A Primer on the Law of Attorney's Fees Under § 1988

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MODERN CIVIL LITIGATION IN AMERICA generally proceeds under the assumption that plaintiffs and defendants must choose and pay their own lawyers. This "American Rule," as it is called, remains a cornerstone in private rights resolution. Whether the action involves a contract, a tort, or real estate, parties ordinarily retain and pay their own lawyers.[1]

In contrast, a modified "English" fee-shifting rule is commonly employed today in litigation involving public rights—that is, rights, privileges, and immunities that protect individuals from government. Contrary to the American practice, English courts have historically required that losing parties compensate winners' lawyers. In order to encourage "private attorneys general" to police government, civil rights legislation today regularly (per the English model) requires that successful plaintiffs' lawyers be paid by governmental defendants.[2] In an effort to maximize the number of private attorneys general, the English rule is generally ignored when governmental defendants prevail in these civil rights suits.[3] Hence, civil rights litigation in America employs a modified English fee-shifting rule.

Plaintiffs making constitutional claims under 42 U.S.C. § 1983 against

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1. Statutory exceptions exist. Title VII, for example, authorizes fee-shifting even in purely private litigation. *See* 42 U.S.C. § 2000e-5(k). The federal Securities Act of 1933, 15 U.S.C. § 77k, and Securities Exchange Act of 1934, 15 U.S.C. § 78j, also authorize fee-shifting. Parties can also agree contractually to fee-shifting. *See, e.g.*, Double Oak Constr. v. Cornerstone Dev., 97 P.3d 140, 150 (Colo. Ct. App. 2003) ("if attorney fees are simply the consequence of a contractual agreement to shift fees to a prevailing party, they should be treated as 'costs,' at least where the fee-shifting contract provision is not the subject of the dispute between the parties and the contract itself is proved to exist").

2. See Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 889 (1992).

3. Successful § 1983 defendants can recover their attorney's fees from losing plaintiffs whose claims were frivolous, unreasonable and without foundation.

state officials, local governments, and local officials have perhaps benefited the most from the adoption of this modified English practice. The Civil Rights Attorney's Fees Act of 1976[4] (§ 1988) states that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 . . . 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 . . . ."[5] Prior to 1976, civil rights plaintiffs seeking purely equitable relief or expecting small monetary awards had great difficulty locating competent counsel. Contingent fee arrangements offered little incentive to lawyers in either context. With the adoption of fee-shifting, lawyers now have more reason to pursue constitutional cases.[6]

This article is intended as an attorney's fees primer of sorts for lawyers engaged in civil rights litigation under 42 U.S.C. § 1983. It is by no means exhaustive; it addresses only some of the more common issues that arise under the Civil Rights Attorney's Fees Act of 1976.

I. The Meaning of "Prevailing Party"

The first and most important question that arises under § 1988 is the meaning of "prevailing party." Although the term literally includes defendants as well as plaintiffs, its spirit certainly favors plaintiffs. A prevailing defendant can win attorney's fees under § 1988 only if it can prove that a plaintiff's claim is frivolous, groundless, or vexatious.[7]

4. 42 U.S.C. § 1988(b). Section 1988 was reorganized in 1991, so that the portion addressing attorney's fees became § 1988(b). The last clause of § 1988(b), moreover, now states that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction." This limitation was added as part of the Federal Courts Improvement Act of 1996. For the sake of consistency and simplicity, I will refer to the Civil Rights Attorney's Fees Act of 1976 as "§ 1988."

5. Section 1988 also authorizes attorney's fees for plaintiffs who prevail under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, as well as those who prevail under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, and the Violence Against Women Act, 42 U.S.C. § 13981. In addition to the remedial provisions referred to in § 1988(b), several other federal civil rights statutes, including the Americans with Disabilities Act (ADA) and the federal Fair Housing Amendments Act of 1988 (FHAA), employ similar, "English" fee-shifting principles. A host of environmental statutes also adopt versions of this modified English rule.

6. *See* Armand Derfner, *Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976*, 37 URB. LAW. 653 (2005).

7. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) ("a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, and without foundation, even though not brought in subjective bad faith"); *see also* Hughes v. Rowe, 449 U.S. 5 (1980) (adopting same standard for successful § 1983 defendants).

For a generation, lower courts agreed that § 1988 did not demand formal victories. Instead, it was enough that the plaintiff's suit *caused* the governmental defendant to repeal, modify, or otherwise change its unconstitutional rule or practice. In addition to awarding fees in cases resolved by settlements and consent decrees, this so-called "catalyst theory" authorized courts to award attorney's fees to plaintiffs whenever defendants modified their actions after litigation was commenced. The plaintiff needed only to establish: (1) the defendant provided "some of the benefit sought" by the lawsuit; (2) the suit stated a "colorable," as opposed to "frivolous," claim; and (3) the suit was a "substantial" cause of defendant's change.[8]

The catalyst theory came to a screeching halt in 2001 with the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[9] a case decided under the federal Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA).[10] The plaintiff, Buckhannon Board and Care Home ("Buckhannon"), an assisted living facility, failed a fire inspection and was ordered closed by local officials.[11] Following the onset of litigation in federal court, in which Buckhannon claimed the state's order violated federal law, the West Virginia legislature enacted two bills that, in sum, allowed Buckhannon to remain open.[12] Because the district court thereafter dismissed the suit as moot, it did not mature to final judgment. Because of its apparent success (notwithstanding the court's dismissal), Buckhannon sought attorney's fees from West Virginia under the catalyst theory.[13]

A divided Supreme Court, per the Chief Justice, rejected Buckhannon's claim to fees. It ruled that in order for a party to "prevail," it must win formal, juridical relief.[14] This relief may come in various

8. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 627–28 (2001) (Ginsburg, J., dissenting).

9. 532 U.S. 598 (2001).

10. Because the fee-shifting language in the FHAA and ADA is identical to that in § 1988, the Court's decision applies to all three statutes (and many others). *See id.* at 603 n.4. Fee-shifting provisions that use different language may not be covered by *Buckhannon.* For example, because the federal Endangered Species Act authorizes an award of attorney's fees "whenever . . . appropriate," the catalyst theory still applies. *See* Ass'n of Cal. Water Agencies v. Evans, 386 F.3d 879 (9th Cir. 2004); Loggerhead Turtle v. County Council, 307 F.3d 1318 (11th Cir. 2002).

11. 532 U.S. at 600. According to West Virginia officials, Buckhannon's residents were not fully capable of "self-preservation" in the case of fire.

12. *Id.* at 601.

13. *Id.*

14. *Id.* at 619–20.

forms—including consent decrees,[15] preliminary[16] and permanent injunctions,[17] and declaratory judgments[18] (as well as classical damage awards)—but the plaintiff's suit acting simply as a catalyst is not enough.[19]

Although § 1988 is literally discretionary,[20] an award of attorney's fees to a prevailing plaintiff is technically mandatory.[21] Hence, a plaintiff who formally prevails on "any significant [federal fee-supported] issue" is entitled to some kind of award.[22] Still, because courts have discretion over the amount of the fee, plaintiffs who win only trivial relief may find themselves receiving no fee. In *Farrar v. Hobby*,[23] the Supreme Court addressed "whether a civil rights plaintiff who receives

15. *See, e.g.*, Maher v. Gagne, 448 U.S. 122 (1980) (awarding attorney's fees to plaintiff who won consent decree).

16. *Cf.* Hanrahan v. Hampton, 446 U.S. 754 (1980) (stating that Congress intended to allow fee awards for interim relief). Most lower courts prior to *Buckhannon* interpreted *Hanrahan* to authorize an award of attorney's fees under § 1988 (either immediately or at the close of the litigation) when the plaintiff obtained a preliminary injunction. Lower courts have proved less willing, however, to award fees based solely on the issuance of temporary restraining orders. *See, e.g.*, Foreman v. Dallas County, 193 F.3d 314 (5th Cir. 1999) (refusing to award attorney's fees for temporary restraining order). Many lower courts prior to *Buckhannon* extended this practice to cases in which defendants *agreed to* or *acquiesced in* preliminary relief. *See, e.g.*, Smith v. Thomas, 725 F.2d 354 (5th Cir. 1984) (awarding attorney's fees when the defendant agreed to abide by a preliminary order); Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985) (awarding attorney's fees where the defendant assured the court that challenged policies would shortly be rescinded, thereby leading the court to defer ruling on the motion for preliminary injunction). This was done regardless of whether the court found, or the defendant admitted, wrongdoing. *See* Armstrong v. ASARCO, Inc., 138 F.3d 382 (8th Cir. 1998) (plaintiffs awarded fees even though the district court did not address the merits of the motion for preliminary injunction). This would appear to be precluded today by *Buckhannon.*

17. *See* Blanchard v. Bergeron, 489 U.S. 87 (1989) (awarding attorney's fees where nonpecuniary relief awarded).

18. *Id.*

19. *Buckhannon*, 532 U.S. at 605.

20. *See supra* note 6 and accompanying text.

21. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402–03 (1968) (holding that award of attorney's fees to prevailing plaintiff under 1964 Civil Rights Act, on which § 1988(b) was modeled, was mandatory absent "special circumstances"). For a more complete discussion of the circumstances that courts consider in assessing the worth of a successful § 1983 plaintiff's claim to attorney's fees, *see* M. DAVID GELFAND, SUING AND DEFENDING CITIES FOR FEDERAL CONSTITUTIONAL VIOLATIONS 6–63 (Lexis 2003).

22. *See* Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989) (holding that a plaintiff who has prevailed on "any significant issue" and achieved "some of the benefit" sought is entitled to attorney's fees). Of course, only those hours spent on the successful federal fee-supported claims are then included in the lodestar award. Where claims are not independent of one another—that is, they arise from common facts—it is not uncommon for the district court to award the full lodestar award to the plaintiff. The theory is that when claims are dependent and interrelated, the plaintiff's attorneys would have had to expend the same amount of time on any one of the claims anyway.

23. 506 U.S. 103 (1992).

a nominal damages award is a 'prevailing party' eligible to receive attorney's fees under 42 U.S.C. § 1988."[24] The plaintiffs, Joseph and Dale Farrar, owned and operated a private school for delinquent, disabled, and disturbed teens. After a student died in 1973, a local "grand jury returned a murder indictment charging Joseph Farrar with willful failure to administer proper medical treatment and failure to provide timely hospitalization."[25] State authorities then temporarily closed the school. After the criminal charges were dismissed, the plaintiffs sued several state and local officials under § 1983 for monetary and injunctive relief. Their "complaint alleged deprivations of liberty and property without due process by means of conspiracy and malicious prosecution aimed at closing [their school]."[26] "Later amendments to the complaint . . . dropped the claim for injunctive relief, and increased the request for damages to $17 million."[27]

A jury found that all of the defendants, except one (Lieutenant Governor William Hobby), had conspired against the plaintiffs and that Hobby had "committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right."[28] The jury also concluded, however, that neither the conspiracy nor Hobby's conduct was a proximate cause of any injury suffered by the plaintiffs. The district court thus ordered that "[p]laintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs."[29] Based on the jury's conclusion that Hobby had violated the plaintiffs' civil rights, however, the Fifth Circuit ordered entry of judgment against Hobby for nominal damages not to exceed $1.[30] On remand, the district court then awarded $280,000 in attorney's fees.

The Supreme Court reversed the award of attorney's fees. Although it found that the plaintiffs had prevailed, it also concluded that "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award.[31] " '[T]he most critical factor' in determining the reasonableness of a fee award," the Court concluded, " 'is the degree of success obtained.' "[32] "In this case, petitioners received nominal damages instead of the $17 million in compensatory damages that they sought.

24. *Id.* at 105.
25. *Id.*
26. *Id.* at 106.
27. *Id.*
28. *Farrar*, 506 U.S. at 106.
29. *Id.* at 107.
30. *Id.* at 106.
31. *Id.* at 114.
32. *Id.* (quoting Hensley v. Eckerhart, 461 U.S. 424 (1983)).

This litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way."[33] "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all."[34]

An important limitation on "prevailing party" status is the requirement of ultimate success. It is not enough that a plaintiff succeed in appellate courts; rather, the plaintiff must ultimately prevail in the trial court. The Supreme Court, in *Hanrahan v. Hampton*,[35] ruled that a successful reversal, by itself, does not ordinarily entitle an appellant to an award of attorney's fees under § 1988. *Hanrahan*, as explained by the Court, "arose from the execution in 1969 of a judicial warrant to search for and seize illegal weapons within an apartment in Chicago occupied by nine members of the Black Panther Party."[36] During the course of the search, two of the apartment's occupants were killed by gunfire, and four others were wounded. The police seized various weapons and arrested the seven surviving occupants of the apartment. The survivors were indicted by a state grand jury on charges of attempted murder and aggravated battery, but the indictments ultimately were dismissed. The seven survivors and the legal representatives of the two persons killed sued under § 1983. The district court directed verdicts for the various defendants. The court of appeals, however, found that the plaintiffs had made out a prima facie case against most of the defendants and accordingly reversed. In addition, the court of appeals awarded the respondents their attorney's fees on appeal under § 1988.

The Supreme Court reversed the award of attorney's fees.[37] Although plaintiffs who win interim relief—such as a preliminary injunction—may be entitled to attorney's fees, obtaining a simple reversal on appeal does not qualify as compensable interim relief.[38] After all, a jury might ultimately reject the plaintiffs' claims. Should the plaintiff prevail at trial following the reversal, or succeed on appeal in sustaining a trial verdict or judgment in the lower court, a reasonable attorney's fee will likely include the lawyer's time spent on appeal.[39] But ultimate success is still a prerequisite.

33. *Farrar*, 506 U.S. at 114 (quoting Hewitt v. Helms, 482 U.S. 755, 762 (1987)).
34. *Id.* at 115.
35. 446 U.S. 754, 758–59 (1980) (per curiam).
36. *Id.* at 755 n.1.
37. *Id.* at 759.
38. *Id.*
39. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 693–98 (1978) (affirming award of appellate fees to prevailing party as part of the costs). Successful plaintiffs may have to file their appellate attorney's fees request with the appellate court in which they

Of course, the same problem can arise with other forms of interim relief, like preliminary injunctions. Notwithstanding preliminary relief, a court might ultimately rule for the defense.[40] More likely, a case might be dismissed by the district court as moot. In neither situation can the plaintiff claim ultimate success. *Buckhannon* makes this clear.[41] Similarly, the Supreme Court has found that a case that becomes moot on appeal, requiring vacatur of the judgment below, deprives a plaintiff of prevailing party status.[42] Thus, even a plaintiff who has won a final judgment in the district court can lose attorney's fees by way of mootness.

As made clear by the majority in *Buckhannon*, however, mootness is by no means automatic: "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[43] Thus, *Buckhannon* notwithstanding, a voluntary change by the defendant should not automatically defeat an award of attorney's fees.[44]

prevailed (rather than the district court) in order to recover fees for their appellate victory. *See, e.g.*, Mills by Mills v. Freeman, 118 F.3d 727, 734 (11th Cir. 1997). As the Eleventh Circuit observed, "a district court is 'not authorized, by local rule or otherwise, to control the filing time or assessment of attorney's fees for services rendered on appeal.' If a party wishes to obtain fees on appeal, he or she must file a petition with the clerk of this circuit within fourteen days of the issuance of the opinion of this court." *Id.* (quoting Davidson v. City of Avon Park, 848 F.2d 172, 173 (11th Cir. 1988)).

40. Should the defendant ultimately prevail on the merits in the district court (or on appeal), antecedent preliminary relief cannot support an award of attorney's fees to the plaintiff. *See* Pottgen v. Mo. State High Sch. Activities Ass'n, 103 F.3d 720 (8th Cir. 1997) (holding that a preliminary injunction that is reversed on appeal cannot support an award of attorney's fees); LaRouche v. Kezer, 20 F.3d 68 (2d Cir. 1994) (holding that a preliminary injunction upset by a final judgment cannot support an award of attorney's fees). Indeed, any fees paid to the plaintiff on an interim basis must ordinarily be refunded.

41. *Buckhannon* is not the first case in which the Supreme Court has held that a judgment that is moot when entered cannot create a "prevailing party" for purposes of § 1988. *See* Rhodes v. Stewart, 488 U.S. 1 (1988).

42. *See* Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990). As the Court noted, "[a]n [appellate] order vacating the judgment on grounds of mootness would deprive [the plaintiff] of its claim for attorney's fees under 42 U.S.C. § 1988 . . . because such fees are available only to a party that 'prevails' by winning the relief it seeks."

43. *Buckhannon*, 532 U.S. at 609. *See also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (observing that voluntary conduct on the part of defendant does not ordinarily moot case and that plaintiffs might still be entitled to recover attorney's fees even when defendants voluntarily moot case); N.E. Fla. Chapter of Ass'n Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) (holding that the defendant's voluntary repeal of minority set-aside program did not moot claim for declaratory and injunctive relief).

44. Because it is difficult for defendants to unilaterally moot a case under the Court's precedents, *see, e.g., N.E. Fla. Chapter of Ass'n Gen. Contractors*, 508 U.S. 656, governmental defendants appear to have a "strong incentive" to settle claims seeking declaratory and injunctive relief even after *Buckhannon. See Buckhannon*, 532 U.S. at

Moreover, the Court held in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*[45] that, although a lower court judgment must be vacated on appeal if the case has become moot by happenstance or by the conduct of the prevailing party below, the lower court's judgment ordinarily should not be vacated on appeal if the case has been mooted by the voluntary conduct of the losing party.[46] Consequently, a losing defendant cannot undo a plaintiff's victory by voluntarily changing its practices after judgment. This change may moot an appeal but will not upset the judgment below.[47] Armed with a judgment in the district court, the plaintiff will be entitled to an attorney's fee award under § 1988.[48]

What is left unclear by the Supreme Court in *Buckhannon* is whether and to what extent an award of attorney's fees can be grounded in a formal award of preliminary relief that precedes mootness.[49] Lower

609 ("Given this possibility [of a case not being found moot], a defendant has a strong incentive to enter into a settlement agreement, where it can negotiate attorney's fees and costs."). Also, a voluntary change in the defendant's behavior cannot moot a claim for money damages. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 n.1 (1989). Thus, *Buckhannon*'s rejection of the catalyst theory may prove less important than initially thought.

45. 513 U.S. 18 (1994).

46. Nor should a judgment be vacated when the case is mooted by settlement during the appeal absent exceptional circumstances. *See id.*

47. *See, e.g.*, Palmetto Props. v. County of DuPage, 375 F.3d 542 (7th Cir. 2004) (holding that mootness after entry of summary judgment moots appeal but does not upset the judgment and does not relieve the defendant of having to pay attorney's fees), *cert. denied*, 125 S. Ct. 965 (2005). In fact, in *Palmetto*, the Seventh Circuit awarded attorney's fees even though the defendant technically mooted the case before the entry of final judgment in the district court. The defendant (DuPage County) represented to the district court, after it lost a summary judgment, that it would change its rules to comply with the court's judgment rather than take an appeal. The court thus kept the case administratively open until after the county made the change. The case was then dismissed as moot. The Seventh Circuit concluded that in light of the summary judgment and the county's representation to the district court, an award of attorney's fees was still appropriate even though mootness technically preceded final judgment. *Id.* at 551.

48. One can avoid the possibility of mootness altogether by demanding relief for past injuries. A claim to money damages cannot generally be mooted by subsequent events. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 n.1 (1989) (noting that damage claims seldom run into difficulty under Article III); McKinley v. Kaplan, 177 F.3d 1253 (11th Cir. 1999) (holding that the district court abused its discretion by not allowing the plaintiff to amend its complaint to seek money damages after the claims to prospective relief became moot). Even claims to nominal damages can suffice, *see, e.g.*, Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248 (10th Cir. 2004) (observing that claim to nominal damages can often defeat mootness), though it is not clear that such claims will lead to awards of attorney's fees after *Farrar v. Hobby.* For a discussion of *Farrar*, see *supra* text accompanying notes 23–34.

49. Interim relief proves relatively unimportant (in terms of attorney's fees) when the case matures to final judgment. Should the plaintiff ultimately prevail, the ensuing fee award will likely include compensation for the time spent obtaining the preliminary relief. If the defendant wins, preliminary relief dissolves, and the plaintiff forfeits its right to attorney's fees.

courts prior to *Buckhannon* had little difficulty holding defendants accountable for plaintiffs' attorney's fees when the mooting event was caused by the defendants.[50] When a defendant voluntarily moots a case, after all, it can hardly be heard to complain about not having an opportunity to challenge an interim award. When mootness is caused by happenstance or by the plaintiff, however, a preliminarily enjoined defendant would seem to have a credible equitable complaint. Through no fault of its own it is prevented from challenging the preliminary order, either in the trial court or on appeal. Although there is precedent for awarding fees in this situation,[51] the Supreme Court's decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*[52] suggests an opposite result.

The Court in *Bonner Mall* ruled that final judgments that become moot on appeal through "happenstance"—that is, "due to circumstances unattributable to any of the parties"—or through actions attributable to the prevailing party, must be vacated.[53] The same logic would seem to apply to preliminary orders that are rendered moot in the trial court by either happenstance or the actions of the prevailing plaintiff. And, in the absence of surviving preliminary relief, a plaintiff cannot claim to be a prevailing party entitled to shift its attorney's fees.

It may be that after *Buckhannon* fee awards can *never* be based on mooted preliminary relief. This possibility arises not so much because of *Buckhannon*'s holding as because of its facts. The defendants in *Buckhannon*, after all, "agreed to stay enforcement of the cease and desist orders [closing the Care Home] pending resolution of the case."[54] The dissent elaborated, explaining that "at a hearing on plaintiffs' request for a temporary restraining order, defendants agreed to the entry of an interim order allowing Buckhannon to remain open."[55] Because the agreement not to close the care home during the pendency of the litigation was included in a court order, this arrangement would have supported an award of attorney's fees in many circuits (with or without the catalyst theory) prior to *Buckhannon.*[56]

50. *See, e.g.*, Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982) (holding that plaintiffs who won injunction pending appeal were entitled to award of attorney's fees).

51. *See* Smith v. Thomas, 725 F.2d 354 (5th Cir. 1984); Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982).

52. 513 U.S. 18 (1994).

53. *Id.* at 23.

54. *Buckhannon*, 532 U.S. at 601.

55. *Id.* at 624 (Ginsburg, J., dissenting).

56. Many lower courts prior to *Buckhannon* recognized that *agreements*, whether or not formally recognized in court orders, supported attorney's fees. *See, e.g.*, Smith v. Thomas, 725 F.2d 354 (5th Cir. 1984) (awarding attorney's fees when the defendant

In *Smyth v. Rivero*,[57] the Fourth Circuit concluded that interim orders, like preliminary injunctions, are simply insufficient to support awards of attorney's fees. The defendant in *Smyth* had, like the state in *Buckhannon*, mooted the case by voluntarily changing its challenged practices. The plaintiffs were thus forced to rely on the award of preliminary relief to support their claim for attorney's fees. Notwithstanding that the equities favored the plaintiffs, the court found that the results of preliminary hearings, though formal, are simply too "abbreviated" and "uncertain" to support an award of attorney's fees under § 1988.[58]

II. Assessing the Reasonableness of Fees

Assuming that a party prevails (and is entitled to an award of attorney's fees), the next question focuses on quantity. How much should the losing party pay to compensate the prevailing party's attorney? The Supreme Court examined this question in *City of Riverside v. Rivera.*[59] There, eight plaintiffs recovered a total of $33,350 from the City of Riverside and five of its police officers in a suit alleging that the police acted unconstitutionally by entering a home without a warrant and using excessive force to break up a party. Notwithstanding that twenty-five police officers were exonerated, the district court awarded the plaintiffs' attorneys $245,456.25 in fees under § 1988. The trial court came to this conclusion by multiplying the number of hours the plaintiffs' lawyers had spent on the litigation (almost 2,000 hours) by a $125 hourly rate.

The Supreme Court affirmed. A four-Justice plurality rejected the proposition that a "reasonable" award of attorney's fees under § 1988 was necessarily bounded by the plaintiffs' recovery. It instead identified twelve factors that should be considered in calculating and awarding attorney's fees under § 1988:

agreed to abide by a preliminary order); Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985) (awarding attorney's fees when the defendant assured the court that challenged policies would shortly be rescinded, thereby leading the court to defer ruling on the motion for preliminary injunction); Armstrong v. ASARCO, Inc., 138 F.3d 382 (8th Cir. 1998) (plaintiffs awarded fees even though the district court did not address the merits of the motion for preliminary injunction). This would appear to be precluded today by *Buckhannon.* However, the fact that an agreement is incorporated into a court order would seem to satisfy *Buckhannon*, at least when the arrangement takes the form of a preliminary injunction. For a contrary view, though, see *Foreman v. Dallas County*, 193 F.3d 314 (5th Cir. 1999) (refusing to award attorney's fees based on finite temporary restraining order).

57. 282 F.3d 268 (4th Cir. 2002).

58. *Id.* at 277.

59. 477 U.S. 561 (1986).

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client under the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.[60]

The starting point, according to the plurality, "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[61] This figure—the "lodestar"—is presumed to be the reasonable fee contemplated by § 1988. Using this figure as a starting point, district courts should then use the remaining eleven considerations to adjust the fee up or down. A plaintiff who is completely successful might be awarded more. One who won only some relief might receive less. Time spent on unsuccessful claims, to the extent possible, should be subtracted from the lodestar. However, because in some instances "the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories,"[62] it may not be possible to separate billable hours. "Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."[63] "[W]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee . . . ."[64] Applying these principles, the plurality determined that the attorneys were entitled to compensation for all of the time they had expended, even though they did not prevail against all of the defendants.[65]

Following *Rivera*, the focal question in nonprisoner litigation[66] is one

60. *Id.* at 568 n.3 (citing Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)).
61. *Id.* at 569.
62. *Id.*
63. *Id.*
64. *Rivera*, 477 U.S. at 569.
65. Justice Powell, who supplied the needed fifth vote in *Rivera*, relied heavily on the district court's factual findings: "For me affirmance—quite simply—is required by the District Court's detailed findings of fact, which were approved by the Court of Appeals. On its face, the fee award seems unreasonable. But I find no basis for this Court to reject the findings made and approved by the courts below." *Id.* at 581 (Powell, J., concurring). Justice Rehnquist, joined by Chief Justice Burger and Justices White and O'Connor, dissented. *Id.* at 588 (Rehnquist, J., dissenting).
66. The Prison Litigation Reform Act of 1995 dramatically limits the amount successful plaintiffs' lawyers can win under § 1988 in prisoners' rights litigation. *See* 42 U.S.C. § 1997e(d) (2000) (limiting fee awards). In particular, § 1997e(d) requires proportionality between attorney's fees and prisoners' relief, requires that a portion of any monetary judgment (not exceeding 25%) be used to pay the attorney's fee, caps the hourly rate paid to the successful prisoner's lawyer at 150% of the rate paid to criminal

of the lodestar—the lawyer's total number of hours expended multiplied by a reasonable hourly rate. Rather than being bound by a *quantitative* figure, like the money damages recovered by the plaintiff, this lodestar figure is limited by *qualitative* concerns, such as whether the plaintiff achieved all (or substantially all) of the relief sought. Assuming a plaintiff has won all of the relief sought, he or she would likely be entitled to a full lodestar award—one reflecting all the hours expended. A plaintiff who achieved substantially less than requested is entitled to a smaller award.

Because civil rights work is commonly contingent on success, for a number of years plaintiffs' lawyers sought (and received) fee enhancements, commonly known as multipliers, under § 1988. The Supreme Court rejected this practice in *City of Burlington v. Dague.*[67] The case involved a successful challenge under the Solid Waste Disposal Act (SWDA) and the Federal Water Pollution Control Act (Clean Water Act (CWA)), both of which have fee-shifting provisions similar to that found in § 1988. The question presented to the Court was whether an award of attorney's fees could be enhanced "above the 'lodestar' amount in order 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."[68] Per Justice Scalia, the Court ruled that fee enhancement based on the relative risk of a case is not permissible.[69]

defendants' lawyers appointed under 18 U.S.C. § 3006A, *see* Martin v. Hadix, 527 U.S. 343 (1999) (applying § 1997e(d) to post-judgment monitoring), *on remand sub nom.* Hadix v. Johnson, 230 F.3d 840 (6th Cir. 2000) (sustaining constitutionality of limitations), and somewhat ambiguously purports to relieve defendants entirely of having to pay any fees beyond those equal to 150% of the prisoner's monetary judgment. *See* 42 U.S.C. § 1997e(d)(2). Lower courts have read this last limitation as an absolute cap on attorney's fees in cases involving money judgments. *See* Riley v. Kurtz, 361 F.3d 906, 915 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 169 (2004) (observing that prisoner's lawyer's fees, whether incurred in trial court or on appeal, should be limited to 150% of prisoner's award); Johnson v. Daley, 339 F.3d 582 (7th Cir. 2003), *cert. denied*, 541 U.S. 935 (2004) (using 150% limitation to cap fee award).

67. 505 U.S. 557 (1992).

68. *Id.* at 559.

69. Justice Scalia reasoned, in part, that multipliers "likely duplicate . . . factors already subsumed in the lodestar." *Id.* at 562. In particular, "the difficulty of establishing [the legal and factual] merits . . . 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." *Id.* at 560. Several lower courts have read this language as implicitly authorizing awards of premium hourly rates to successful § 1983 plaintiffs based on the contingent nature of the fee. *See* Adcock-Ladd v. Sec. of Treasury, 227 F.3d 343 (6th Cir. 2000) (holding that contingent nature of fee can be properly considered, and awarding $300 per hour as proper Washington, D.C., rate); Marisol A. v. Giuliani, 111 F. Supp. 2d 381 (S.D.N.Y. 2000) (setting fee of $375 per hour for lead counsel with extensive experience, $300 per hour for lawyer with ten to fifteen years experience, and $230–250 per hour for lawyers with seven to

Although judicially imposed multipliers are not authorized under § 1988, contingent fee arrangements remain common in § 1983 litigation. These arrangements, for the most part, are governed by contract law and local codes of professional responsibility rather than § 1988. Still, federal fee-shifting questions have emerged from privately negotiated contingent contracts. *Blanchard v. Bergerson*[70] involved the question "whether an attorney's fee allowed under 42 U.S.C. § 1988 is limited to the amount provided in a contingent-fee arrangement entered into by a plaintiff and his counsel." The plaintiff (Blanchard) recovered compensatory and punitive damages totaling $10,000 on his § 1983 claim. The district court awarded $7,500 in attorney's fees and $886.92 for costs and expenses under § 1988. The court of appeals reduced this fee award to $4,000 because petitioner had entered into a contingent-fee arrangement with his lawyer under which he was to receive 40% of plaintiff's damage award. The Supreme Court reversed. Justice White, speaking for a unanimous Court, held that the contingent agreement did not limit the award of fees available under § 1988. Thus, the plaintiff was entitled to a lodestar award under § 1988 notwithstanding that his contingency agreement provided for less.[71]

Blanchard makes clear that contingency arrangements are not ceilings on fee awards under § 1988. Nor is § 1988 a ceiling on contingency agreements. *Venegas v. Mitchell*[72] addressed "whether § 1988 invalidates contingent-fee contracts that would require a prevailing civil rights plaintiff to pay his attorney more than the statutory award against the defendant."[73] The plaintiff (Venegas) and his lawyer (Mitchell)

nine years of experience). Few lawyers, after all, would be willing to take cases with marginal chances of success at anything less than premium hourly rates. Because Justice Scalia also complained that "[c]ontingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable," *Dague*, 505 U.S. at 566, other lower courts have held that successful § 1983 plaintiffs are entitled to no hourly premium based on the risk of loss. *See, e.g.*, Davis v. City and County of San Francisco, 976 F.2d 1536, 1549 (9th Cir. 1992) (holding that contingent nature of § 1983 claim cannot justify increased attorney's fee under § 1988); Yahoo!, Inc. v. Net Games, Inc., 329 F. Supp. 2d 1179, 1183 (N.D. Cal. 2004) (observing that aim of fee-shifting is to allow plaintiffs to obtain only "reasonably competent counsel," not "counsel of unusual skill and experience," and thus limiting hourly rate in San Francisco area to $190 per hour).

70. 489 U.S. 87, 88 (1989).

71. Along these same lines, the fact that a lawyer has agreed to represent a client for free ("pro bono") does not prevent recovery under § 1988. The Court has made clear on several occasions that plaintiffs who are represented by nonprofit legal services organizations or pro bono attorneys are nonetheless entitled to fee awards under § 1988. *See, e.g., Blanchard*, 489 U.S. at 95 (1989) ("That a nonprofit legal services organization may contractually have agreed not to charge any fee of a civil rights plaintiff does not preclude the award of a reasonable fee to a prevailing party in a § 1983 action, calculated in the usual way.").

72. 495 U.S. 82 (1990).

73. *Id.* at 83–84.

signed a contingent fee contract providing that Mitchell would represent Venegas at trial for a fee of 40% of the gross amount of any recovery. The contract gave Mitchell "the right to apply for and collect any attorney fee award made by a court," prohibited Venegas from waiving Mitchell's right to court-awarded attorney's fees, and allowed Mitchell's intervention to protect his interest in the fee award. The contract also provided that any fee awarded by the court would be applied, dollar for dollar, to offset the contingent fee. Venegas won over $2 million in damages, and the district court awarded him $75,000 in fees under § 1988 based on the work done by Mitchell. Mitchell then sought to collect 40 percent of the judgment ($406,000 once the work of co-counsel was subtracted) from Venegas based on the contingent-fee agreement. The Supreme Court, again per Justice White, unanimously ruled that § 1988 does not displace contingent-fee agreements:

> In sum, § 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract.[74]

In *Venegas*, Mitchell agreed to use any shifted fee under § 1988 to offset his contractual right to 40 percent of Venegas's award. Under the terms of the agreement, he thus could not recover *both* the lodestar and the contingency fee. Lower courts, however, have found that federal fee-shifting statutes (like § 1988) do not by themselves preclude attorneys from recovering both bargained-for and shifted fees.[75] Limitations on "double-dipping" must be found in either the agreement or local ethical rules as opposed to federal law.[76]

In *Blum v. Stenson*,[77] the Supreme Court made clear that the reasonableness of an attorney's hourly rates should be gauged by the rates commonly charged in the local legal community. The fact that an attorney charges his client low rates—or, indeed, no fee at all—is not determinative of the amount to be charged a losing defendant under

74. *Id.* at 90.

75. *See, e.g.*, Gobert v. Williams, 323 F.3d 1099 (5th Cir. 2003) (holding that attorney was entitled to 35% contingent fee—totaling $17,419—as well as a shifted fee of almost $37,000).

76. In addition to attorney's fees, the Supreme Court, in *Missouri v. Jenkins*, 491 U.S. 274 (1989), sustained the practice of awarding reasonable, market rate fees for the work of law clerks and paralegals. Fees for expert witnesses, however, cannot be recovered. *See* W. Va. Univ. Hosps. v. Casey, 499 U.S. 83 (1991). *But see* 42 U.S.C. § 1988(c) (allowing expert fees in § 1981 cases).

77. 465 U.S. 886 (1984).

§ 1988. Following *Blum, Dague, Blanchard*, and *Venegas*, lower courts have tended to focus on prevailing rates charged by retained counsel in similar kinds of cases.[78] Generally speaking, an attorney's experience goes a long way in helping a court set the governing reasonable rate,[79] as does the lawyer's expertise[80] and the case's outcome.[81]

III. Settlements and Settling Fees

One thing is clear following *Buckhannon:* a simple agreement on behalf of the defendant not to enforce a challenged rule during the pendency of the litigation is not sufficient to support an award of attorney's fees. *Buckhannon* was adamant about the plaintiff's winning some sort of judicial relief. So long as the agreement is extra-judicial, the plaintiff cannot claim that it is a prevailing party within the meaning of § 1988. Citing to *Maher v. Gagne*,[82] however, the *Buckhannon* Court also observed that a settlement that is *incorporated* into a court order may form the basis of a fee award.

Maher was a § 1983 action brought to enforce the terms of the Aid to Families with Dependent Children Act (AFDCA), a federally funded public assistance program. While the litigation was pending, a settlement was negotiated and the district court entered a consent decree providing the plaintiff with much of her requested relief. The parties also agreed that the question of attorney's fees would be submitted to the district court.

Following an adversarial hearing, the district court awarded the plaintiff a fee of just over $3,000. The court held that the plaintiff had prevailed because, while not winning "every particular," she had won "substantially all of the relief originally sought in her complaint" in the consent decree.[83] The court also rejected petitioner's argument that an

78. *See, e.g.*, Paschal v. Flagstar Bank, 297 F.3d 431, 436 (6th Cir. 2002) (observing that in a Title VII case the court was to look to similar cases to assess reasonableness of fee).

79. *See, e.g.*, Marisol A. v. Giuliani, 111 F. Supp. 2d 381 (S.D.N.Y. 2000) (setting fee of $375 per hour for lead counsel with extensive experience, $300 per hour for lawyer with more ten to fifteen years experience, and $230–250 per hour for lawyers with between seven and nine years experience).

80. *See, e.g.*, Conn. State Dep't of Soc. Servs. v. Thompson, 289 F. Supp. 2d 198 (D. Conn. 2003) (observing that lawyer's expertise was relevant to reasonableness of fee). *But see Yahoo!, Inc.*, 329 F. Supp. 2d at 1183 (observing that aim of fee-shifting is to allow plaintiffs to obtain only "reasonably competent counsel," not "counsel of unusual skill and experience," thus limiting hourly rate in San Francisco area to $190 per hour).

81. *See, e.g.*, Phelps v. Hamilton, 120 F.3d 1126 (10th Cir. 1997) (stating that case's outcome could be used to adjust fees up or down).

82. 448 U.S. 122 (1980).

83. *Id.* at 127.

award of fees against him was barred by the Eleventh Amendment in the absence of a judicial determination that respondent's constitutional rights had been violated. Relying on the basic policy against deciding constitutional claims unnecessarily, the court held that respondent was entitled to fees under the AFDCA because, in addition to her statutory claim, she had alleged constitutional claims that were sufficiently substantial to support federal jurisdiction.[84]

The Supreme Court affirmed. It found that "[n]othing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated."[85] Instead, it is enough that a "sufficiently substantial" constitutional question supports federal jurisdiction.[86] Coupled with the formal entry of a consent decree, the plaintiff was entitled to an attorney's fee award under § 1988.[87]

84. *See* Hagans v. Lavine, 415 U.S. 528 (1974).

85. *Maher*, 448 U.S. at 129.

86. *Id.* at 127.

87. The Court in *Maher* also addressed whether the Eleventh Amendment precludes attorney's fee awards from states' treasuries. In rejecting the defendant's Eleventh Amendment defense, *Maher* relied on the Supreme Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978), which held that Congress had abrogated the states' Eleventh Amendment immunity when it enacted § 1988. In so holding, *Hutto* relied on the long tradition of awarding costs "without regard for the States' Eleventh Amendment immunity." *Hutto*, 437 U.S. at 695. "[T]he Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants," the *Hutto* majority observed. *Id.* The Court also pointed out that language in the House and Senate reports accompanying § 1988 clearly evinced a congressional intent that attorney's fee awards would be paid by states when state employees were sued in their official capacities for prospective relief. Although *Hutto*'s reliance on legislative history does not survive more recent Supreme Court precedent demanding a "clear statement" in the statute itself in order to abrogate states' Eleventh Amendment immunity, *see* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), the Court reaffirmed *Hutto*'s result in *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989), and ruled that the Eleventh Amendment has no application to "an award of attorney's fees, ancillary to a grant of prospective relief. . . ." The § 1983 claims in *Maher* were premised on both the Constitution and a federal statute. Because a substantial constitutional claim was found to exist, the *Maher* Court did not have to address the question whether a state could be ordered to pay attorney's fees under § 1988(b) for a purely *statutory* violation. In the seminal case of *Maine v. Thibotout*, 448 U.S. 1 (1980), which was issued on the same day as *Maher*, the Court ruled that federal statutory violations, such as claims under the Social Security Act, could form the basis for claims under § 1983. Although *Thiboutot* has been limited by more recent holdings, *see, e.g.*, City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005) (holding that Communications Act of 1934, as amended by the Telecommunications Act of 1996, cannot be enforced through § 1983), federal statutory rights can (under certain circumstances) still support claims under § 1983. *See generally* M. DAVID GELFAND, SUING AND DEFENDING CITIES FOR FEDERAL CONSTITUTIONAL VIOLATIONS (Lexis 2003). Assuming a *Thiboutot*-type claim is properly brought for prospective relief against a state official acting in her official capacity, the state can be forced to pay attorney's fees under § 1988. As emphasized in *Missouri v. Jenkins*, the Court's holding in *Hutto*, that costs and attorney's fees constitute prospective relief and have never been protected by the Eleventh Amendment, remains sound.

Maher makes clear that *consent decrees* will support fee awards under § 1988 regardless of whether they contain an admission or finding of liability. So long as there is a significant federal question—that is, so long as the federal claim is not "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit, as not to involve a federal controversy"[88]—fees can be awarded to the plaintiff.

Before *Buckhannon*, lower courts used the catalyst theory to award attorney's fees for settlements, even when they were not incorporated into judgments. Following *Buckhannon*, of course, this is not permissible. The question thus becomes whether a settlement or agreement is sufficiently incorporated into a judgment to support an award of attorney's fees. In *Smyth v. Rivero*,[89] the Fourth Circuit ruled that a mere passing reference to the parties' settlement agreement in an order dismissing a case cannot support an award of fees under *Buckhannon*:

> A consent decree has elements of both judgment and contract, a dual character that "result[s] in different treatment for different purposes." . . . [I]t is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.[90]

Because consent decrees constitute court orders, "a court entering a consent decree must examine its terms to ensure they are fair and not unlawful."[91] In contrast, "a private settlement, although it may resolve a dispute before a court, ordinarily does not receive the approval of the court. . . . Nor is a private settlement agreement enforceable by a district court as an order of the court . . . ."[92] Because the court's order did not incorporate the terms of the agreement and did not retain jurisdiction, but merely recognized the settlement, the order was not the equivalent of a consent decree.[93] Thus, under *Buckhannon*, it could not support an award of attorney's fees.

Rather than risk the vagaries and pitfalls of *Buckhannon*, parties might simply agree on an award of attorney's fees to be paid in lieu of

88. *See Hagans*, 415 U.S. at 543 (1974); s*ee also* Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431 (2004) (holding that consent decree against state officials is enforceable so long as grounded in part in federal law).
89. 282 F.3d 268, 279 (4th Cir. 2002).
90. *Id.* at 280.
91. *Id.*
92. *Id.* at 280–81.
93. *Contra* Roberson v. Giuliani, 346 F.3d 75 (2d Cir. 2003) (holding that the retention of enforcement jurisdiction over settlement agreement amounts to judicial relief and creates "prevailing party" status); Truesdell v. Phila. Hous. Auth., 290 F.3d 159 (3d Cir. 2002) (holding that an order approving a settlement is a judicial decree and creates a "prevailing party").

an award under § 1988. During settlement negotiations, the parties can also simultaneously bargain over the amount of attorney's fees to be paid to the plaintiff in lieu of an award under § 1988. When the case has been certified as a class action, of course, any settlement must be approved by the court under Rule 23(e) of the *Federal Rules of Civil Procedure.* But in the absence of class certification, cases can be settled without judicial management or involvement. Only when the parties agree to consent decrees, or otherwise agree that the settlements should be incorporated into judgments, will the court be called on to review the terms of the settlement.

The Supreme Court in *Evans v. Jeff D.*[94] ruled that as part of settlement negotiations, a defendant can bargain for a plaintiff's waiver of fees under § 1988.[95] For example, a defendant might agree to pay the plaintiff a small amount in exchange for an agreement to waive fees under § 1988, or a defendant might agree to change its challenged practice in exchange for a fee waiver. Although plaintiffs' lawyers cannot prevent defense offers like these, and are ethically bound to communicate these offers to their clients, *ex ante* protective devices can help plaintiffs' lawyers minimize the risk of their acceptance. First, when allowed by local ethical rules, the lawyer can include in her retainer an agreement preventing the waiver of fees under § 1988.[96] Second, in actions seeking monetary relief, clients can be made responsible for contingencies. Third, when an expected judgment is small or nonexistent, clients can be made contractually responsible for paying lodestar fees. Fourth, lawyers can "exercis[e] caution in client selection and . . . educat[e] clients about the importance of fees in a civil rights prac-

94. 475 U.S. 717 (1986).

95. "At the time *Evans* was decided, a number of bar ethics opinions prohibited defense attorneys from conditioning settlement offers on plaintiff's waiver of attorneys' fees. After *Evans*, the New York City and Maine Bar Association's opinions [prohibiting the practice] were withdrawn. However, some other bar associations [most notably Los Angeles] took a contrary position to the practice approved in *Evans.* In 1989 the D[istrict of] C[olumbia] Bar modified its previous 1985 opinion prohibiting conditional settlement offers, stating that conditioned settlement offers are not per se unethical, but could be unethical when (1) a lump-sum settlement including attorneys' fees is achievable or (2) the defendant has no legitimate defense on the merits and is merely using the threat of further litigation to force the plaintiff to waive her statutory right to attorneys' fees.

Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1879 n.93 (1998).

96. *See* Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2523 n.195 (1999) (citing a California bar opinion endorsing this approach).

tice to prepare clients in the event of a settlement offer contingent on a waiver."[97]

Defendants also have tactics that can influence the fee-bargaining process. In particular, the Supreme Court in *Marek v. Chesny*[98] concluded that Fed. R. Civ. P. 68 can be used to abort a successful civil rights plaintiff's recovery of fees under § 1988. In *Marek*, police shot and killed the plaintiffs' adult son after responding to a domestic dispute. Prior to trial, the defendants made a timely offer of settlement under Rule 68[99] "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS."[100] The offer was rejected and thereafter the plaintiffs won a $60,000 judgment.

Because they had prevailed within the meaning of § 1988, plaintiffs requested almost $172,000 in costs and attorney's fees. This amount included approximately $140,000 in costs and fees incurred after the rejected settlement offer. Because the plaintiffs' total recovery (including costs up to the time of the offer) of $92,000 did not exceed the defendants' offer of $100,000, the defendants complained that under Rule 68 they could not be held accountable for post-offer costs and fees. The Supreme Court agreed and thus limited the plaintiffs' fee award to the $32,000 incurred before the settlement offer.[101]

97. Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 215 (1997). Professor Davies concludes that these tactics have proved largely successful; a majority of plaintiffs' lawyers report "that requests for fee waivers were not much of a problem in their practice." *Id.* at 215. Although public interest law firms are eligible to receive fee awards under § 1988, *see, e.g.*, Blanchard v. Bergeron, 489 U.S. 87 (1989), they are placed at a bargaining disadvantage by tax laws. In order to maintain their tax-exempt status, public interest law firms are generally prevented from directly charging fees to their clients. This "makes non-profit law firms less able to protect themselves from waivers than private attorneys." Davies, *supra*, at 217 n.94. Legal services corporations, meanwhile, are not only prohibited from directly charging clients, but are now precluded from using federal and state fee-shifting statutes. *See* 45 C.F.R. § 1642.3 (1999); Davies, *supra*, at 214 n.94.

98. 473 U.S. 1 (1985).

99. Rule 68 of the *Federal Rules of Civil Procedure* provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." FED. R. CIV. P. 68. Professor Davies has found that *Marek*'s endorsement of Rule 68 in civil rights cases has not had a tremendous effect on settlement offers. "Despite Rule 68's potential to reduce attorneys' fees and induce settlements, in reality, it does not appear to be a major factor in the practices of the civil rights lawyers I interviewed, whether they represent plaintiffs or defendants." Davies, *supra* note 97, at 222–24.

100. *Marek*, 473 U.S. at 3–4.

101. Read literally, Rule 68 would also make the plaintiffs liable for the defendants' post-offer costs and attorney's fees. The Supreme Court did not address this issue in *Marek.* Most lower courts have refused to force civil rights plaintiffs to pay defendants' post-offer attorney's fees under Rule 68. In *Crossman v. Marcoccio*, 806 F.2d 329 (1st

IV. Client's Tax Consequences Under the Internal Revenue Code

When a prevailing plaintiff's attorney is paid a fee—whether from the plaintiff or the defendant—it is clear that the attorney has realized income for purposes of the federal Internal Revenue Code.[102] A more difficult question is whether the payment of the fee from the losing defendant to the plaintiff's lawyer constitutes taxable income to the successful plaintiff. Because of a corresponding deduction for amounts expended in the collection of income,[103] this question is likely unimportant when fee awards are small. However, when fee awards are large, an alternative minimum tax (AMT) imposed by the Internal Revenue Code may operate to reduce the value of the deduction.[104] Consequently, an award of attorney's fees could have sizeable tax consequences for a prevailing plaintiff. So long as the plaintiff's monetary judgment exceeds the attorney's fee award, of course, she will still be better off. But when the plaintiff recovers only a fraction of her fee award or, worse yet, wins only declaratory relief, it may be that the tax consequences exceed the recovery.

The question whether the payment of part of a judgment (i.e., a contingent fee) to one's lawyer constitutes taxable income to the client has generated conflicting opinions in the lower courts. Part of this conflict was caused by the Internal Revenue Code's reliance on state property laws for principles of ownership. Most lower courts simply looked

Cir. 1986), for example, the court concluded that a § 1983 plaintiff who had refused a Rule 68 offer of judgment, and then failed to obtain a more favorable judgment at trial, was not obligated to pay the losing defendant's post-offer attorney's fees. *See also* Payne v. Milwaukee County, 288 F.3d 1021 (7th Cir. 2002) (same); O'Brien v. City of Greers Ferry, 873 F.2d 1115 (8th Cir. 1989) (same). *But cf.* Jordan v. Time, Inc., 111 F.3d 102 (11th Cir. 1997) (holding that under the federal Copyright Act, which has a fee-shifting provision similar to that in § 1988, the prevailing plaintiff who rejected Rule 68 offer of judgment, only to recover less at trial, can be required to pay losing defendant's post-offer attorney's fees).

102. *See* 26 U.S.C. § 61 (2000) (income "from whatever source derived" is included in gross income).

103. The miscellaneous itemized deductions for any taxable year are allowed only to the extent that they exceed 2% of adjusted gross income. 26 U.S.C. § 67(a) (2000). Thus, even when the fee award is small, a plaintiff may effectively experience a tax increase.

104. 26 U.S.C. §§ 55(b)(2), 56(b)(1)(A)(i) (2000); *see* Barlow Davis v. Commissioner, 210 F.3d 1346, 1347 n.3 (11th Cir. 2000) (noting that "[t]he deduction for attorneys' fees and costs which the IRS allowed was less favorable to the taxpayer than the exclusion-from-income approach . . . because of the operation of technical tax rules such as the alternative minimum tax"). Note that § 104(a) of the Internal Revenue Code excludes from gross income damages for physical injury. To the extent an attorney's fee is drawn from (or related to) an award for physical injury, it too may be excluded from the client's gross income under § 104(a). *See* Banks v. Commissioner, 345 F.3d 373 (6th Cir. 2003), *rev'd on other grounds*, 125 S. Ct. 826 (2005).

to state laws to determine the ownership of contingent fees. Where the fee, according to state law, was owned by the client—and merely assigned to the lawyer—it was commonly deemed taxable income to the client as well as the lawyer. Where state law provided that it was owned by the lawyer, on the other hand, the client had no claim to it and could not be taxed under the Internal Revenue Code.

Unfortunately, ownership principles in the context of intangible property—like causes of action and rights to fees—are not always easy to understand and apply. Several lower courts concluded that a contingent fee is part of the plaintiff's underlying cause of action, the whole of which necessarily belongs to the client. Under this theory, the entire recovery, including that part used to pay the attorney's fee, is thus charged as income to the client.[105] Other lower courts took a contrary view, treating the right to a fee as a separate piece of property. The question, according to these courts, was one of ownership: who owned this separate, contingent right?

Cotnam v. Commissioner[106] was the leading proponent of the separate property theory. There, Alabama law assigned to lawyers an equal property right to their contingent fees and afforded them a "lien superior to all liens but tax liens."[107] Relying on this provision, the old Fifth Circuit (which included Florida, Georgia, and Alabama prior to 1981[108]) concluded that a contingent fee arising from a state-law claim belonged to the successful lawyer as opposed to the client. That portion of the judgment paid to the lawyer, in satisfaction of the contingent fee contract, thus was not income to the client.

In *Estate of Clarks*,[109] the Sixth Circuit followed *Cotnam* and concluded that Michigan law "operates in more or less the same way as the Alabama lien in *Cotnam.*" The Eleventh Circuit likewise followed

105. For example, the Ninth Circuit, in *Sinyard v. Commissioner*, 268 F.3d 756, 758 (9th Cir. 2001), held that an Age Discrimination in Employment Act (ADEA) victim's lump sum settlement, part of which was earmarked for attorney's fees in satisfaction of the ADEA's fee-shifting provision, was income to the client: "If A [the plaintiff] owes B [the lawyer] a debt, and C [the defendant] pays the debt on A's behalf, it is elementary that C's payment is income to A as well as to B." The fact that the attorney had a property interest—a lien under Alabama law—in the fee was irrelevant: "we do not see how the existence of a lien in favor of the taxpayer's creditor makes the satisfaction of the debt any less income to the taxpayer whose obligation is satisfied." *Id.* at 760.

106. 263 F.2d 119 (5th Cir. 1959).

107. *Id.* at 125 n.5.

108. *See* Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (adopting as binding precedent in the newly created Eleventh Circuit, which included Florida, Georgia, and Alabama, all Fifth Circuit decisions rendered before October 1981).

109. 202 F.3d 854, 855 (6th Cir. 2000).

Cotnam in *Davis v. Commissioner*,[110] at least to the extent the Alabama lien statute was at stake. The Third,[111] Fourth,[112] Seventh,[113] Ninth,[114] Tenth,[115] and Federal Circuits[116] applied similar analyses, but all concluded that the various state lien laws at issue did not insulate the client from realizing additional income. In *Hukkanen-Campbell v. Commissioner*, for example, the Tenth Circuit noted that:

> [T]he Missouri [lawyer's] lien statute, unlike the Alabama and Michigan statutes [at issue in *Cotnam* and *Clarks*], does not create a proprietary interest in the recovery on the attorney's behalf. Instead, the Missouri statute simply operates as a manner of ensuring payment to the attorney. . . . [The attorney] "is no different . . . from any other trade creditor stiffed by his debtor."[117]

The client was thus required to report as income that portion of a Title VII judgment paid to her attorney in satisfaction of a contingent fee agreement.[118]

Fees awarded under a federal fee-shifting statute like § 1988, of course, differ from contractual contingent fees in at least two respects. First, shifted fees represent a separate, additional payment by the defendant to reimburse the plaintiff for the costs of bringing the suit. Second, federal law makes clear that although the right to attorney's fees can be assigned, it still belongs in the first instance to the client. Notwithstanding these differences, lower federal courts rarely distinguished the tax implications of federal fee-shifting under statutes like § 1988 from those arising from state-law contingency arrangements.[119]

110. *See* Davis v. Comm'r, 210 F.3d 1346 (11th Cir. 2000) (holding that contingent fee governed by Alabama law is not taxable income for client).

111. *See* O'Brien v. Commissioner, 38 T.C. 707, 1962 WL 1147 (1962), *aff'd*, 319 F.2d 532 (3d Cir. 1963) (assuming applicability of Pennsylvania law).

112. S*ee* Young v. Commissioner, 240 F.3d 369 (4th Cir. 2001) (interpreting North Carolina lien statute).

113. *See* Kenseth v. Commissioner, 259 F.3d 881 (7th Cir. 2001) (interpreting Wisconsin lien statute).

114. *See* Benci-Woodward v. Commissioner, 219 F.3d 941 (9th Cir. 2000) (interpreting California lien statute), *cert. denied*, 531 U.S. 1112 (2001); Coady v. Commissioner, 213 F.3d 1187 (9th Cir. 2000) (interpreting Alaska lien statute), *cert. denied*, 532 U.S. 972 (2001).

115. Hukkanen-Campbell v. Commissioner, 274 F.3d 1312 (10th Cir. 2001) (interpreting Missouri lien statute), *cert. denied*, 535 U.S. 1056 (2002).

116. *See* Baylin v. United States, 43 F.3d 1451 (Fed. Cir. 1995) (interpreting Maryland lien statute).

117. 274 F.3d 1312, 1314 (10th Cir. 2001) (quoting Kensenth v. Commissioner, 259 F.3d 881, 884 (7th Cir. 2001)).

118. *See id.* at 1315; *see also* Srivastava v. Commissioner, 220 F.3d 353, 357 (5th Cir. 2000) (observing that were it "ruling on a *tabula rasa*, [the Fifth Circuit] might be inclined to include contingent fees in gross income"); Raymond v. United States, 355 F.3d 107 (2d Cir. 2004) (concluding that contingent arrangement under Vermont law resulted in taxable income to client).

119. Neither *Sinyard*, which held that a shifted fee under the ADEA was taxable to the client, nor *Hukkanen-Campbell*, which reached the same result under Title VII and Missouri law, distinguished fee shifting from contingent fees. The court in *Sinyard*

The tax ramifications that followed awards of attorney's fees under § 1988, like those attached to contingent fees, thus tended to vary from state to state.

The Supreme Court, during the spring of 2004, granted a writ of certiorari in order to resolve this messy state of affairs.[120] In two consolidated cases, the Court decided "[w]hether the portion of a money judgment or settlement paid to a plaintiff's attorney under a contingent-fee agreement is income to the plaintiff under the Internal Revenue Code[.]"[121] In the first of these two cases, *Banks v. Commissioner*,[122] the tax assessment arose out of the taxpayer's (Banks) suit under Title VII, § 1981, and § 1983 against his former employer, the California Department of Education. A settlement was reached, with the former employer agreeing to pay Banks $464,000. Banks thereafter paid $150,000 to his attorney pursuant to a contingency arrangement. Both the IRS and Tax Court concluded that Banks's payment to his lawyer could not be excluded from his income. The Sixth Circuit reversed. Not only did it reject the Commissioner's "position that contingency fees must be included [in income] based on the anticipatory assignment of income doctrine,"[123] but it also ruled that California law (like Alabama's and Michigan's lien statutes) gave Banks's lawyer a superior ownership interest in the contingency fee. Thus, Banks's payment to his lawyer was excluded from his income.

In the second case, *Banaitis v. Commissioner*,[124] the taxpayer (Banaitis) sued his former employer under Oregon law for wrongful discharge and recovered almost $9 million. Banaitis paid almost $4 million of this judgment to his lawyer pursuant to a contingency agreement. The Tax Court ruled that although the $4 million payment was fully deductible (as a reasonable expenditure in pursuit of income), it was also gross income. Because of the Internal Revenue Code's alternative minimum tax,[125] Banaitis thus owed an additional $300,000 in taxes.

observed that the answer rested with Congress: "The remedy for such unfairness when it does occur lies with Congress specifically exempting ADEA damages as it has exempted personal injury damages; or the whole issue could be avoided by Congress redesigning the computation of the [alternative minimum tax] to permit the full deduction of attorneys' fees." *Sinyard*, 268 F.3d at 760.

120. *See* Banks v. Commissioner, 345 F.3d 373 (6th Cir. 2003), *cert. granted*, 541 U.S. 958 (2004); Banaitis v. Comm'r, 340 F.3d 1074 (9th Cir. 2003), *cert. granted*, 541 U.S. 958 (2004). The two cases were argued jointly before the Supreme Court on November 1, 2004.

121. Commissioner v. Banks, 125 S. Ct. 826 (2005).

122. 345 F.3d 373 (6th Cir. 2003), *cert. granted*, 541 U.S. 958 (2004).

123. *Id.* at 382.

124. 340 F.3d 1074 (9th Cir. 2003), *cert. granted*, 541 U.S. 958 (2004).

125. *See supra* notes 103–04 and accompanying text.

The Ninth Circuit disagreed: "Oregon law mirrors Alabama law in that it affords attorneys generous property interests in judgments and settlements."[126] Consequently, because of the lawyer's superior lien under Oregon law, the fee did not belong to Banaitis and was therefore not included in his income.

After the Supreme Court granted review in *Banks* and *Banaitis*, the President signed into law the American Jobs Creation Act of 2004.[127] Section 703 of this Act, entitled "Civil Rights Tax Relief," amends the Internal Revenue Code to allow taxpayers to subtract from gross income "attorneys fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination . . . ."[128] "Unlawful discrimination" is defined as including any "act that is unlawful under"[129] a long list of state and federal laws, including 42 U.S.C. §§ 1981, 1983, and 1985.[130] Consequently, attorney's fees awards under § 1988 that are premised on § 1983 claims should no longer cause federal income tax problems for clients nor, apparently, should fees paid to successful § 1983 lawyers as part of contingent fee arrangements.

Because the fees in *Banks* and *Banaitis* were paid before the adoption of this federal legislation, the clients in those two cases were not covered by the amendment's terms. The Civil Rights Tax Relief provision clearly states that it applies only to "fees and costs paid after" October 22, 2004.[131] Notwithstanding this limitation, the taxpayers in *Banks* and *Banaitis* argued that the Supreme Court should have dismissed the writs of certiorari. The Supreme Court disagreed. "Had the Act been in force for the transactions now under review," the Court observed, "these cases likely would not have arisen."[132] Still, since the Act "is not retroactive . . . it does not pertain here."[133]

Addressing the merits, the Court unanimously rejected the clients' claims that because their fees were speculative when assigned and part of joint attorney-client ventures, they should not be taxed.[134] Instead, the Court observed that the attorney-client relationship "is a quintessential principal-agent relationship."[135] "The attorney is an agent who

126. 340 F.3d at 1082.
127. Pub. L. No. 108–357, 118 Stat. 1418 (2004).
128. American Jobs Creation Act of 2004, § 703, 118 Stat. 1546 (codified at 26 U.S.C. § 62(a)(19) (Supp. I 2000)).
129. *Id.* § 703, 118 Stat. 1547 (codified at 26 U.S.C. § 62(e) (Supp. I 2000)).
130. *Id.*
131. *See id.* § 703(c), 118 Stat. 1548 (providing effective date of the Act).
132. Commissioner v. Banks, 125 S. Ct. at 831.
133. *Id.*
134. *Id.* at 832.
135. *Id.*

is duty bound to act only in the interests of the principal, and so it is appropriate to treat the full amount of the recovery as income to the principal."[136] Importantly, the Court emphasized that this remains true "whether or not the attorney-client contract or state law confers any special rights or protections on the attorney, so long as these protections do not alter the fundamental principal-agent character of the relationship."[137]

The taxpayer in *Banks*, who had sued his public-sector employer under federal anti-discrimination laws (Title VII and § 1983), as well as state law, also argued that taxing him for the portion paid to his lawyer "would be inconsistent with the purpose of statutory fee-shifting provisions."[138] "Sometimes, as when the plaintiff seeks only injunctive relief, or when the statute caps plaintiffs' recoveries, or when for other reasons damages are substantially less than attorney's fees, court-awarded attorney's fees can exceed a plaintiff's monetary recovery . . . [and] can lead to the perverse result that the plaintiff loses money by winning the suit."[139] Because the newly enacted American Jobs Creation Act solves this concern in regard to "many, perhaps most, claims governed by fee-shifting statutes,"[140] and because Banks settled the case without "any indication in [his] contract with his attorney, or in the settlement agreement with the defendant, that the contingent fee paid to [his] attorney was in lieu of statutory fees,"[141] the Court did not address this argument.

Because of the adoption of the American Jobs Creation Act, the Supreme Court's decision in *Banks* is likely of little import to lawyers in future § 1983 cases. Still, tax problems can arise in § 1983 litigation when non-exempt state-law damage claims—including those for defamation, intentional infliction of emotional distress, breach of unfair competition, and personal injuries giving rise to punitive damages[142]—are joined with exempt federal claims. Contingent fee awards in these contexts can still have tax ramifications for clients. The key, it would seem, is separating attorney's fees collected for these non-exempt state-

136. *Id.* at 833.
137. Commissioner v. Banks, 125 S. Ct. at 833. The Court noted that it was not aware of any state laws "that purport to give attorneys an 'ownership' interest in their fees, [or] convert the attorney from an agent to a partner." *Id.*
138. *Id.* at 828.
139. *Id.* at 834.
140. *Id.* at 828.
141. *Id.*
142. *See* Brief for Petitioner at 4, Commissioner v. Banks, 125 S. Ct. 826 (2004) (Nos. 03–892, 03–907) (arguing that the Supreme Court should resolve the cases notwithstanding the federal statutory changes because of this possibility).

law claims from fees earned for the exempt § 1983 claims. As suggested by the Court in *Banks*, judgments and settlements that do not adequately distinguish their federal legal bases could still give rise to tax difficulties for clients. Given the disparate tax treatment afforded § 1983 claims and many of their state-law counterparts, it would appear wise for plaintiffs' lawyers to structure their contingency agreements, arguments, and settlements so as to best preserve their clients' newly created tax shelters.

V. Conclusion

The Supreme Court's decision in *Buckhannon* was certainly a setback for the plaintiffs' bar in civil rights cases. However, *Buckhannon*'s bark may be worse than its bite. If one takes the majority at its word—that mootness is relatively rare when governmental defendants voluntarily abort challenged conduct—it would seem that these defendants will still have a "strong incentive" to settle their potential attorney's fees liability.[143] Assuming that the plaintiff's lawyer has negotiated some sort of protection from her client's outright waiver of fees, the bargaining process that ensues ought to result in a fee that closely approaches reasonableness.

Should lower courts prove too eager to dismiss on grounds of mootness, of course, the assumed bargaining positions will be dramatically altered. Knowing that they can likely moot cases at will, governmental defendants will have a decided advantage during settlement negotiations. How the mootness doctrine has been applied by lower federal courts post-*Buckhannon*,[144] and how it has impacted settlement negotiations, are two questions that warrant closer study.

Although much of the tax problem faced by successful civil rights plaintiffs has been solved by recent legislation, questions remain. For instance, what about a large punitive award that is grounded both in § 1983 and in state personal injury law? Is the client's payment of a contingent fee to her lawyer based on this award taxable to her as income? What about a settlement in this same situation? Can the parties structure their settlement to invoke the new tax shelter? Because ques-

143. *See Buckhannon*, 532 U.S. at 609. "Given this possibility [of a case not being mooted], a defendant has a strong incentive to enter into a settlement agreement, where it can negotiate attorney's fees and costs." *Id.*

144. *See, e.g.*, New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002) (finding that a voluntary legislative change mooted case and thus prevented the plaintiff from winning a fee under § 1988).

tions like these will certainly arise in the future, it is too early to claim that the American Jobs Creation Act has fully resolved the matter.

All quarters agree that the Civil Rights Attorney's Fees Act of 1976 was a watershed development in the realm of individual rights. Without the financial support provided by this Act, much of the litigation that proceeds under § 1983 would evaporate. The end result, some believe,[145] would be less governmental accountability and more bureaucratic abuse. Because the fees that are shifted from successful plaintiffs to losing governments are commonly passed through to innocent taxpayers, and because § 1988 was not designed to make lawyers rich, a remaining problem focuses on the amount of compensation due successful plaintiffs and their lawyers.

145. I include myself in this camp. *See, e.g.*, Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1523 (1999) (describing the deterrence that flows from § 1983 litigation as an overall "societal good").