D. Wis. Apr. 27, 2018). The complaint in this case was filed on July 26, 2016.

[252] *Id.* at *4.

[253] *Id.*

[254] Spuhler v. State Collection Servs., Inc., No. 16-cv-1149, 2019 WL 2183803 (E.D. Wis. May 21, 2019). The complaint in this case was filed on August 26, 2016.

[255] *Id.* at *2. The magistrate judge hearing the fee dispute noted that "several courts in [the same] district ha[d] recognized [the fee survey] as a reliable resource." *Id.*

[256] *Id.* at *3.

[257] *Id.*

between the rates actually prevailing in the private market—which tend to increase over time,[258] usually faster than inflation[259]—and the comparatively stagnant rates that courts use to calculate fee-shifting awards.[260] In addition, unless the inflation rate is zero, this stagnation will mean that an attorney's effective compensation will decrease from one fee-shifting case to the next. For example, when the court awarded the Wisconsin attorney fees at $300 per hour in 2019, that rate equated to $281.42 per hour in 2016 dollars (using the Consumer Price Index as a measure of inflation.)[261] By attempting to duplicate attorneys' hourly rates, district courts are in effect giving them a pay cut—often a significant one.[262]

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[258] *See, e.g.*, Wise v. Kelly, 620 F. Supp. 2d 435, 447 (S.D.N.Y. 2008) (describing the "proposition that billing rates continue to increase over time" as "obvious"); *see also* A.B. v. N.Y.C. Dep't of Educ., No. 1:20-cv-03129, 2021 WL 951928, at *3 (S.D.N.Y. Mar. 13, 2021) ("the prevailing market rate for experienced special education attorneys like [the plaintiff's attorney] surely has increased since circa 2018, the period relevant to [a previous fee-shifting decision]").

[259] *See, e.g.*, Hartman v. Pompeo, No. 77-cv-2019, 2020 WL 6445873, at *12 (D.D.C. Nov. 3, 2020) ("[A] comparison of the Bureau of Labor Statistics data for the CPI-U and the LSI show that the 'cost of legal services nationally has far outstripped the increase in overall prices.'") (quoting Eley v. District of Columbia, 999 F. Supp. 2d 137, 153 (D.D.C. 2013), *vacated and remanded*, 793 F.3d 97 (D.C. Cir. 2015)). For example, between January 1993 and January 2023, the Consumer Price Index increased by about 273%, while the Legal Services Index increased by about 294%. *See Consumer Price Index (CPI) Databases*, U.S. Bureau of Labor Statistics, https://www.bls.gov/cpi/data.htm (last visited Nov. 30, 2024). A Wells Fargo survey found that Big Law rates went up slower than inflation in 2021 and 2022 for the first time in the survey's 15-year history; but the firms planned record-high rate hikes of 8% for the following year. Ray Strom, *Big Law Defies Economics as Firms Prepare Record Rate Increases*, Bloomberg Law (Nov. 17, 2022), https://news.bloomberglaw.com/business-and-practice/big-law-defies-economics-as-firms-prepare-record-rate-increases [https://perma.cc/HK8C-SSJ5]. The firms ended up raising rates by 9% in 2023, according to the Wells Fargo survey for that year. Ray Strom, *Top Law Firms' Revenue Rose 6% on Higher Rates, Wells Fargo Says*, Bloomberg Law (Jan. 30, 2024), https://news.bloomberglaw.com/business-and-practice/top-law-firms-revenue-rose-6-on-higher-rates-wells-fargo-says [https://perma.cc/FA5E-3KHH].

[260] *Cf.* E. Associated Coal Corp. v. Dir., Off. of Workers' Comp. Programs, 724 F.3d 561, 573 (4th Cir. 2013) ("[W]e emphasize that prior fee awards are not controlling authority establishing a prevailing market rate for later cases. Were that the case, the hourly rates of attorneys could be predetermined by erroneous prior awards, or lose the capacity to respond to changing market conditions.").

[261] This number was calculated using the U.S. Bureau of Labor Statistics' CPI Inflation Calculator, which showed that $300 in May 2019 (the date of the *Spuhler* decision) "has the same buying power as" $281.42 in May 2016 (the date of the *Gagliano* decision). *See CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/4GRV-6Q2T] (last visited Sept. 21, 2024). Using inflation data specific to legal services would show an even larger divergence; while the CPI increased by about 6.6% between May 2016 and May 2019, the CPI Legal Services Index showed an increase of about 9.4%, and the Producer Price Index for Offices of Lawyers showed an increase of about 9.8%. *See Consumer Price Index (CPI) Databases*, U.S. Bureau of Labor Statistics, https://www.bls.gov/cpi/data.htm [https://perma.cc/NZ3Q-E95V] (last visited Nov. 30, 2024); *Producer Price Indexes*, U.S. Bureau of Labor Statistics, https://www.bls.gov/ppi/ [https://perma.cc/LF95-BG2P] (last visited Sept. 21, 2024).

[262] In fairness to district judges, they too have received de facto pay cuts at various points in time, when Congress has kept their nominal salaries constant instead of increasing them to keep pace with inflation. For example, district judges made the same nominal salary in 2013 as in 2009. *See Judicial Compensation*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/KY9H-MR9W] (last visited Nov. 30, 2024). Perhaps the stagnancy of their own pay could create a false impression of broader economic stasis. Then again,

Unfortunately, the Wisconsin attorney's experience is not unique; nor is it the most extreme instance of rate duplication. In 1999, for example, a judge in the Northern District of New York noted that courts in that district had been awarding the same hourly rates—*i.e.*, "$150.00 for partners [and] $100.00 for associates"—for at least *eleven years*.[263] Determining that those rates were "no longer appropriate," the court increased the hourly rate "for civil rights attorneys with significant experience and numerous years of practice" by $25.[264] District courts in the Northern District of New York then continued to use the $175 hourly rate for another six years.[265]

In 2005, the Second Circuit intervened, instructing district courts that "'a reasonable hourly rate' is not ordinarily ascertained simply by reference to rates awarded in prior cases."[266] The Second Circuit emphasized that the applicable case law "contemplates a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's

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to the extent that judges have been aware of their own declining real pay, that awareness should enable them to recognize the issue when it arises in other contexts. And there have been various indications of judges' awareness of their own declining real pay, such as the Chief Justice's discussion of the issue in his 2006 year-end report. *See, e.g.*, John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary, Third Branch*, ADMIN. OFFICE OF THE U.S. COURTS 3 (Washington, D.C.) (Jan. 2007), https://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf [https://perma.cc/F3TT-DBQH], (noting that, adjusted for inflation, federal judicial pay has declined by 23.9% since 1969); *see also id.* at 6 ("Since Chief Justice Rehnquist first called for a pay raise *twenty years ago*, the decline in real compensation has continued.") (emphasis in the original).

[263] TM Park Ave. Assocs. v Pataki, 44 F. Supp. 2d 158, 166 (N.D.N.Y. 1999), *vacated on other grounds*, 214 F.3d 344 (2d Cir. 2000) ("Since as far back as 1988, the reasonable hourly rates in this district have been $150.00 for partners, $100.00 for associates, $50.00 for paralegals, and a 50% reduction of the relevant hourly fee for travel time.").

[264] *Id.* at 167. The $175 per hour rate that the court used in March 1999 equated to less than $130 per hour in 1988 dollars. *See CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/4GRV-6Q2T] (last visited Sept. 21, 2024).

[265] *See, e.g.*, Coppola v. Bear Stearns & Co., No. 1:02-CV-1581 FJS/RFT, 2005 WL 3159600, at *4 (N.D.N.Y. Nov. 16, 2005) ("The current prevailing hourly rates generally applied in this district are: $175.00 for attorneys with significant experience and numerous years of practice; $125.00 for associates with four or more years of experience; $100.00 for newly admitted attorneys; and $65.00 for paralegals."); Baim v. Notto, 316 F. Supp. 2d 113, 119 (N.D.N.Y. 2003) ("Though plaintiff apparently admits that the $175.00 per hour rate . . . used to be the prevailing reasonable hourly rate, he contends that it is now 'out-dated.' . . . There is absolutely no support in the case law for an increase of the rate from $175.00 per hour to $200.00 per hour. No compelling reason has been offered to increase the rate. Therefore, the reasonable hourly rate is $175.00 per hour." (citations omitted)); Plumbers, Pipefitters & Apprentices Loc. Union No. 112 Pension, Health & Educ. & Apprenticeship Plans *ex rel.* Fish v. Mauro's Plumbing, Heating & Fire Suppression, Inc., 84 F. Supp. 2d 344, 356 (N.D.N.Y. 2000) ("The Court will . . . reduce the requested fee to reflect the accepted hourly rates in the Northern District of New York. . . . [A]s a general rule, attorneys with significant experience and numerous years of practice are entitled to reimbursement at the hourly rate of $175.00 . . . ."). *But see* Arbor Hill Concerned Citizens Neighborhood Ass'n. v. Cnty. of Albany, No. 03-cv-502, 2005 WL 670307, at *6 (N.D.N.Y. Mar. 22, 2005), *report and recommendation adopted*, 419 F. Supp. 2d 206 (N.D.N.Y. 2005), *aff'd sub nom.* Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182 (2d Cir. 2008) (applying a higher set of hourly rates in light of "the passage of time since the present rate structure was found to be the prevailing rates, the information contained in plaintiffs' supporting affidavits, the prevailing rates in neighboring districts, and the Court's familiarity with the rates charged in the Northern District").

[266] Farbotko v. Clinton Cnty. of N.Y., 433 F.3d 204, 208 (2d Cir. 2005).

counsel."[267] It noted that, while a district court can look to prior fee awards as one source of information, the case law "also requires an evaluation of evidence proffered by the parties;"[268] and it faulted district courts for "[r]ecycling rates awarded in prior cases without considering whether they continue to prevail."[269] Yet even now, some district courts in the Second Circuit continue that type of recycling,[270] sometimes treating a previous hourly rate as a ceiling that will apply for the foreseeable future.[271]

Other circuit courts have faced similar difficulties in their efforts to stop district courts' duplication of prior hourly rates. The Ninth Circuit, for example, has repeatedly disapproved of district court decisions that "diverged from the applicable standard in discarding the declarations entirely and considering *only* previous fee awards in determining the prevailing market rate."[272] One of those cases involved a district judge who applied a "de facto policy of awarding a rate of $250 an hour to civil rights cases" for a period of ten consecutive years.[273] As the Ninth Circuit recognized when it finally

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[267] *Id.* at 209.

[268] *Id.*

[269] *Id.*

[270] In 2022, for example, prevailing plaintiffs in the Southern District of New York sought fees at a rate of $675 per hour for an attorney who "graduated in 1991 from Harvard Law School, clerked on the Supreme Court and the D.C. Circuit," "ha[d] practiced primarily in civil rights litigation since 1995," and "ha[d] been involved in more 150 cases before the Supreme Court." Nnebe v. Daus, No. 06-cv-04991, 2022 WL 612967, at *4 (S.D.N.Y. Mar. 1, 2022). The court reduced the attorney's hourly rate to $650, based largely on a decision that had used that rate when awarding fees to the same attorney five years earlier. *Id.* (citing Restivo v. Nassau Cty., No. 06-cv-6720, 2017 WL 3727366, at *4 (E.D.N.Y. Aug. 28, 2017)).

[271] In 2021, for example, an attorney requested fees at $400 per hour for his work in a Fair Labor Standards Act ("FLSA") case in the Eastern District of New York, even though he actually received $500 per hour from paying clients at that time. Lopez v. 1923 Sneaker, Inc., No. 18-cv-3828, 2021 WL 1845057, at *10 (E.D.N.Y. Mar. 5, 2021), *report and recommendation adopted*, No. 18-cv-3828, 2021 WL 1259623 (E.D.N.Y. Apr. 6, 2021). But the court reduced his hourly rate further, to $375. *Id.* The court relied on case law dating back to 2018 to conclude that "[r]ates of $400 per hour or higher in FLSA cases have generally been reserved for attorneys with more experience" than the plaintiff's attorney. *Id.*

[272] Roberts v. City of Honolulu, 938 F.3d 1020, 1024 (9th Cir. 2019) (collecting cases); *see also* Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 981 (9th Cir. 2008) ("We also note that in determining the prevailing market rate a district court abuses its discretion to the extent it relies on cases decided years before the attorneys actually rendered their services."); Moreno v. City of Sacramento, 534 F.3d 1106, 1115 (9th Cir. 2008) ("If the lodestar leads to an hourly rate that is higher than past practice, the court must award that rate . . . ."); Bell v. Clackamas Cnty., 341 F.3d 858, 868 (9th Cir. 2003) (concluding that a district court erred in relying on a 1998 decision "to award attorney fees here for work performed in 2000 and 2001 at the same rate awarded in that 1998 decision").

[273] *Moreno*, 534 F.3d at 1115. As the Ninth Circuit noted, the district court candidly acknowledged this approach:

> At the fees hearing, the district court noted that "300 an hour is a fairly big step for me, and I think for the court generally" and that "the court has pretty much held the line at 250 [an hour] for the past ten years." While the district court's final fee order does not reiterate this reasoning, an effort to adhere to this de facto policy probably influenced the final rate awarded, which was $250 an hour. Nothing else supports the $50 an hour reduction.

put a stop to that "de facto policy" in 2008, the straightforward duplication of prior rates "is inconsistent with the methodology for awarding fees that the Supreme Court . . . has adopted."[274]

As the Ninth Circuit recognized, previous fee-shifting awards have limited usefulness in light of the attorney- and case-specific factors that the Supreme Court requires district courts to consider.[275] Different attorneys have different skills and experience, different cases present different challenges, and the market changes too quickly for previous rates to provide reasonably current information.[276] Moreover, in light of the other shortcuts described above,[277] as well as the generally "chaotic" state of the case law,[278] a district court cannot assume that a previous award provides reasonably *accurate* information about the private-market rates in effect at an earlier point in time.[279]

III. Reconciling Doctrine and Reality

The depth of the disconnect between the Supreme Court's fee-shifting doctrine[280] and the lower courts' fee-shifting shortcuts[281] suggests that its roots also run deep. This Part examines some of the structural factors that may contribute to this state of affairs—whether by facilitating the Supreme Court's adoption of standards that district courts will find untenable, increasing the likelihood that district courts will be willing to cut corners, or reducing the likelihood that federal judges will see the resolution of fee-shifting disputes as a task worthy of their time—as well as actions that have the potential to improve matters. Those structural factors include the pervasive view among legal professionals of public interest lawyering as charity;[282] the

Id. (alteration in the original). As with other judges who have engaged in rate duplication and other shortcuts, the district judge in question is hardly an intellectual lightweight. He left the bench in 2007 to become Dean of the Duke University School of Law, has served as chair of both the Civil Rules Advisory Committee and the Standing Committee on the Rules of Practice and Procedure, and is currently the president of the American Law Institute. *See David F. Levi*, Duke Law, https://law.duke.edu/fac/levi/ [https://perma.cc/KYM5-YXFK] (last visited Nov. 30, 2024).

[274] *Id.*; *see also* Smith v. Phila. Hous. Auth., 107 F.3d 223, 226 (3d Cir. 1997) ("By simply relying on the hourly rate set by the court for [the plaintiff's attorney] in previous cases in which he has appeared, the district court failed to exercise its responsibility . . . to settle upon a reasonable hourly rate based solely upon a factual record.").

[275] *See supra* section I.B.

[276] *See supra* section I.C; *see also Moreno*, 534 F.3d at 1115 ("One problem with any such policy is that it becomes difficult to revise over time, as economic conditions change . . . .").

[277] *See supra* sections II.A-B.

[278] George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31 Loy. U. Chi. L.J. 599, 616 (2000).

[279] *Accord* E. Associated Coal Corp. v. Dir., Off. of Workers' Comp. Programs, 724 F.3d 561, 573 (4th Cir. 2013) (noting that, if district courts recycle hourly rates, "the hourly rates of attorneys could be predetermined by erroneous prior awards").

[280] *See supra* Part I.

[281] *See supra* Part II.

[282] *See infra* section III.A.

scarcity of federal judges with experience in plaintiff-side civil rights work and Supreme Court justices with experience sitting on a trial court;[283] and the heavy workloads of the district courts.[284]

A. Recognizing the Social Value of Fee Shifting

Upon examining lower courts' fee-shifting decisions, including the types of shortcuts they take, a reasonable observer could conclude that many judges simply do not take the process seriously.[285] District judges who are generally conscientious about precedent can seem willing to ignore relevant case law in this area, and appellate judges who are usually diligent about their supervisory role can seem willing to look the other way. This section analyzes the relationship between these cavalier approaches to fee shifting and widespread views about public interest lawyering.

Among members of the legal profession, including the federal judiciary, "[a] common conception is that public interest lawyering is distinct from commercial, profit-generating practice."[286] Although members of the legal profession once understood "*pro bono publico*" to mean "for the public good," most now understand it to refer to legal work undertaken without expectation of payment (or at a significantly discounted rate).[287] The dichotomy is clear: An attorney can engage in "lawyering for a livelihood," or she can engage in "lawyering for the public good,"[288] but she cannot do both at the same time.

These "perceptions of public interest lawyering as charity"[289] can lead judges to react negatively when a law firm seeks payment for public interest litigation. Even if they approve of the prevailing plaintiff's lawsuit,[290] they

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[283] *See infra* section III.B.

[284] *See infra* section III.C.

[285] *Cf.* Silver, *supra* note 22, at 950 ("Anyone who reads even a few fee award cases will quickly form the impression that judges shoot from the hip. They indulge in casual speculations about the reasonableness of hours and the value of lawyers' time. They mete out fees as rewards and punishments. They offer paper-thin rationales for decisions on which, in a different mood or moment, they would have gone the other way.").

[286] Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 Denv. U. L. Rev. 441, 442 (2014); *see also* Howard M. Erichson, *Doing Good, Doing Well*, 57 Vand. L. Rev. 2087, 2106 (2004) ("The prevailing conception of 'public interest' lawyering defines it, in large part, in terms of the lawyer's financial self-sacrifice.").

[287] Erichson, *supra* note 286, at 2108-10; Sabbeth, *supra* note 286, at 443.

[288] Erichson, *supra* note 286, at 2124.

[289] Sabbeth, *supra* note 286, at 446-47; *see also* Deborah M. Weissman, *Law As Largess: Shifting Paradigms of Law for the Poor*, 44 Wm. & Mary L. Rev. 737, 743 (2002) (examining "the view of legal services as a welfare benefit subject to the same norms that shape welfare programs generally").

[290] Many do not. "The structurally undercompensatory nature of federal fee-shifting awards, and the attendant suppression of civil rights claims, is probably not accidental. This status quo might instead reflect judicial disapproval of the 'private attorney general' model of enforcement, hostility to the substantive laws supported by fee-shifting statutes, or some combination of both." Carroll, *Compensation for Risk*, *supra* note 5, at 1047.

may disapprove of counsel's request for fees, let alone fees that would compensate them at the market value of their time.[291] Some judges have fretted that market-rate fees "may end up compensating public interest attorneys beyond the amount necessary to attract them to the case"[292]—as though to imply that, if public interest lawyers are to be paid, they should be paid the bare minimum. Others have suggested that, if an organization already has enough money to keep operating, it should not be paid for public interest work at all.[293]

Although the Supreme Court has approved of market-rate fees for public interest organizations,[294] it has expressed uneasiness about the financial benefits that attorneys may derive from fee-shifting awards. The Court has repeatedly emphasized that fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys," but were instead meant "to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws."[295] Lower courts have sometimes cited this distinction as support for the idea that litigation about fee-shifting awards, as opposed to litigation about the merits of the plaintiff's claims, inherently lacks social value.[296]

In drawing this line between fee shifting and merits litigation, courts sometimes fail to appreciate the relationship between the two. For example,

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[291] In 1984, the Supreme Court rejected the idea that market-rate fees for public interest organizations would constitute a "windfall." Blum v. Stenson, 465 U.S. 886, 895 (1984). It held instead that fee-shifting awards "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Id.*

[292] Student Pub. Int. Rsch. Grp. of N.J., Inc. v. AT & T Bell Lab'ys, 842 F.2d 1436, 1448 (3d Cir. 1988).

[293] Hum. Rts. Def. Ctr. v. Baxter Cnty., No. 3:17-cv-3070, 2019 WL 3848944, at *5 (W.D. Ark. Aug. 15, 2019) ("As the Supreme Court has made clear, 'Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights.' An organization whose principal task is litigation and who can afford to retain six attorneys, is not the kind of 'persons without means' the statute has in mind.") (quoting Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 559 (2010)); *see also* Animal Legal Def. Fund v. Special Memories Zoo, 42 F.4th 700, 706 (7th Cir. 2022) (holding that the district court did not provide a "permissible reason" for denying fees when it "speculated that [the plaintiff] did not need funding and the defendants lacked resource to pay").

[294] *Blum*, 465 U.S. at 895-96.

[295] Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986), *supplemented*, 483 U.S. 711 (1987); *see also* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 552 (2010) ("Section 1988's aim is to enforce the covered civil rights statutes, not to provide 'a form of economic relief to improve the financial lot of attorneys.'" (quoting *Delaware Valley*, 478 U.S. at 565)); City of Burlington v. Dague, 505 U.S. 557, 563 (1992) ("These statutes were not designed as a form of economic relief to improve the financial lot of lawyers." (quoting *Delaware Valley*, 478 U.S. at 565)).

[296] *See, e.g.*, Hardister v. Kijakazi, No. 1:21-cv-50, 2022 WL 2304284, at *3 (D. Utah June 27, 2022) (reducing by 75% a request for filing a reply brief in support of the plaintiff's fee petition "[b]ased on the strong preferences against litigation over fees, and the fact that this type of litigation does not advance Plaintiff's case, instead focusing on a form of economic relief to improve the financial lot of an attorney").

one court wrote that "the Congressional intent behind fee-shifting provisions is not to benefit attorneys, *or to provide them with incentives for taking certain kinds of cases*, but to assure plaintiffs with cognizable wrongs and shallow pockets that they can get representation."[297] But the mechanism by which fee-shifting statutes assure plaintiffs of representation consists of providing attorneys with financial incentives to take certain kinds of cases.

Nevertheless, these expressions of judicial distaste persist, especially with respect to law firms' attempts to be compensated for the work necessary to secure a fee-shifting award. For three decades, the Sixth Circuit applied a rule that limited "fees on fees"[298] awards to 3% of the hours in the main case, or 5% if the case went to trial.[299] The court reasoned that "[t]he legislative intent behind attorney fee statutes . . . was to encourage lawyers to bring successful civil rights cases, not successful attorney fee cases."[300]

When the Sixth Circuit abrogated that rule in 2016, it stuck up for "fees on fees" litigation and fee-shifting awards more generally.[301] It noted that, "[b]y not compensating for work seeking fees, the practical effect is to diminish the value of attorneys' fees awarded for the entire case, including the work on the merits."[302] If their effective hourly rates are diminished, "attorneys may become wary about taking Title VII cases, civil rights cases, or other cases for which attorneys' fees are statutorily authorized."[303] "[D]iluting the overall fee award" thus "undermines the congressional intent behind a fee-shifting statute, which is 'to encourage the private prosecution of civil rights suits through the transfer of the costs of litigation to those who infringe upon basic civil rights.'"[304]

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[297] Richards v. N.Y.C. Bd. of Educ., No. 83 CIV. 7621, 1988 WL 70209, at *5 (S.D.N.Y. June 27, 1988) (emphasis added).

[298] Courts sometimes use the phrase "fees on fees" to refer to the portion of a fee-shifting award that covers time spent preparing the fee petition and resolving any related disputes. *See, e.g.*, Hernandez v. Kalinowski, 146 F.3d 196, 198-99 (3d Cir. 1998) ("Generally, under the Civil Rights Attorney's Fees Awards Act of 1976 ('CRAFAA'), 42 U.S.C. § 1988, fees for preparing a motion requesting costs and fees, or 'fees on fees,' are recoverable."); Thompson v. Gomez, 45 F.3d 1365, 1366 (9th Cir. 1995) ("Recoverable attorney's fees may include fees incurred while doing work on the underlying merits of the action ('merits fees') as well as fees incurred while pursuing merits fees ('fees-on-fees').").

[299] *See* Coulter v. Tennessee, 805 F.2d 146, 151 (6th Cir. 1986), *abrogated by* Ne. Ohio Coal. for the Homeless v. Husted, 831 F.3d 686, 725 (6th Cir. 2016).

[300] *Coulter*, 805 F.2d at 151. The court deemed the limitations "necessary to insure that the compensation from the attorney fee case will not be out of proportion to the main case and encourage protracted litigation." *Id.*

[301] *See generally Husted*, 831 F.3d at 686.

[302] *Id.* at 724.

[303] *Id.* at 723 (quoting *In re* Nucorp Energy, Inc., 764 F.2d 655, 660-61 (9th Cir. 1985)).

[304] *Id.* at 724-25 (quoting Weisenberger v. Huecker, 593 F.2d 49, 53-54 (6th Cir. 1979)). Other courts continue to impose fees-on-fees restrictions. In the Southern District of New York, for example, courts "generally limit awards for time spent litigating an IDEA fee application to a fraction of the time spent on the underlying administrative proceeding." S.K. v. N.Y.C. Dep't of Educ., No. 1:21-cv-07291, 2023 WL 4493434, at *2 (S.D.N.Y. July 12, 2023) (cleaned up).

So long as many federal judges believe that fee-shifting litigation has little to no social value, they may be unlikely to believe that they should devote more of their time and attention to the resolution of fee-shifting disputes than they currently do. Judicial culture must shift away from the denigration of law firms'[305] attempts to obtain compensation for the successful representation of fee-shifting clients, and toward a recognition that litigation about fee-shifting awards is at least as valuable as any other effort to compensate professionals for the services they provide.[306]

There is no quick and easy way to accomplish that shift, but emphasizing the history of private enforcement regimes may help to bring it about.[307] Congress intentionally adopted the "private attorney general" model of enforcement, which primarily relies on lawsuits brought by private individuals rather than public enforcement actions, and it chose pro-plaintiff fee shifting as a mechanism for supporting that enforcement model.[308] A court might find it "crass and disreputable" that attorneys would pursue public interest litigation because of financial incentives, but Congress deemed it appropriate to "harness[] the profit motive of plaintiffs' attorneys" in this manner.[309] Indeed, unless one assumes that financial incentives can induce

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[305] As with prior work, this Article

> focuses on the compensation a law firm (including a solo practice or public interest law organization) should receive for representing a particular client. It does not address the distinct question of how much compensation an attorney should receive from her employer or practice. Although an attorney's salary or income can be affected by the compensation her law firm receives for a particular case, it can also depend on a host of other factors—like organizational structure, unionization, pension obligations, etc.—that would serve to muddle rather than to illuminate the analysis I undertake here.

Carroll, *Compensation for Risk*, *supra* note 5, at 1023 n.5.

[306] If anything, courts should count fee-shifting litigation among the more valuable efforts to compensate professionals for the services they provide, because Congress specifically provided for such compensation when it enacted fee-shifting statutes. *Cf.* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 Tex. L. Rev. 291, 303 (1990) (arguing that the Supreme Court should "focus on the public benefits accruing from vigorous enforcement of Congress's fee-shifting scheme and adjust its view of public interest lawyers to recognize that they function under the same economic and ethical pressures as attorneys involved in other types of civil litigation").

[307] Changing the composition of the federal judiciary, as discussed *infra* section III.B.1, could also help to bring about that shift.

[308] *See supra* notes 3-6 and accompanying text.

[309] *See* Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 Nw. U. L. Rev. 1459, 1459 (2007) ("We currently have a system of civil rights enforcement that harnesses the profit motive of plaintiffs' attorneys to encourage the prosecution of violations of civil rights laws. That system may seem crass and disreputable to those who believe that lawyers should bring civil rights actions out of the goodness of their hearts (perhaps while singing 'Kumbaya' or, for those of a more lefty persuasion, 'If I Had a Hammer')."); *see also* McCown v. City of Fontana, 711 F. Supp. 2d 1067, 1070 (C.D. Cal. 2010), *aff'd*, 464 F. App'x 577 (9th Cir. 2011) ("A lawyer must place the ideals of our profession above the pursuit of profits, and lawyers are generally to be commended for the services they provide without regard to making money. But this does not mean the incentives provided by the payment of attorney fees can be ignored.").

attorneys to represent civil rights claimants, the structure of fee-shifting statutes would make little sense.[310]

Moreover, the decision to enact fee-shifting provisions does not have the partisan valence that some may think it does. In recent years, some have assumed that the idea of private attorneys general came from the left side of the political spectrum,[311] but history tells a different story.[312] For example, "it was Republicans who were the pivotal actors in making private lawsuits central to the [Civil Rights Act] of 1964's job discrimination provisions and the [Civil Rights Act] of 1968's fair housing provisions, in both instances as a means of defeating bureaucratic state-building."[313] Subsequently, in support of the Civil Rights Attorney's Fees Awards Act of 1976, "a broad and bipartisan coalition of legislators pointed to the success of fee shifting in mobilizing robust private enforcement in the recent civil rights laws; to the insufficiency of executive enforcement; and to the ability of fee-shifting rules to provide needed enforcement without increasing bureaucracy or budgets."[314]

"Attorney's fees are the fuel that drives the private attorney general engine,"[315] and there is nothing distasteful about law firms'[316] efforts to put gas in the tank. To the extent that individual judges may disagree, the role of the judiciary is to implement the decisions that Congress made, not to undermine them.[317]

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[310] Silver, *supra* note 22, at 877 ("The structure of the fee-shifting process requires the assumption that lawyers respond to financial incentives; it is impossible to connect the statutes to the goal of enabling victims to secure representation unless that assumption is made.").

[311] *See, e.g.*, Joshua C. Wilson, *In the Texas Abortion Law, Conservatives Adopted the Progressive Playbook and Used It Against Them*, Wash. Post (Sept. 3, 2021), https://www.washingtonpost.com/politics/2021/09/03/texas-sbs-abortion-law-conservatives-adopted-progressive-playbook-used-it-against-them/ ("Progressives have long employed what is sometimes referred to as 'private attorney general' powers in rights enforcement. That is, instead of empowering state authorities to manage the enforcement of laws, legislatures have given citizens the right to bring lawsuits to sue for damages.").

[312] *See* Brian T. Fitzpatrick, *Deregulation and Private Enforcement*, 24 Lewis & Clark L. Rev. 685, 690 (2020) ("Although it has been largely forgotten, for most of our history, conservatives preferred legal enforcement by private lawyers because they thought private enforcers of the law were better than public enforcers."); *see also* Farhang, *supra* note 3, at 72 ("[P]rivate enforcement regimes are not the unique province of any particular ideological or partisan program, nor have they been exclusively deployed to serve any specific type of constituency.").

[313] Farhang, *supra* note 3, at 226; *see also id.* at 143 ("As with job discrimination in 1964 and fair housing in 1968, with school desegregation in 1971 it was again a Republican who proposed an amendment adding fee shifting for winning plaintiffs, and Republicans again were pivotal in dictating that outcome.").

[314] *Id.* at 130-31.

[315] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 205 (2003).

[316] *See supra* text accompanying note 305.

[317] *Cf.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975) (explaining that the use of fee shifting to encourage litigation is "a policy matter that Congress has reserved for itself").

B. Broadening Judicial Expertise

In recent years, there has been a growing recognition of the importance of judicial diversity—not only in terms of identity characteristics like race or sex, but also in terms of judges' professional backgrounds.[318] This section examines two aspects of federal judges' professional backgrounds that may contribute to the pathologies of the fee-shifting status quo. First, the federal judiciary has had very few judges who previously made their living representing civil rights plaintiffs. Second, for the past several decades, the Supreme Court has had very few justices who previously served as a trial-court judge.

1. Experience as a Plaintiff-Side Civil Rights Lawyer

As with other types of litigation, judges' views of fee-shifting disputes can be influenced by the type of work they did before they took the bench. Research confirms this link between professional backgrounds and judicial decision-making. For example, one report found that "judges that worked as state or federal prosecutors and judges with corporate backgrounds are less likely to decide employment cases in favor of claimants."[319] Another study found that renters had better outcomes in Connecticut housing courts when they appeared before judges with backgrounds in legal aid or plaintiff-side litigation, as compared to judges who had been prosecutors, corporate lawyers, or general practitioners.[320] And a study of criminal sentencing found that "criminal defendants assigned to a former public defender are, on average, less likely (by up to 2.3 percentage points) to be sentenced to incarceration and more likely to be sentenced to community service or probation, regardless of the judge's political affiliation."[321]

The salience of judges' professional backgrounds suggests that federal judges would not be quite so contemptuous of public interest attorneys'

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[318] *See, e.g.*, Maggie Jo Buchanan, *Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench* (Center for American Progress, Aug. 2020); Brian Fallon & Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, The Atlantic (Aug. 21, 2019); Alliance for Justice, *Broadening the Bench: Professional Diversity and Judicial Nominations* (Feb. 6, 2014); National Employment Lawyers Association, *Judicial Hostility to Workers' Rights: The Case for Professional Diversity on the Federal Bench* (Feb. 2012).

[319] Shepherd, *supra* note 221, at 2. These results were "statistically significant, even after controlling for a variety of other influences on judges' decisions." *Id.* at 2-3. The results also held "when analyzing only judges appointed by President Obama, meaning that, regardless of political ideology, corporate and prosecutorial background are related to decisions in favor of employers over employees." *Id.* at 3.

[320] Grace Brunner & Steve Kennedy, People's Parity Project, Impact of Judges' Professional Backgrounds on Eviction Outcomes 6-7 (2024), https://peoplesparity.org/wp-content/uploads/2024/02/PPP-2024-Report-1.5.pdf [https://perma.cc/FA2T-S6N8].

[321] Allison Harris & Maya Sen, *How Judges' Professional Experience Impacts Case Outcomes: An Examination of Public Defenders and Criminal Sentencing*, https://scholar.harvard.edu/msen/public-defenders [https://perma.cc/8P52-2XYG] (last visited Oct. 6, 2024).

efforts to be compensated for their work if they had undertaken similar work themselves.[322] As explained below, however, very few judges have professional backgrounds that would give them insight into the day-to-day realities of plaintiff-side civil rights practice. That lack of experience means that many do not appreciate the difficulties involved in trying to make a living by representing civil rights claimants[323]—not just with respect to succeeding on the merits of the claims, but also in terms of the economic health of the legal organization.

The cases that make the news can make plaintiff-side civil rights work seem more profitable than it is. Consider the case of Eric Garner, a Black man killed by New York Police Department officers who suspected him of selling loose cigarettes.[324] Video footage of his death, which showed the officers putting Garner in a prohibited chokehold, prompted widespread outrage and protests.[325] Garner's family settled their claims for a total of $6.9 million.[326] The law firm that represented them received $2.3 million for doing so,[327] but that compensation resulted from a contingent percentage fee, not a fee-shifting award.

Unlike the cases that make the news, most civil rights claims do not involve millions of dollars in damages. Many involve monetary amounts that, while significant to the claimants, would not generate a contingent percentage fee large enough to cover the time and effort that would be required to

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[322] For a discussion of federal judges' reactions to attorneys' efforts to be compensated for public interest work, see *supra* section III.A.

[323] Popular narratives about plaintiffs' lawyers, encouraged by defense-side economic interests, have contributed to the difficulty of understanding the economic realities of plaintiff-side civil rights litigation. As Arthur Miller put it, plaintiffs' lawyers must "swim upstream against the overwhelming human and economic resources of defense interests who thus far have been fairly successful in painting the plaintiffs' bar as greedy ambulance chasers and have projected unsubstantiated images of runaway litigation expenses; abusive, out-of-control, and lawyer-driven lawsuits; extortionate settlements; and threats of damage to American competitiveness." Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293, 306-07 (2014). According to the New York State Trial Lawyers' Association, the insurance industry attacked trial lawyers "[f]rom the earliest stages of the 'tort wars'" because of lawyers' "success in increasing payouts on automobile claims." Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. Sch. L. Rev. 323, 325 (2007) (citing New York State Trial Lawyers Association, NYSTLA: The First 50 Years 9-12 (2003)). "The damage to insurers' economic bottom lines inspired a creative campaign to use all available media—the press, movies, and even television sitcoms—to reinforce the public's unsavory image of trial lawyers." *Id.*

[324] Mark Berman, *Eric Garner's Family Settles with New York City for $5.9 Million*, Wash. Post. (July 13, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/07/13/eric-garners-family-settles-with-new-york-city-for-5-9-million.

[325] *Id.*

[326] This total includes $5.9 million from the City of New York and $1 million from Richmond University Medical Center. Ryan Lavis, *Exclusive: Former Eric Garner Lawyer Wants Share from $6.9 Million Settlement*, SILive.com, https://www.silive.com/news/2016/01/former_eric_garner_lawyer_want.html [https://perma.cc/34QY-TDNC] (last updated Jan. 29, 2016, 3:09 AM).

[327] *Id.*

successfully litigate the case.[328] Others involve only injunctive or declaratory relief, sometimes due to doctrines that make monetary relief unavailable and sometimes because the plaintiff chooses not to seek damages.[329] For-profit counsel will not usually take those cases as part of their regular practice,[330] and they take on very little pro bono work.[331] The nonprofit organizations that are more likely to represent these plaintiffs represent a much smaller slice of the legal market.[332] They tend to operate on a shoestring budget,[333] and they lack sufficient resources to take on all of the cases that come their way, no matter how meritorious those cases may be.[334] Fee-shifting awards tend to represent only a small portion of their budgets, requiring them to secure funding from other sources, including private foundations and fundraising events.[335]

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[328] *Cf.* Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DePaul L. Rev. 269, 283-85 (2020) (examining situations in which "the dollar value of the amount in controversy might mean much more to the plaintiff than it does to the defendant, the attorneys, or the court").

[329] *See* Maureen Carroll, *Civil Rights, Access to Counsel, and Injunctive Class Actions in the United States*, *in* Cambridge International Handbook of Class Actions 25 (Brian Fitzpatrick & Randall Thomas eds., 2021) (discussing circumstances under which civil rights plaintiffs might seek only injunctive or declaratory relief).

[330] *See* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 Wm. & Mary L. Rev. 641, 658-61 (2023); Paul D. Reingold, *Requiem for Section 1983*, 3 Duke J. Const. L. & Pub. Pol'y 1, 19 (2008); Bagenstos, *supra* note 309, at 1460-61; Julie Davies, *Federal Civil Rights Practice in the 1990s: The Dichotomy Between Reality and Theory*, 48 Hastings L.J. 197, 234-35 (1997).

[331] A 2016 survey by the American Bar Association found that the median attorney provided only three hours of pro bono work that year, and about one in five attorneys had never done any pro bono work at all. Am. Bar Ass'n, Supporting Justice: A Report on the Pro Bono Work of America's Lawyers 7 & n.4 (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/other-documents/ls_pb_supporting_justice_iv_final.pdf [https://perma.cc/8FY7-JU7V]. Even among the 124 law firms that signed onto the Law Firm Pro Bono Challenge for 2022, pro bono hours represented less than 3.5% of their total client billable hours that year. Pro Bono Inst., Report on the Law Firm Pro Bono Challenge Initiative 1 (2023), https://www.probonoinst.org/wp-content/uploads/2023_PBI_Challenge-Report_Final.pdf [https://perma.cc/7T53-GU9W].

[332] Researchers estimated that, as of 2000, there were a little over 1,000 public interest law organizations in the United States—a significant number, but a small fraction of the more than 47,000 law firms overall. Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 N.C. L. Rev. 1591, 1605-06 (2006).

[333] Among other things, public interest law organizations keep their budgets low by paying attorneys far less than they could earn in other practice settings. For example, the National Association for Law Placement reported that in 2021, the median salary for an entry-level attorney was $57,500 at a legal services organization, $85,000 at a law firm with 50 or fewer attorneys, $127,500 at a law firm with 51-100 attorneys, and $190,000 at a law firm with more than 700 attorneys. *See* Press Release, Nat'l Ass'n for Law Placement, New Public Service Attorney Salary Figures Show Growth Since 2018, But Remain Considerably Below Private Sector Salaries 2 (June 22, 2022), https://www.nalp.org/uploads/PressReleases/NALPPressRel_2022PublicServiceAttorneySalaryReport.pdf [https://perma.cc/52QW-PR9E].

[334] Schwartz, *supra* note 330, at 662.

[335] Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 Law & Soc. Inquiry 62, 75-76 (2014) (finding that "federal funds and private foundations account for the largest percentage of support" for Public Interest Law Organizations, that "[p]rivate contributions and state funds are the next largest categories of support," and that attorney's fees "account for only about 5 percent of budgets, on average").

Currently, there is no segment of the federal judiciary that is well-positioned to understand the economic realities of plaintiff-side civil rights practice. Since the Supreme Court lost Ruth Bader Ginsburg, who spent several years as a litigator at the ACLU,[336] none of the justices have ever held a full-time, non-governmental position representing civil rights claimants.[337] Although Clarence Thomas worked in governmental positions related to civil rights,[338] the economic considerations facing a government agency differ dramatically from those facing a law firm, regardless of whether that firm operates on a for-profit or nonprofit basis.

At the appellate and district court levels, prior experience as a civil rights lawyer is similarly lacking. According to an August 2020 analysis, "[o]nly one circuit judge spent the majority of his career in nonprofit work, such as at a civil rights, workers' rights, or legal aid organization."[339] By contrast, "[n]early two-thirds of circuit court judges spent the majority of their careers in private practice," and only "a small number of judges from this category appear to have been engaged in private public interest law."[340] And an August 2019 analysis found that, "of all 175 circuit-court judges, . . . nearly 60 percent were once corporate-law partners."[341]

Some might be tempted to blame the Trump administration for this state of affairs, but that would be a mistake. According to a 2016 report, among President Obama's judicial nominees, "[o]nly 10—fewer than four percent—ha[d] worked as lawyers at public interest organizations," while "[a]pproximately 85% ha[d] been either corporate attorneys or prosecutors

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[336] *See Ginsburg, Ruth Bader*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/ginsburg-ruth-bader [https://perma.cc/R8UT-98K5] (last visited Sept. 22, 2024).

[337] *See Alito, Samuel A., Jr.*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/alito-samuel-jr [https://perma.cc/58NS-ZM2A] (last visited Sept. 22, 2024); *Barrett, Amy Coney*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/barrett-amy-coney [https://perma.cc/QG8X-V9J9] (last visited Sept. 22, 2024); *Gorsuch, Neil M.*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/gorsuch-neil-m [https://perma.cc/J9ZK-XS4V] (last visited Sept. 22, 2024); *Jackson, Ketanji Brown*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/jackson-ketanji-brown [https://perma.cc/2LZM-VKUJ] (last visited Sept. 22, 2024); *Kagan, Elena*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/kagan-elena [https://perma.cc/RR25-ZTM2] (last visited Sept. 22, 2024); *Kavanaugh, Brett M.*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/kavanaugh-brett-m [https://perma.cc/86EQ-VHYE] (last visited Sept. 22, 2024); *Roberts, John Glover, Jr.*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/roberts-john-glover-jr [https://perma.cc/K6CT-2PNU] (last visited Sept. 22, 2024); *Sotomayor, Sonia*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/sotomayor-sonia [https://perma.cc/X36H-ZD43] (last visited Sept. 22, 2024); *Thomas, Clarence*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/thomas-clarence [https://perma.cc/2G82-LKR7] (last visited Sept. 22, 2024).

[338] Thomas was the assistant secretary for civil rights at the Department of Education from 1981 to 1982 and was chairman of the EEOC from 1982 to 1990. *Thomas, Clarence*, *supra* note 337.

[339] Buchanan, *supra* note 318, at 7. Richard Paez, now a senior judge on the Ninth Circuit, "spent the majority of his career as a legal aid attorney," including at the Legal Aid Foundation of Los Angeles. *Id.* at 13.

[340] *Id.* at 13-14.

[341] Fallon & Kang, *supra* note 318.

(or both)."[342] And according to a 2021 analysis, only one percent of Obama's district-court nominees had at least three years of experience as a legal aid lawyer.[343]

Moreover, although scholars have devoted an increased amount of attention to the issue in recent years, the dearth of civil rights experience on the federal bench is not new. A 2008 analysis, for example, found that "[o]nly five out of 162 (3.1 percent) active federal appellate judges had worked for organizations or government agencies that enforce civil rights."[344] In addition, "[o]nly three active federal appellate judges had worked for organizations that represent low-income Americans, and only one appeared to have had substantial experience advocating for consumer rights."[345]

In light of the connection between judges' professional backgrounds and their decision-making,[346] the federal judiciary's overall dearth of experience in plaintiff-side civil rights practice has likely had a negative impact on fee-shifting decisions. The Supreme Court's fee-shifting cases, for instance, have often reflected "the assumption that public interest litigation is not part and parcel of ordinary practice, but is more in the nature of charity or volunteer work."[347] Federal judges would be less likely to make such assumptions if more of them had engaged in public interest litigation as part and parcel of their own ordinary practice.

Presidential administrations should work to diversify the federal judiciary by appointing more plaintiff-side civil rights lawyers. The good news on this front is that the Biden administration expressly committed to addressing the lack of professional diversity in the federal judiciary,[348] including by nominating more civil rights lawyers to be district and appellate judges.[349]

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[342] Alliance for Justice, *supra* note 318, at 6. Of the eight district-court nominees who had worked at public interest organizations, "five worked at organizations that were primarily international in focus." *Id.* at 7.

[343] Shepherd, *supra* note 221, at 6 tbl.2. The analysis also showed that 2.9% of Obama's nominees for circuit courts and 0% of Trump's nominees for district and circuit courts had such experience. *Id.*

[344] Nat'l Emp. Laws. Ass'n, *supra* note 318, at 10.

[345] *Id.* at 11.

[346] *See supra* notes 319-321 and accompanying text.

[347] Brand, *supra* note 307, at 373 (analyzing fee-shifting cases decided between 1976 and 1990); *see also supra* section III.A (examining judicial views about public-interest litigation).

[348] *See, e.g.*, *President Biden Names Thirty-Fifth Round of Judicial Nominees and One New Nominee to Serve as U.S. Attorney*, The White House (June 28, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/28/president-biden-names-thirty-fifth-round-of-judicial-nominees-and-one-new-nominee-to-serve-as-u-s-attorney/ [https://perma.cc/7WDV-3B8H] ("These choices also continue to fulfill the President's promise to ensure that the nation's courts reflect the diversity that is one of our greatest assets as a country—both in terms of personal and professional backgrounds.").

[349] *See, e.g.*, Sahil Kapur, *Biden Secures Landmark 100th Judge, Outpacing Trump*, NBC News, https://www.nbcnews.com/politics/congress/biden-poised-secure-100th-judge-outpacing-trump-rcna61924 [https://perma.cc/M8BU-2NB8] (last updated Feb. 14, 2023, 12:29 PM) ("Biden has picked unusually high numbers of public defenders, civil rights lawyers and labor lawyers compared to his predecessors from both parties."); James Arkin, *Civil Rights Lawyers Among 10 New*

As of February 2022, 24% of President Biden's judicial nominees had been civil rights lawyers.[350] Because a president typically has the opportunity to appoint only a fraction of the overall number of sitting federal judges,[351] however, sustained progress will require a similar commitment from future administrations.

2. Experience as a District Court Judge

While some aspects of the Supreme Court's fee-shifting case law suggest a lack of understanding of the mechanics of civil rights practice,[352] others suggest a lack of understanding of the work of district courts. In particular, the Court has not acknowledged the difficulties that its fee-shifting decisions have created for district courts,[353] instead asserting that its chosen methodology "is readily administrable."[354]

As explained below, very few of the justices responsible for creating and characterizing this case law have had first-hand experience with the work that trial courts do. That lack of experience facilitates "an insensitivity to the perspective of district courts—a heedlessness of consequences of the doctrines for the real world of litigation."[355] As Suzanna Sherry has explained, "the problem lies not in a considered decision to ignore consequences, but rather in simple unfamiliarity with those consequences. Without sufficient exposure to the district court perspective, appellate courts are simply unaware of the problems that particular doctrinal choices cause."[356] In particular, Supreme Court justices "with too little trial-court experience are likely to make federal litigation more complex, time-consuming, and difficult than it needs to be."[357]

Picks for Federal Courts, Law360 (Sept. 30, 2021), https://www.law360.com/articles/1426770/civil-rights-lawyers-among-10-new-picks-for-federal-courts [https://perma.cc/4YLE-CHB6].

[350] Colleen Long, *Biden Seeking Professional Diversity in His Judicial Picks*, Associated Press (Feb. 10, 2022), https://apnews.com/article/joe-biden-us-supreme-court-business-congress-race-and-ethnicity-e775b084ed2943c9c328a4726b21b579 [https://perma.cc/55DP-6963]. The mix of professional backgrounds changed in 2023, "mostly due to the bulk of vacancies without a nominee being in states represented in the Senate by Republicans and a home-state custom in the chamber applying to trial court appointments." Tiana Headley, *Biden's Recent Court Picks Diverge from Progressive Strategy*, Bloomberg Law (Aug. 31, 2023), https://news.bloomberglaw.com/us-law-week/biden-court-picks-have-less-diverse-resumes-sought-by-liberals. Among nominations during the first eight months of 2023, "only four of the 29 or 13% ha[d] been public defenders, did other indigent client work, or enforced labor laws. That's compared to 36% and 48% of those with similar progressive-backed career experiences nominated through the congressional August recess in 2022 and 2021, respectively, according to a Bloomberg Law analysis." *Id.*

[351] *See Judgeship Appointments by President*, United States Courts, https://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president [https://perma.cc/FG4J-44AC] (updated through Dec. 31, 2023).

[352] *See supra* section III.B.1.

[353] *See supra* section I.C.

[354] Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 551 (2010).

[355] Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 Notre Dame L. Rev. 97, 148 (2006).

[356] *Id.*

[357] *Id.* at 153.

As legal scholars have documented, the modern Supreme Court reflects "an extraordinary lack of career diversity. At no other time in American history has the Court been composed of justices so alike in terms of their career experience."[358] Among other factors, over the last few decades a "norm of prior judicial experience" has created an expectation that justices will be drawn exclusively from the federal appellate bench,[359] but there has not been a parallel expectation that appellate judges will be drawn exclusively from the district courts.[360] These trends have contributed to a situation in which, as of 2012, "the Roberts Court Justices ha[d] spent less time . . . in trial judging . . . than any previous Court."[361]

Notwithstanding the recency of some of the contributing trends, there has long been a dearth of prior district-court experience on the Supreme Court. Among the justices appointed to the Court between 1900 and 2007, only three had any previous experience as a district court judge.[362] During the decades-long period between Charles Whittaker's departure in 1962[363] and Sonia Sotomayor's arrival in 2009,[364] *none* of the sitting Supreme Court justices had any prior experience as a district judge, and only three of the justices who served during that period had state trial-court experience.[365]

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[358] Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 908-09 (2003).

[359] *See id.* at 938 ("Over thirty years have elapsed since anyone lacking judicial experience has ascended to the Court, and it has been over twenty since anyone has reached the Court who has not previously served as a federal appellate judge.").

[360] *See generally* Sherry, *supra* note 355 (arguing that too few federal appellate judges have prior experience at the district-court level).

[361] Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1139 (2012).

[362] Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1366-67 tbl.1A (2008). Two out of those three served on the district court for two years or less. John Clarke, appointed to the Supreme Court by Woodrow Wilson in 1916, served on the district court for the Northern District of Ohio for two years. *Id.* Edward Sanford, appointed to the Supreme Court by Warren Harding in 1923, served on the district courts for the Middle District of Tennessee and the Eastern District of Tennessee for a total of more than 14 years. *Id.* Charles Whittaker, appointed to the Supreme Court by Dwight Eisenhower in 1957, served on the district court for the Western District of Missouri for less than two years. *Id.*

[363] *See Whittaker, Charles Evans*, FED. JUD. CTR., https://www.fjc.gov/history/judges/whittaker-charles-evans [https://perma.cc/DGM4-CVTL] (last visited Sept. 22, 2024).

[364] *See Sotomayor, Sonia*, *supra* note 337.

[365] David Souter, who served on the Supreme Court from 1990 to 2009, was a trial judge in New Hampshire from 1978 to 1983. *Souter, David Hackett*, FED. JUD. CTR., https://www.fjc.gov/history/judges/souter-david-hackett [https://perma.cc/UH4U-F9HL] (last visited Sept. 22, 2024). Sandra Day O'Connor, who served on the Supreme Court from 1981 to 2006, was a trial judge in Arizona from 1975 to 1979. *O'Connor, Sandra Day*, FED. JUD. CTR., https://www.fjc.gov/history/judges/oconnor-sandra-day [https://perma.cc/3227-MWJ2] (last visited Sept. 22, 2024). William Joseph Brennan, who served on the Supreme Court from 1956 to 1990, was a trial judge in New Jersey from 1949 to 1951. *Brennan, William Joseph, Jr.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/brennan-william-joseph-jr [https://perma.cc/8TEU-9XCC] (last visited Sept. 22, 2024). A fourth justice, Benjamin Cardozo, who served on the Supreme Court from 1932 to 1938 (before the period discussed in the text), was a trial judge in New York

It bears emphasis that the Supreme Court developed the bulk of its statutory fee-shifting doctrine, including the standards that govern the calculation of a reasonable fee, during that period.[366]

Of the nine justices sitting on the Supreme Court today, only two have prior experience on a trial court: Sonia Sotomayor sat on the district court for the Southern District of New York from 1992 to 1998,[367] and Ketanji Brown Jackson sat on the district court for the District of D.C. from 2013 to 2021.[368] None of the other seven justices so much as clerked for a federal trial court, let alone sat on one, and none has any previous experience as a state trial-court judge.[369]

In 2009, Chief Justice Roberts remarked "that the current justices' limited trial court experience was 'an unfortunate circumstance' and 'a flaw.'"[370] As the New York Times reported, Roberts recounted that Chief Justice Rehnquist

> tried to remedy that [lack of trial-court experience] by once appointing himself to the trial bench in Virginia during a Supreme Court recess. "He heard a case and issued the opinion," Chief Justice Roberts recalled, "and was promptly reversed by the Fourth Circuit." He added, "Partly because of that, I can assure you that I am not going to appoint myself to the trial bench."[371]

Declining to sit on a trial court may help to avoid embarrassing reversals, but it does nothing to mitigate the negative doctrinal consequences of the justices' lack of trial-court experience, which infects many areas of law. During the oral argument in *Ashcroft v. Iqbal*, for example, Justice Breyer asked what he described as "a very elementary question" about the discovery process.[372] None of the other justices provided an answer—perhaps

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from 1914 to 1917. *Cardozo, Benjamin Nathan*, FED. JUD. CTR., https://www.fjc.gov/history/judges/cardozo-benjamin-nathan [https://perma.cc/CC4V-QKRL] (last visited Sept. 22, 2024).

[366] *See supra* section I.B (discussing Supreme Court cases decided between 1983 and 2010).

[367] *Sotomayor, Sonia*, *supra* note 337.

[368] *Jackson, Ketanji Brown*, *supra* note 337.

[369] *See Alito, Samuel A., Jr.*, *supra* note 337; *Barrett, Amy Coney*, *supra* note 337; *Gorsuch, Neil M.*, *supra* note 337; *Kagan, Elena*, *supra* note 337; *Kavanaugh, Brett M.*, *supra* note 337; *Roberts, John Glover, Jr.*, *supra* note 337; *Thomas, Clarence*, *supra* note 337.

[370] Adam Liptak, *Roberts Sets Off Debate on Judicial Experience*, N.Y. TIMES (Feb. 16, 2009), https://www.nytimes.com/2009/02/17/us/17bar.html.

[371] *Id.*; *see also* Charles Fishman, *U.S. Supreme Court Justice Rehnquist To Sit as Judge in a Civil Rights Trial*, WASH. POST, May 12, 1984, at B1 (describing Rehnquist's plans to preside over the Section 1983 case in Virginia). In the case over which Rehnquist presided, he denied the defendants' motion for a directed verdict, the jury reached a verdict in favor of the plaintiffs, and he entered judgment on that verdict. Heislup v. Town of Colonial Beach, 813 F.2d 401, *1-2 (4th Cir. 1986). The Fourth Circuit held that Rehnquist erred in denying the defendants' motion for a directed verdict and remanded with instructions to enter judgment in favor of the defendants. *Id.* at *9-10.

[372] Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 842 (2010) (quoting Transcript of Oral Argument at 13, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2008) (No. 07-1015), 2008 WL 5168391).

unsurprisingly, as none of them had ever sat on a district court.[373] That lack of experience, and its attendant confusion, contributed to an opinion that "destabilized the entire system of civil litigation" by "inventing a new and foggy test for the threshold stage of every lawsuit."[374] As Kevin Clermont and Stephen Yeazell put it, "it is quite hard to resist the conclusion that the Justices inadvertently stumbled into a new procedural era."[375]

Like the decision in *Iqbal*, the Supreme Court's fee-shifting case law demonstrates that justices "[w]ithout sufficient hands-on experience at the trial level . . . have little or no understanding of how their decisions play out on the ground,"[376] leading them to characterize that case law as "readily administrable" when it is nothing of the sort.[377] The current ratio of two out of nine[378] does not seem high enough to avoid further complicating fee-shifting doctrine in the future, let alone to cut back on the unnecessary complexity that was introduced in the past.

Presidential administrations should improve that ratio by appointing more justices who have sat on a district court. A Supreme Court with more district-court experience would be in a better position to understand the burdensomeness of the tasks it has asked district courts to undertake. As a result, it might make the fee-shifting inquiry less complex, alleviating the burden on district courts. Alternatively, the Court might acknowledge the doctrine's complexity, instead of asserting its administrability, such that district courts would not need to artificially improve the tasks' administrability in order to match those inaccurate assertions. Either way, district courts would face less pressure to take unwarranted shortcuts.

C. Rethinking Judicial Economy

If a person has an overwhelming workload, they will naturally look for ways to reduce their burden, sometimes to the point of cutting corners. In the context of fee shifting, not only does the Supreme Court's current fee-shifting doctrine create significant burdens for the district courts,[379] but those burdens add to workloads that are already substantial.[380] Such pressures, especially

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[373] *Id.* at 850-51. "Only Justice Souter had ever sat on a trial bench, and he did so in the non-Federal Rules state of New Hampshire." *Id.* at 851.

[374] *Id.* at 850, 823.

[375] *Id.* at 850.

[376] Sherry, *supra* note 355, at 98.

[377] *See supra* section I.C; *see also* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 551-52 (2010).

[378] *See supra* notes 367-369 and accompanying text.

[379] *See supra* section I.C.

[380] *See, e.g.*, Margaret H. Lemos, *Special Incentives to Sue*, 95 Minn. L. Rev. 782, 823-24 (2011) ("Federal judges have long complained about overcrowded dockets and inadequate resources . . . ."); Merritt E. McAlister, *White-Collar Courts*, 76 Vand. L. Rev. 1155, 1180 (2023) (explaining that, over the past several decades, federal judges have experienced "rising caseloads and intensifying case complexity" as "major burdens").

when combined with judicial attitudes about attorney's fees,[381] may well promote the types of shortcuts discussed in this Article.[382] Accordingly, a reduction in district courts' caseloads has the potential to improve matters.

Congress should bring about that reduction by increasing the number of authorized district court judgeships, as the federal judiciary's national policy-making body has suggested.[383] Congress has the authority to create additional district court judgeships by statute, but it has not exercised that authority since 2002.[384] In the decades since those changes took effect, annual civil filings in the district courts have increased significantly,[385] and the median time from filing to disposition in civil cases has increased from eight months to twelve months.[386] Congress is currently considering legislation that would add several dozen district judgeships over a period of several years.[387]

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[381] *See supra* section III.A.

[382] *See supra* Part II. In addition, concerns about judicial workloads could implicitly or explicitly affect federal judges' interpretation of mechanisms—such as fee shifting—designed to encourage attorneys to bring more cases. *See* Lemos, *supra* note 380, at 823-24. For example, although empirical research suggests that the enactment of Section 1988 "appears not to have had any clear effect on the number of civil rights actions filed under statutes like 42 U.S.C. § 1983," Justice Powell once asserted that the fee-shifting statute "has become a major additional source of litigation. Since its enactment in 1976, suits against state officials under § 1983 have increased geometrically." *Id.* at 825 (quoting Pulliam v. Allen, 466 U.S. 522, 555-56 (1984) (Powell, J., dissenting)). Justice Powell also expressed the view that "harassing litigation and its potential for intimidation increases in suits where the prevailing plaintiff is entitled to attorney's fees." *Pulliam*, 466 U.S. at 555.

[383] The Judicial Conference of the United States recently proposed the addition of sixty-six permanent district court judgeships and the conversion of seven temporary judgeships to permanent judgeships. *See* Administrative Office of the U.S. Courts, *Federal Judiciary Seeks New Judgeship Positions* (Mar. 14, 2023), https://www.uscourts.gov/news/2023/03/14/federal-judiciary-seeks-new-judgeship-positions [https://perma.cc/FBD2-5ZEH]. Perhaps surprisingly, some federal judges strenuously objected to previous efforts to reduce docket pressures by increasing the number of federal judgeships. McAlister, *supra* note 380, at 1201-03.

[384] *See* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat 1758 (2002) (increasing the number of permanent district court judgeships from 651 to 663). These changes took effect on July 15, 2003. *Id.*; *see also Authorized Judgeships*, U.S. Courts 8, https://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/5TSL-M732], (reflecting that the total number of permanent authorized district court judgeships has been 663 since 2003).

[385] *Compare* United States Courts, Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2002 and 2003, https://www.uscourts.gov/file/12204/download [https://perma.cc/SQ58-5HZT] (showing 256,858 civil filings in 2003), *with* United States Courts, Federal Judicial Caseload Statistics, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 [https://perma.cc/H4WG-LPBW] (showing 284,220 civil filings in 2023).

[386] *Compare* United States Courts, Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2003, https://www.uscourts.gov/file/10325/download [https://perma.cc/SS9L-9W65] (showing a median time from filing to disposition of eight months in 2003), *with* United States Courts, U.S. District Courts–Civil Federal Judicial Caseload Statistics, https://www.uscourts.gov/statistics/table/c-5/federal-judicial-caseload-statistics/2023/03/31 [https://perma.cc/YBD2-ZXDU] (showing a median time from filing to disposition of twelve months in 2023).

[387] *See* H.R. 7597, 118th Cong. (2023-2024), https://www.congress.gov/bill/118th-congress/house-bill/7597 [https://perma.cc/5GCJ-S47Z]. The proposed legislation would add 66

Nevertheless, district courts have finite amounts of time available for the resolution of fee-shifting disputes, and that will remain true even if their caseloads decrease dramatically. It is therefore worth clarifying that, while district courts should stop taking unwarranted shortcuts, lower courts need not abandon all efforts to resolve fee disputes expeditiously. Instead of taking problematic shortcuts, however, lower courts could promote judicial economy by discouraging petty disputes and refusing to entertain objections that lack evidentiary support.

With regard to discouraging petty disputes, an important question is how close is close enough—both from the perspective of a district court deciding a fee-shifting dispute, and from the perspective of a higher court reviewing that decision. The Supreme Court addressed that question in 2011,[388] stating that "[t]he essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection."[389] Accordingly, while the fee applicant must "submit appropriate documentation to meet the burden of establishing entitlement to an award," district courts "need not, and indeed should not, become green-eyeshade accountants."[390] Instead of aiming for perfectly precise fee-shifting awards, the Supreme Court explained, "trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time."[391]

The "rough justice" standard is not a one-way ratchet, allowing bluntness in fee reductions but requiring precision in fee increases. Many district courts have readily accepted imprecision when significantly reducing plaintiffs' fees.[392] Some have also accepted imprecision that may benefit the plaintiff, declining to "engage in a picayune battle of the ledgers" or "entertain squabbles over the minutes logged for a particular task."[393] Other judges, however, have readily accepted defendants' invitations to nickel-and-dime a prevailing plaintiff; sometimes, the defendant hasn't even needed to ask. For example, in a 2020 decision awarding fees to a plaintiff who prevailed

district judgeships over a period of several years. Suzanne Monyak, *First New US Judgeships in Decades Gain Momentum in Congress*, Bloomberg Law (May 28, 2024), https://news.bloomberglaw.com/us-law-week/first-new-us-judgeships-in-decades-gain-momentum-in-congress.

[388] Fox v. Vice, 563 U.S. 826, 838 (2011); *see also supra* section II.B.1 (discussing this decision in the context of district courts' authority to "take into account their overall sense of a suit").

[389] *Fox*, 563 U.S. at 838. The Court made a similar point with regard to circuit courts, cautioning that "appellate micromanagement" is to be avoided. *Id.*

[390] *Id.*

[391] *Id.*

[392] *See, e.g.*, Hartley v. On My Own, Inc., No. 2:17-cv-00353, 2020 WL 5017608, at *5 (E.D. Cal. Aug. 25, 2020) (citing the "rough justice" standard when lowering an attorney's requested rate from $525 to $350 per hour, among other reductions).

[393] Elec. Priv. Info. Ctr. v. U.S. Drug Enf't Admin., 266 F. Supp. 3d 162, 172-73 (D.D.C. 2017); *see also* Thomas v. District of Columbia, 908 F. Supp. 2d 233, 251 (D.D.C. 2012) (quoting *Fox*, 563 U.S. at 838) (declining to make reductions proposed by a magistrate judge because "such an exacting scrutiny of an attorney's bill is akin to a quest for 'auditing perfection,' rather than the more appropriate goal of 'do[ing] rough justice'").

via default judgment, the district court cut one of the plaintiff's time entries by twelve minutes.[394] Courts should promote judicial economy by discouraging, rather than encouraging, requests for such trifling reductions.

With regard to objections that lack evidentiary support, it bears emphasis that a court will issue a fee-shifting award only under limited circumstances.[395] Among other things, Congress must have deemed the type of claim brought by the plaintiff important enough to warrant fee shifting;[396] the plaintiff must have retained one or more attorneys who successfully prosecuted the claim;[397] and the case must have ended with a settlement that stipulated to the plaintiff's eligibility for fees, an adjudication that the defendant violated federal law, or a consent decree that binds the defendant on pain of contempt.[398] As the Supreme Court put it in 2011, "[a] civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes."[399]

To be sure, those circumstances do not give a district court license to move the burden of production from the prevailing plaintiff to the losing defendant.[400] But once the plaintiff has met its initial burden, the district court should hold the defendant to its burden of rebuttal,[401] rather than

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[394] *See* Trujillo v. GH Food Mart, Inc., No. 1:20-cv-00368, 2020 WL 4697139, at *7 (E.D. Cal. Aug. 13, 2020) ("On March 11, 2020, [the plaintiff's attorney] recorded a total of 0.30 hour (18 minutes) reviewing the Court's 'order setting scheduling conference for deadline to file scheduling report and deadline to meet and confer.' [The attorney's] time of 18 minutes for reviewing the Court's standard scheduling order to locate the deadline for filing the parties' joint scheduling report is excessive—0.1 hour (6 minutes) is sufficient.").

[395] As noted previously, the parties can settle the amount of the fee without the district court's involvement. *See supra* section I.B. Such an agreed-upon amount would presumably be discounted by the parties' views of the likelihood of these limited circumstances coming to pass; accordingly, the prospect of other cases settling does not mean that a court should engage in that discounting prophylactically.

[396] *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (referring to a prevailing plaintiff as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'") (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263-64 (1975) (holding that Congress, not the judiciary, has the authority to invoke the "private attorney general" concept to choose which types of claims are important enough to warrant an award of attorney's fees); *see also* Carroll, *Nominal Damages*, *supra* note 5, at 23-26 (discussing the implications of *Alyeska* with respect to judicial authority over fee-shifting awards).

[397] *See* Kay v. Ehrler, 499 U.S. 432, 437-38 (1991) (holding that only represented parties are eligible for fee-shifting awards).

[398] *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 600 (2001) (articulating the requirements for "prevailing party" status); Evans v. Jeff D., 475 U.S. 717, 731-32 (1986) (affirming the parties' ability to enter into settlement agreements that determine whether a plaintiff will receive attorney's fees).

[399] Fox v. Vice, 563 U.S. 826, 834 (2011); *see also Christiansburg Garment*, 434 U.S. at 418 ("[W]hen a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.").

[400] *See Fox*, 563 U.S. at 838 ("The fee applicant . . . must, of course, submit appropriate documentation to meet 'the burden of establishing entitlement to an award.'") (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).

[401] *See, e.g.*, Gates v. Deukmejian, 987 F.2d 1392, 1397-98 (9th Cir. 1992) ("The party opposing the fee application has a burden of rebuttal that requires submission of evidence to

entertaining unsupported arguments or assertions. By requiring the defendant to "either accede to the applicant's requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate,"[402] a district court can promote efficiency without undermining fairness—and without undermining the purpose of fee-shifting statutes.

Conclusion

As this Article has explained, the Supreme Court's case law about statutory fee shifting requires district courts to engage in a highly case-specific inquiry, but the Court has admonished district courts not to spend too much time on the process.[403] Lower courts have attempted to square that circle by employing a set of homogenizing shortcuts, including the use of artificially standardized hourly rates,[404] reliance on judges' own presumed expertise about legal markets,[405] and duplication of the hourly rates awarded in previous cases.[406] These shortcuts may save time, but they fall short of the case-specific analysis the Supreme Court requires.

Fee-shifting statutes are meant to be "the fuel that drives the private attorney general engine,"[407] generating economic incentives that enable civil rights claimants to find qualified counsel. In addition to running afoul of binding precedent, the shortcuts discussed in this Article tend to reduce fee awards in unjustified ways, undermining the purpose of fee-shifting statutes. The Supreme Court's parsimonious interpretations of fee-shifting statutes have already diminished the statutes' efficacy, and lower courts' unwarranted shortcuts make matters worse.

The disconnect between the Supreme Court and the lower courts appears in the doctrine, but it has roots in the culture of the legal profession and the composition of the federal judiciary.[408] With regard to the culture of the legal profession, attorneys and judges sometimes act as though there is something distasteful about seeking payment for work that advances the

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the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.") (citing Blum v. Stenson, 465 U.S. 886, 892 n.5 (1984); Toussaint v. McCarthy, 826 F.2d 901, 904 (9th Cir.1987)).

[402] Covington v. District of Columbia, 57 F.3d 1101, 1109-10 (D.C. Cir. 1995) (citing Nat'l Ass'n of Concerned Veterans v. Sec'y of Def., 675 F.2d 1319, 1326); *see also* F. Loc. R. 7.3(a) (requiring that a party opposing a fee-shifting petition "shall describe with reasonable particularity each time entry or nontaxable expense to which it objects, both as to issues of entitlement and as to amount, and shall provide supporting legal authority. If a party objects to an hourly rate, its counsel must submit an affidavit giving its firm's hourly rates for the matter and include any contingency, partial contingency, or other arrangements that could change the effective hourly rate").

[403] *See supra* Part I.

[404] *See supra* section II.A.

[405] *See supra* section II.B.

[406] *See supra* section II.C.

[407] Karlan, *supra* note 315, at 205.

[408] *See supra* Part III.

public interest, as a law firm does when it seeks a fee-shifting award.[409] But there is nothing wrong with getting paid for public interest work, and public interest lawyers are not somehow immune from the economic incentives that drive case selection decisions in other practice areas. Congress recognized as much when it enacted fee-shifting statutes, and judges lack the authority to second-guess those legislative choices.

With regard to the composition of the federal judiciary, very few federal judges have experience as a plaintiff-side civil rights lawyer, which could inform their understanding of the economic realities of that type of legal practice;[410] and very few Supreme Court justices have experience as a district judge, which could inform their understanding of the judicial burdens their fee-shifting decisions have created.[411] Moreover, district courts have heavy workloads, which may make them more susceptible to taking inappropriate shortcuts.[412] Congress can reduce district courts' workloads by authorizing additional judgeships, and presidential administrations can alter the composition of the federal judiciary by appointing more federal judges with plaintiff-side civil rights experience and more Supreme Court justices who have sat on a district court.

Changing these underlying circumstances cannot happen easily or overnight. But enforcement of the country's civil rights laws relies heavily on private lawsuits, and those private lawsuits depend heavily on fee shifting. Improving fee shifting thus warrants a great deal of time and effort.

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[409] *See supra* section III.A.

[410] *See supra* section III.B.1.

[411] *See supra* section III.B.2.

[412] *See supra* section III.C.