BATTLING FOR ATTORNEYS' FEES: THE SUBTLE INFLUENCE OF "CONSERVATISM" IN 42 U.S.C. § 1988

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I. INTRODUCTION

Since 1976, district courts have had the authority to award attorneys' fees to prevailing parties in civil rights litigation under 42 U.S.C. § 1988.[1]

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[1] *See* 42 U.S.C. § 1988 (2006) (allowing recovery of attorney fees for cases arising under 42 U.S.C. §§ 1981–83, 1985, 1986, 2000 (title VI of the Civil Rights Act of 1964), the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, and section 40302 of the Violence Against Women Act of 1994); Hensley v. Eckerhart, 461

Although the basic framework of § 1988 is well-settled, discussion of its application remains relevant today because § 1988 is a frequent topic of debate and litigation.[2] For instance, the House in the 109th Congress recently amended § 1988 to limit the potential class of plaintiffs who could recover attorneys' fees under § 1988.[3] The bill demonstrates the unending conflict between the goals of a pro-establishment, anti-enforcement ideology and those of predominantly pro-plaintiff statutes such as § 1988.[4]

This conflict becomes particularly pointed in the courtroom, where a lower court's facially reasonable interpretation and application of the law produces net results that are in apparent conflict with the purpose of the statute as a whole.[5] These countervailing results should only be justified if the lower court's analysis is tailored to support the purpose of the statute.[6] While § 1988 grants the lower court broad discretion to determine a proper fee amount,[7] the lower courts' flexibility introduces the possibility for a countervailing, anti-establishment ideology to unduly influence the determination of a fee request under § 1988.[8] To avoid these influences, the law should provide the lower courts with procedures to ensure the statute's intended purpose is upheld when lower courts apply the statute to a particular fact situation.[9] Not only does the law fail to provide these procedures, arguably, the law provides for the opposite: a procedure that encourages lower courts to arrive at net results contrary to the intent of §

U.S. 424, 433 n.7 (1983) (stating Congress intended for the standards of awarding fees in § 1988 to be the same as Title II and VII of the Civil Rights Act of 1964).

[2] *See generally, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006); Carson v. Billings Police Dep't, 470 F.3d 889 (9th Cir. 2006); Skokos v. Rhoades, 440 F.3d 957 (8th Cir. 2006).

[3] *See* H.R. 2679, 109th Cong, § 2, (2006), *available at* http://thomas.loc.gov (limiting the potential class of plaintiffs suing certain named groups in the amendment).

[4] *Compare id. with infra* Part II.B.

[5] *See infra* Part III.D.

[6] *See* United States v. Kimble Foods, Inc., 440 U.S. 715, 738 (1979) ("[I]n fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy.").

[7] *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) ("The amount of the fee, of course, must be determined by the facts of each case.").

[8] *See infra* Part III.A.

[9] *See, e.g., infra* Part III.B. Without such procedures, the lower courts are will be left to their own volition in applying the purpose of the statute. *See infra* Part III.A (analyzing a situation where despite the lower court considering the purpose of the statute, the lower court fashioned a procedure to arrive at an anti-enforcement result).

1988.[10] Hence, simply through applying the law, lower courts may be inadvertently undermining the purpose of § 1988.[11] This attacks not only the soundness of § 1988 but all other civil rights laws which derive their life from a proper functioning of § 1988.[12]

This Comment's purpose is to discuss and propose a solution to the threat anti-enforcement ideology poses to inadvertently undermine the purpose of § 1988. Since no two fee determinations are alike, this Comment will demonstrate how the procedure for determining a fee amount allows—even encourages—countervailing policies to undermine the pro-plaintiff purpose of the law.[13] The solution proposed will aim at addressing these procedural concerns. Part II will address the background and purpose of 42 U.S.C § 1988. Part III will address how § 1988's purpose is potentially undermined by an anti-enforcement ideology. Part IV will propose a solution to balance these anti-enforcement influences.

II. THE BACKGROUND OF 42 U.S.C. § 1988

A. The History and Analysis of § 1988

Congress created § 1988 as a direct response to the Supreme Court's affirmation of the "American Rule" in *Alyeska Pipeline Service Co. v. Wilderness Society*.[14] In *Alyeska*, the Court held "each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary."[15] Congress responded by passing The Civil

[10] *See infra* Part III.C.

[11] *See infra* Part III.D.

[12] *See* S. REP. NO. 94-1011, at 1, 4–6 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5911–13 (noting the virtual necessity of § 1988 and court awarded attorney fees to uphold Congress' civil rights laws).

[13] This approach to analyzing the issue presented is preferred to taking on the much more difficult task of demonstrating how the law is systematically undermined by an anti-enforcement ideology. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 160 (Winter 1999) (indicating the outsider is reduced to "speculation" as to the possible causes behind legal devices used to achieve anti-enforcement ends, since "it is impossible to know why" such devices are used).

[14] 421 U.S. 240, 246, 269–70 (1975); *see* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983); S. REP. NO. 94-1011, at 1 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5909 ("The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the [Supreme Court's decision in] . . . *Alyeska Pipeline* . . . .").

[15] 421 U.S. at 247 ("We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that it would be inappropriate

Rights Attorney's Fees Act of 1976, giving the "specific authorization required by the Court in *Alyeska*."[16] Under this statute, district courts were authorized to award prevailing parties' attorneys' fees, creating the necessary statutory exception to the American Rule the Court required in *Alyeska*.[17]

The statutory scheme of The Civil Rights Act did not mandate an award for attorneys' fees, but allowed the lower court to award reasonable attorneys' fees in their discretion.[18] Today, this is codified at 42 U.S.C. § 1988 and requires a party to meet two steps to recover. A party must first cross the "statutory threshold."[19] The statutory threshold itself is a two-step analysis.[20] First, the lower court must determine if the fee-petitioning party (usually the plaintiff) is a prevailing party under § 1988.[21] A prevailing party is one that has "succeed[ed] on any significant issue in litigation,"[22] which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[23] If the plaintiff is determined *not* to be a prevailing party, the lower court may determine whether the defendant is to be awarded attorneys' fees.[24] If the plaintiff is a prevailing party, the lower courts will consider the "special circumstances exception," whether to deny awarding the prevailing party attorneys' fees because of special circumstances that

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for the Judiciary, without legislative guidance, to reallocate the burdens of litigation . . . ."); s*ee also Hensley*, 461 U.S. at 429.

[16] S. REP. NO. 94-1011, at 4, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912.

[17] *See* 42 U.S.C. § 1988 (2006).

[18] The Civil Rights Attorney's Fees Award Act of 1976, S. 2278, 94th Cong. (1976) (enacted) ("the court, in its discretion, may allow . . . a reasonable attorney's fee.").

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

[20] *Id.*

[21] *See* 42 U.S.C. § 1988 (2006).

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

[23] Farrar v. Hobby, 506 U.S. 103, 111–12 (1992); Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989) ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties . . . . Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability . . . .").

[24] *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 422 (1978); Khan v. Gallitano 180 F.3d 829, 837 (7th Cir. 1999) ("Although the language of the statute seems not to distinguish between prevailing parties, prevailing plaintiffs receive attorney's fees as a matter of course, but prevailing defendants only receive attorney's fees if the plaintiff's claim was 'frivolous, unreasonable, or groundless.'") (quoting *Christiansburg*, 434 U.S. at 422).

render the award unjust.[25] If no special circumstances exist, the district court proceeds to step two and determines a reasonable fee amount.[26] The district court determines a reasonable fee amount by applying the lodestar, "the number of hours reasonably expended . . . multiplied by a reasonable hourly rate."[27] The prevailing party will bear the burden to present sufficient documentation of the hours reasonably expended and hourly rates.[28] Upon determining the lodestar, the lower courts may consider other factors that may require an adjustment to the lodestar.[29] Such considerations may include the level of success and "the significance of the overall relief obtained" by the plaintiff.[30] To give the lower court flexibility in determining "what essentially are factual matters,"[31] the law gives the lower court broad discretion, subject to review only for abuse.[32]

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[25] *Hensley*, 461 U.S. at 429, 433 (quoting S. REP. NO. 94-1011, at 1, 4 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912).

[26] *Id.* at 433.

[27] *Id.* The term "lodestar" was applied to this analysis later. *See* Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986). The lodestar is an adaptation of the twelve factors announced in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and suggested in both the House and Senate reports of § 1988 as constituting a reasonable fee request. *Hensley*, 461 U.S. at 430 n.3 (reciting the twelve factors as (1) time and labor required, (2) the novelty and difficulty of the questions, (3) the skill required to perform the legal service, (4) opportunity costs for taking the case, (5) the attorney's customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, (12) awards in similar cases) (citing *Johnson*, 488 F.2d at 717–19).

[28] *Hensley*, 461 U.S. at 437.

[29] *Id.* at 434 ("The product of [the lodestar] does not end the inquiry . . . . [T]he district court [may] adjust the fee upward or downward . . . .").

[30] *Id.* at 435.

[31] *See id.* at 437; Posada v. Lamb County, 716 F.2d 1066, 1072 (5th Cir. 1983) ("At bottom, the inquiry is an intensely factual, pragmatic one.")

[32] City of Riverside v. Rivera, 477 U.S. 561, 572–73, 586, 588 (1986) (Brennan, J., plurality, Powell, J., concurrence) (reviewing the order of an award of reasonable fees for an abuse of discretion and findings of fact for clear error). Additionally, the lower court is not bound to award amounts determined by the lodestar. *See Hensley*, 461 U.S. at 435 n.11 (saying a reasonable fee request is not the product of a mathematical formula, but a determination of reasonableness).

B. The Purpose of § 1988

In every meaning of the word, 42 U.S.C. § 1988 was intended to be a pro-plaintiff law.[33] The legislative history is instructive on the reasoning behind this formulation.[34] Congress was concerned about the enforcement of civil rights laws and was in need of private citizens to help vindicate these important congressional goals.[35] As with other fee-shifting statutes, private citizens rarely sought to vindicate their violated civil rights because of the prohibitive costs in paying their attorneys' fees.[36] Through the promise of awarding attorneys' fees, attorneys would have the incentive to represent persons whose civil rights had been violated and were otherwise unable to pay.[37] Hence, "[t]he purpose of § 1988 [was] to ensure 'effective access to the judicial process' for persons with civil rights grievances" by creating an incentive for attorneys to take these cases.[38] This would increase the likelihood of judicial enforcement of civil rights laws thereby "achiev[ing] [Congress' goal,] consistency in . . . civil rights laws."[39] Thus, private citizens would act as "private attorney generals," enforcing important congressional policy that Congress was otherwise without means to administer.[40]

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[33] *See, e.g.*, S. REP. NO. 94-1011, at 1, 4 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (intending a party who was successful at asserting a civil right claim to ordinarily recover attorneys' fees).

[34] Throughout this Comment, there will be heavy reference and reliance upon the legislative history of § 1988. Strong reliance on the legislative history is justified because the Supreme Court has heavily relied upon legislative history to interpret § 1988. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 91 (1988); *Riverside*, 477 U.S. at 574, 575–80, 585, 591–92 (Brennan, J., plurality, Powell, J., concurrence, Rehnquist, J., dissent); Blum v. Stenson, 465 U.S. 886, 893–95 (1984); *Hensley*, 461 U.S. at 429, 434; *but see Blanchard*, 489 U.S. at 97–100 (Scalia, J. concurrence) (criticizing the court for relying so heavily on the legislative history when interpreting § 1988).

[35] S. REP. NO. 94-1011, at 2, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5909.

[36] *Id.*, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer.").

[37] *Id.* ("[C]itizens must have the opportunity to recover what it costs them to vindicate these rights in court.").

[38] *Hensley*, 461 U.S. at 429 (quoting H.R. REP. 94-1558, at 1 (1976)). The Senate Report calls this "remedy[ing] anomalous gaps." S. REP. NO. 94-1011, at 1, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5908.

[39] S. REP. NO. 94-1011, at 1, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5909.

[40] *Id.* at 3–4, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (noting such incentive incidentally limits expanding governmental enforcement bureaucracy).

Congress had two objectives in enacting § 1988.[41] First, Congress recognized that awarding fees carried a remedial objective, providing private citizens with the means to remedy both their individual harm[42] and the harm done to the law.[43] As Congress stated, "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these law's contain."[44] This remedial objective is the backbone of § 1988.[45] Second, Congress recognized awarding fees carried a deterrent objective, to prevent those who violated the nation's laws from proceeding "with impunity."[46] Congress sought to deter potential violators by increasing their prospects of facing litigation for their actions.[47] This threat would encourage potential violators to comply with Congress' laws, as one court recognized:

> [Without the threat of awarding attorneys' fees] government officials such as the ones involved here [will] be free to harass or victimize disfavored employees, secured in the knowledge that the employee will either be

[41] Congress demonstrated a dual objective in one of the opening phrases in the Senate Report. "If private citizens are to be able to assert their civil rights [remedial], and if those who violate the Nation's fundamental laws are not to proceed with impunity [deterrent], then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. REP. NO. 94-1011, at 2, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910; *see also* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 309 (1977) (noting § 1988 has two objectives). Note, however, that both the remedial and the deterrent objective are tightly interwoven. *See, e.g.*, S. REP. NO. 94-1011 at 3, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5911 ("[F]ees are an integral part of the *remedy* necessary to achieve *compliance* with our statutory policies." (emphasis added)).

[42] *See* S. REP. NO. 94-1011, at 5, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (describing the purpose as allowing private citizens to "vindicate [their] fundamental rights").

[43] *See* City of Riverside v. Rivera, 477 U.S. 561, 574–76 (1986) (Brennan, J., plurality) (discussing the public benefits attached to civil rights litigation enabled by § 1988).

[44] S. REP. NO. 94-1011, at 2, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

[45] *See id.* at 6, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 ("If the cost of private enforcement actions becomes too great, there will be no private enforcement[,] [and] [i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting . . . .").

[46] *Id.* at 2, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910; *see also* Popham v. City of Kennesaw, 820 F.2d 1570, 1580 (11th Cir. 1987) ("The affirmation of constitutional principles produces an undoubted public benefit that courts must consider in awarding attorneys' fees under Section 1988. When courts affirm the constitutional rights of citizens, public officials are *deterred* from violating other citizens' rights in the future.") (citing *Riverside*, 477 U.S. at 574–76) (emphasis added).

[47] *See* S. REP. NO. 94-1011, at 2–3, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5909–11.

> wholly unable to stand up for his or her rights because of the staggering cost of prospective fees involved or . . . left with a bill which . . . would be financially catastrophic.[48]

Congress may have also viewed the award of the fees itself as an intended deterrent.[49] For instance, Congress specifically called the fee award "an integral part of the *remedies* necessary to obtain such compliance."[50] Though fee awards had never been viewed as a remedy for an injury at common law[51] (and even Congress labeled the award "as part of the costs" of litigation),[52] by labeling fee awards a "remedy," Congress may have intended the award to serve the deterrent objective in a punitive capacity.[53] Whether or not Congress intended the fee award to serve a punitive function,[54] this is often a practical effect of a lower court awarding attorneys' fees.[55]

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[48] Fitzgerald v. U.S. Civil Serv. Comm'n, 407 F. Supp. 380, 387 (D.D.C. 1975), *rev'd on other grounds*, 554 F.2d 1186, 1188 (1977). This was a pre-section 1988 case was later reversed because the lower court had awarded attorneys' fees in violation of the American Rule without explicit and clear statutory authority. *Fitzgerald*, 554 F.2d at 1188.

[49] Jones v. Orange Hous. Auth., 559 F. Supp. 1379, 1383 (D.N.J. 1983) (noting beyond the prospects of litigation, "assessing fees [in themselves] against defendants in all circumstances may deter wrongdoing in the first place") (quoting Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3d Cir. 1977)).

[50] S. REP. NO. 94-1011, at 5, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 (emphasis added).

[51] *See* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200–01 (1988) (stating "an award [of attorneys' fees] does not remedy the injury giving rise to the action" but is usually "collected as 'costs'").

[52] *See* The Civil Rights Attorney's Fees Award Act of 1976, S. 2278, 94th Cong. (1976) (enacted).

[53] *See* S. REP. NO. 94-1011, at 3, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (recognizing "the *remedy* of attorneys' fees" as not being new) (emphasis added).

[54] Many courts have rejected the punitive aspect of the fee award. *See, e.g.*, Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981) (awarding attorneys' fees where despite only nominal damages being awarded on the merits but rejecting the notion that the award served as a punishment to the defendant). There is some language among the circuits directly condemning the characterization of the § 1988 fee award as serving a punitive or deterrent objective. *See, e.g.*, Simpson v. Sheahan, 104 F.3d 998, 1003 (7th Cir. 1997) ("In light of Congress' purpose in enacting § 1988, it is clear that an award of attorney's fees is *not* intended to punish defendants."). (emphasis added). However, this issue is far from settled. For instance, in *Hyde v. Small*, the 7th Circuit noted a dispute in their Circuit concerning this issue (whether to recognize a punitive factor in the award of attorneys' fees) and decided not to resolve it. *See* Hyde v. Small, 123 F.3d 583, 585 (7th Cir. 1997) (comparing the language in *Simpson*, 104 F.3d at 1003 with *Charles v. Daley*, 846 F.2d 1057, 1063 (7th Cir. 1988), which proposed the opposite rule). Additionally, in

Because awarding attorneys' fees is necessary to effect the purpose of civil rights laws, the real key behind § 1988 is the incentive it provides to lawyers to take the otherwise underrepresented cases.[56] To preserve this incentive at every step of the statutory analysis, Congress offered a balancing formula. Once a party is determined to be a prevailing party, the party is presumed to recover some attorneys' fees.[57] The lower court must then determine an amount "adequate to attract competent counsel," or an amount consistent with being paid by a fee-paying client, but not amounts that "produce windfalls to [the] attorneys."[58] In this way, Congress balanced the broad discretion of the lower courts, establishing a

Hyde, the Seventh Circuit cites *Langton v. Johnston*, a First Circuit case, for the proposition that a § 1988 fee award has no punitive function. *See Hyde*, 123 F.3d at 585 (citing *Langton*, 928 F.2d 1206, 1226 (1st Cir. 1991) ("an essentially punitive purpose has no place in a prevailing party analysis under section 1988")). But *Langton*'s language condemned using § 1988 as a sanction for a party's "prolonged foot-dragging" during the process of litigation, not for the defendant's violation of the civil rights law forming the merits of the case. *See* 928 F.2d at 1226 ("[T]he aim of [§ 1988] is to reward successful plaintiffs for their efforts, not to punish victorious defendants for some *unspecified degree of recalcitrance*.") (emphasis added). Some courts may be unintentionally upholding this deterrent objective when they consider the public benefit the civil rights litigation served as a factor to weigh in awarding attorney fees. *See, e.g.*, Villano v. City of Boynton Beach, 254 F.3d 1302, 1307 (11th Cir. 2001).

[55] If the statute allows the recovery of attorney fee awards that are substantially more than the damages sought, then (of course) the *real* reason to avoid violating an individual's civil rights will be to avoid paying a substantial attorney fee award. *See, e.g.*, McHenry v. Chadwick, 896 F.2d 184, 189 (6th Cir. 1990) (awarding attorneys' fees more than five times damages recovered on the merits); McKevitt v. City of Meriden, 822 F. Supp 78, 80–81 (D. Conn. 1993) (recovering attorneys' fees almost nine times more than the damages recovered on the merits). While the preceding argument is really just common sense, common sense is evidence of congressional intent. First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 869 (4th Cir. 1989) (noting common sense is the "most fundamental guide to statutory construction"). Congress at least condoned this effect, since attorney fees are not to be reduced merely because the fee award is substantially more than the compensation sought on the merits. *See* S. REP. NO. 94-1011, at 6, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 ("It is intended that the amount of fees awarded [are] . . . not [to] be reduced because the rights involved *may be nonpecuniary* in nature.") (emphasis added).

[56] *See* S. REP. NO. 94-1011, at 6, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 ("[F]ee awards . . . are necessary if citizens are to be able to effectively secure compliance with these existing statutes [civil rights laws]."). Contrast this with other language, saying fee awards are not essential for civil rights laws to be fully enforced. *See id.* at 5.

[57] *Id.* at 4, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (noting prevailing parties "should ordinarily recover an attorney's fee") (quoting Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968)).

[58] *Id.* at 6, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913.

presumption in favor of the prevailing party recovering fee requests no different from what the attorney would ordinarily obtain with a fee-paying client.[59] Hence, in every sense of the word, § 1988 was intended to be a pro-plaintiff law.

III. AN ANTI-ENFORCEMENT INFLUENCE

A. A Direct Influence: Activism Among Lower Courts

Concerns of anti-enforcement goals influencing various courts' interpretation and application of more pro-plaintiff minded laws are common place[60] and have been voiced by both the media[61] and the judiciary.[62] Section 1988 is certainly not immune to these influences.[63] For

[59] *See id.* ("[C]ounsel for prevailing parties [under § 1988] should be paid as is traditional with attorneys compensated by a fee-paying client . . . .").

[60] *See, e.g.*, Colker, *supra* note 13, at 99, 160 (noting judges' hostility towards a statute portrayed as a "windfall statute for the plaintiffs" by the media); James C. Harrington, *Civil Rights*, 28 TEX. TECH L. REV. 367, 429 (1997) (critiquing a 5th Circuit decision saying "[w]hile many may decry the activism of *liberal* judges, the activism shown by [this] en banc court, dominated by *conservative* judges, is remarkable both for its breadth and its facile disregard of stare decisis") (emphasis in original); Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 322 (1989) ("While conservative judges urge judicial restraint, they often practice selective activism. At times *caseload concerns* seem paramount to federal courts, while at other times courts ignore the access-expansive effects of their decisions. Indeed, the malleability of the overload issue suggests it is being used as *an instrument to further other goals*.") (emphasis added); James B. Staab, *Conservative Activism on the Rehnquist Court: Federal Preemption is No Longer a Liberal Issue*, 9 ROGER WILLIAMS U. L. REV. 129, 129–30 (2004) (noting the Supreme Court's "five-justice conservative bloc" has sharply limited federal authority in areas such as product liability thereby fulfilling the anti-enforcement "*political agenda of protecting* '*big business*' from various forms of tort liability") (citations omitted) (emphasis added).

[61] For example, see Editorial, *Shielding the Powerful*, N.Y. TIMES, Feb. 21, 2007, at A20, *available at* 2007 WLNR 3379639 (West), where the New York Times comments on the Supreme Court's decision in Phillip Morris USA v. Williams—overturning a state's award of punitive damages against corporate giant Phillip Morris—saying "[t]he [C]ourt in recent years has become increasingly activist when it comes to defending the rights of corporations by striking down punitive damage awards." *Id.*

[62] *See, e.g.*, Positive Software Solutions, Inc. v. New Century Mortg. Corp., 476 F.3d 278, 286 (5th Cir. 2007) (Reavley, J., dissenting) (criticizing the court for "chang[ing] the law" to achieve its own political agenda, protecting "powerful parties").

[63] *See, e.g.*, Anne S. Emanuel, *Forming the Historic Fifth Circuit: The Eisenhower Years*, 6 TEX. F. ON C.L. & C.R. 233, 246 (2002) (noting the sentiments of one Judge Warren Jones of the 5th Circuit who "had a solid record on civil rights . . . [but] resented, understandably, being

instance, the discretion the law gives to the lower courts presents a potential issue. The law grants lower courts broad discretion to determine a reasonable fee amount because the lower courts, unlike the appellate courts, will be intimately familiar with the facts of the litigation and thus more equipped to make the factual determination of a reasonable fee request.[64] However, in making the reasonable fee determination, the lower court does more than resolve factual issues; the lower court effects the policy of § 1988.[65] Thus, by granting lower courts broad discretion, the law potentially affords lower courts an opportunity to construe and adapt congressional policy without any meaningful review.[66]

The subjectivity of an analysis derived from a lower court's broad discretion coupled with an absence of meaningful review makes § 1988

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grouped with . . . [judges] considered 'more conservative and less disposed (and in some cases hostile) toward plaintiffs in civil rights decisions.'") (citations omitted); William K. Kimble, *Attorney's Fees in Civil Rights Cases: An Essay on Streamlining the Formulation to Attract General Practitioners*, 69 MARQ. L. REV. 373, 387 (1986) ("Justice Rehnquist's tentative opinion . . . tends to ignore the public interest genesis of the Attorney's Fees Act of 1976 . . . ."); Jeffrey A. Parness & Gigi A. Woodruff, *Federal District Court Proceedings to Recover Attorney's Fees For Prevailing Parties on Section 1983 Claims in State Administrative Agencies*, 18 GA. L. REV. 83, 84–85 (1983) ("Th[e] legislative purpose [of § 1988] has . . . been frustrated by the repeated failures of the lower federal courts to implement the statute on behalf of civil rights litigants who have prevailed earlier on claims brought . . . .").

[64] *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters."); *see also supra* note 31. Other reasons courts have given to justify such broad discretion is the need for streamlining the judicial process and avoid turning fee requests into a second major litigation, see *Hensley*, 461 U.S. at 437, and the absence of a need for uniformity in awarded fee amounts. *See* Estate of Borst v. O'Brien, 979 F.2d 511, 514 (7th Cir. 1992).

[65] *See Hensley*, 461 U.S. at 437 ("[T]he [district] court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified."). See the pre-Hensley case *Keyes v. School District No. 1*, where the lower court found there was "no fixed standard or guide by which the court can determine reasonable attorneys' fees," illustrating the subjectivity of the analysis, and the capability of a court to institute its own policy in making these factual determinations. 439 F. Supp. 393, 402 (D. Colo. 1977).

[66] This potential issue has been discussed before. *See* William K. Kimble, *Attorney's Fees in Civil Rights Cases: An Essay on Streamlining the Formulation to Attract General Practitioners*, 69 MARQ. L. REV. 373, 388 (1986) (arguing there is a "need for a neutral fee-setting process that does not relate fees in statutory cases [such as § 1988] to subjective judgments") (quoting Third Circuit Task Force Report, *Court Awarded Attorney Fees*, Supplement to 771 F.2d at 19, 39 (3d Cir. 1985)).

especially vulnerable to influence from pro-establishment, anti-enforcement goals that are contrary to the pro-plaintiff purpose of § 1988. For example, in *Rock Against Racism v. Ward*, the lower court allowed a set-off against what appeared to be an otherwise reasonable § 1988 fee request by the prevailing plaintiff.[67] The plaintiff in *Rock Against Racism* had obtained sufficient relief on the merits to be considered a prevailing party for purposes of § 1988.[68] Subsequently, both the plaintiff and the defendant (the City of New York) had come to an agreement as to the reasonable attorneys' fees owed under § 1988.[69] The issue before the court was whether the defendant was allowed to set-off the costs incurred to the plaintiff while the case was on appeal before the Supreme Court.[70] The court did not cite any test, but relied heavily upon its broad discretion in deciding to allow the set-off in favor of the defendant.[71] The court explained:

> [While] mindful of the policy reasons underlying § 1988 . . . the City [defendant] presently faces increasingly difficult economic circumstances, with social demands upon it which far outstrip its funding powers. Accordingly there is a countervailing [anti-enforcement] policy which militates against requiring the City to forego costs to which the Supreme Court has held it entitled, and which can be funded within the context of the litigation.
>
> As the result of the set-off, plaintiff's attorneys will recover for themselves less than they otherwise would . . . [however] I conclude that it is less unfair to set these costs off against the fees of plaintiff's attorneys than

[67] *Rock Against Racism v. Ward*, No. 85 Civ. 3000-CSH, 1989 U.S. Dist. LEXIS 14869, at *6–7 (S.D.N.Y. Dec. 7, 1989) (designated for publication), *on remand from* 491 U.S. 781, 784 (1989). As the Court in *Hensley* recognized, settlements are the ideal "reasonable attorney's fee." *See Hensley*, 461 U.S. at 437.

[68] *Rock*, 1989 U.S. Dist. LEXIS 14869, at *2–3.

[69] *Id.*

[70] *Id.* at *3.

[71] *Id.* at *5 ("I begin with the observation that the right of the prevailing party in a § 1983 action to attorney's fees is not absolute. The question rests in the sound discretion of the district court.").

> it would be to require the City to pay plaintiff's attorneys in full and recover nothing on the costs.[72]

The court upheld this rationale despite the obvious disincentive this decision created with respect to the plaintiff's attorneys.[73] The lower court in *Rock* even noted that the net effect of the decision was inconsistent with the purposes of § 1988, saying, "[i]t is an imperfect world[,] [but] [s]ometimes the Chancellor in equity must choose between greater and lesser degrees of imperfection."[74] This was not an attempt to balance the purpose of the statute with the circumstances at hand; this was a blatant application of anti-enforcement ideology, which undermined the purpose of the statute.[75]

B. Balancing the Anti-Enforcement Influence

Since the law recognizes the pro-plaintiff intent of § 1988,[76] the law needs to balance the lower courts' broad discretion by requiring lower

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[72] *Id.* at *5–6.

[73] The judge noted the plaintiff's indigence and that the decision to force the plaintiff to absorb the costs would make these costs "in all likelihood . . . uncollectible." *Id.* at *2–3.

[74] *Id.* at *6.

[75] The lower court's failure to label whether its broad discretion was exercised under the reasonableness analysis or the special circumstances exception enabled the court to formulate its own broad discretion under both analyses. *Id.* at *5 (exercising broad discretion subject to abuse of discretion under a reasonableness analysis to consider a special circumstance). This was wrong on two accounts. First, since the parties had agreed upon the fee award, the court was past the threshold inquiry and should have been determining whether to exercise the set-off under the reasonableness analysis—treating the set-off as a reduction of the lodestar—instead of considering the factor as a "special circumstance." *See id.* Second, the hybrid test led the court to consider factors—the ability or inability of the defendant to pay the award—that are not in the reasonableness analysis. *See id.* Interestingly, the law has specifically rejected the ability of the defendant to pay as a special circumstance warranting a denial of a fee request. *See, e.g.*, Coppedge v. Franklin County Bd. of Educ., 345 F. Supp. 2d 567, 570–71 (E.D.N.C. 2004) (citing multiple circuits decided before the decision in *Rock* was rendered and noting, "[m]ost courts that have considered the issue have determined that the ability, or inability, to pay attorney's fees is not a 'special circumstance' warranting the denial of an award."). Hence, the only way the court could have given this factor weight was under its "broad discretion" in the reasonableness analysis. But since the judge's discretion in the reasonableness analysis to make factual the determination of an attorneys' fee award is limited to the considerations in *Hensley*, considering this additional factor is clearly improper. *See* Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("[The lower court's equitable] discretion, however, *must* be exercised in light of the considerations we have identified.") (emphasis added).

[76] *See supra* note 38.

courts either to procedurally or expressly balance the purpose of the statute in their § 1988 analysis.[77] The law has effectively accomplished this at both steps of the statutory threshold. Obviously, the congressional policy would not be served unless a broad class of persons are allowed to recover under § 1988.[78] Thus, the law provides for a "generous formula" at the first step of the statutory threshold, effectively limiting a lower court's discretion and the possibility of anti-enforcement ideology from undermining the purpose of the statute.[79] To be prevailing, a party need only obtain *some* relief on *any* significant issue providing *some* benefit the party sought.[80] Hence, a party need not necessarily obtain a favorable ruling on a final judgment to be considered prevailing.[81] A party may even obtain an unfavorable ruling and be considered prevailing, as in *Farrar v. Hobby*.[82] In *Farrar*, while the plaintiffs were able to prove a civil rights violation, the plaintiffs were unable to prove their claim for an entitlement to compensatory damages.[83] Although the plaintiffs failed to prove the ultimate claim for damages, because the plaintiffs were awarded nominal damages, the plaintiffs were deemed prevailing parties for purposes of the statute.[84] The Court found the plaintiffs prevailed because "[a] judgment of damages in any amount . . . modifies the defendant's behavior for the plaintiff's benefit by

[77] *See supra* note 75 (citing *Hensley*, 461 U.S. at 437).

[78] Congress indicated prevailing party status included a broad class of plaintiffs, including parties who vindicated rights outside of court and even those who ultimately did not prevail on all issues. *See* S. REP. NO. 94-1011, at 5 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912–13.

[79] *See Hensley*, 461 U.S. at 433 ("The standard for making this threshold determination . . . is a generous formulation . . . ."). The term "prevailing party" has been interpreted by the courts broadly in order to achieve the social equity § 1988 sought to provide for plaintiffs. *See, e.g.*, Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981) (holding fee award appropriate even though damages sought were awarded under the state law claim and not the constitutional or civil rights claim § 1988 was designed to cover); Knighton v. Watkins, 616 F.2d 795, 798 (5th Cir. 1980) (holding a party is not time barred from claiming attorney's fees under § 1988 since "Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees."); Smith v. Thomas, 725 F.2d 354, 356 (5th Cir. 1984) (holding a party is prevailing even though the "victory' is not achieved within court); Ganey v. Edwards, 759 F.2d 337, 339–40 (4th Cir. 1985) (holding monetary damage award or equitable relief is not required for a party to be considered prevailing under the statute).

[80] *See* Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989); Hewitt v. Helms, 482 U.S. 755, 760 (1987).

[81] Hanrahan v. Hampton, 446 U.S. 754, 756–57 (1980).

[82] 506 U.S. 103, 113 (1992).

[83] *Id.* at 106–07 (1992).

[84] *Id.* at 107, 113.

forcing the defendant to pay an amount of money he otherwise would not pay."[85] With such a generous formulation, the law has enabled a large class of potential plaintiffs to qualify for fees under § 1988.[86]

To avoid discouraging litigation, the law has also been careful to narrowly define circumstances that would allow prevailing defendants to recover under § 1988.[87] Should a party fail to establish prevailing party status, the lower courts have discretion to consider whether prevailing defendants are awarded fees under § 1988.[88] Again, § 1988's purpose could be undermined by allowing lower courts broad discretion to employ an anti-establishment ideology and award attorney's fees against unsuccessful plaintiffs.[89] However, the law only allows lower courts to award prevailing defendants their attorneys' fees when the plaintiff's suit is determined to be unreasonable, frivolous, or groundless.[90] This exception has been described as "an extreme sanction" limited to the truly "egregious cases of misconduct,"[91] and is generally reserved for plaintiffs *clearly* abusing the system.[92]

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[85] *Id.*

[86] *See* John E. Kirklin, *The Recovery of Attorney's Fees in Civil Rights Cases Pursuant to 42 U.S.C. Section 1988*, 512 PRAC. L. INST. 455, 519–21 (1994), *available at* 512 PLI/Lit 455 (Westlaw) (citing various lower courts applying this law broadly).

[87] *See* Hughes v. Rowe, 449 U.S. 5, 14–15 (1980) (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)) ("To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.").

[88] *See* S. REP. NO. 94-1011, at 5 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 ("[A] party, if unsuccessful, could be assessed his opponent's fee . . . ."); *see also supra* note 24.

[89] *See* S. REP. NO. 94-1011, at 5, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5912–13.

[90] *See Christiansburg*, 434 U.S. at 421 (prevailing defendants may recover when the "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."); *Hughes*, 449 U.S. at 14–16 (holding prevailing defendant status alone is not sufficient to justify a defendant's recovery under § 1988, nor is proving the plaintiff's claims were legally insufficient).

[91] Jones v. Cont'l Corp., 789 F.2d 1225, 1232 (6th Cir. 1986).

[92] For example, even frivolous lawsuits are not deemed to be frivolous for the purposes of § 1988 if the question involves a novel or unresolved issue of law. *See, e.g.*, Holloway v. Walker, 784 F.2d 1294, 1296 (5th Cir. 1986); Sherman v. Babbitt, 772 F.2d 1476, 1478 (9th Cir. 1985); Colombrito v. Kelly, 764 F.2d 122, 132 (2d Cir. 1985). This same rule has been applied to *pro se* plaintiffs. Pryzina v. Ley, 813 F.2d 821, 823–24 (7th Cir. 1987) ("[W]e have recognized that arguments that a lawyer should or would recognize as clearly groundless may not seem so to the *pro se* appellant.").

Likewise, the law has advanced the purpose of § 1988 at the second step of the statutory threshold by narrowing the breadth of the lower courts' discretion in finding a special circumstances exception.[93] Since § 1988's language does not obligate lower courts to award a prevailing party attorneys' fees,[94] if the law allows lower courts to apply its statutory discretion broadly (without sufficient procedural balancing), anti-establishment influences might find many circumstances justifying a denial of a fee request, effectively undermining the purpose of the statute by limiting the class of prevailing parties who should ordinarily recover.[95] The law avoids this in two ways. First, the law requires lower courts to expressly balance the purpose of the statute *before* considering whether the special circumstance exception applies.[96] This forces lower courts to consider § 1988's pro-plaintiff policy in applying the special circumstances exception, which encourages the lower courts to arrive at more pro-plaintiff results.[97] Second, the law rarely sanctions a circumstance as "special"[98] and these circumstances have generally been limited to cases where to award the fee would result in obvious injustice.[99] Hence, by making such

[93] Blanchard v. Bergerson, 489 U.S. 87, 89 n.1 (1989) (quoting Hensely v. Eckerhart, 461 U.S. 424, 429 (1983)) (noting the court's discretion is not without limit in determining a special circumstances exception); *see, e.g.*, Sethy v. Alameda County Water Dist., 602 F.2d 894, 898 (9th Cir. 1979) (holding no special circumstances will be found because a fee award would allegedly result in an undeserved "windfall" to the prevailing party).

[94] 42 U.S.C. § 1988 (2006) ("[T]he court, in its discretion, *may* allow the prevailing party . . . a reasonable attorney's fee . . . .") (emphasis added).

[95] *See, e.g.*, *supra* note 75.

[96] *See Hensley*, 461 U.S. at 429 ("[Section] 1988 authorize[es] the district courts to award a reasonable attorney's fee to prevailing parties . . . . The purpose of § 1988 is [pro-plaintiff] . . . . Accordingly, a prevailing plaintiff 'should ordinarily recover an attorney's fee unless a special circumstance would render such an award unjust.'") (citation omitted); *see, e.g.*, Coppedge v. Franklin County Bd. of Educ., 345 F. Supp. 2d 567, 570 (E.D.N.C. 2004) (considering § 1988 policy *before* considering whether the special circumstance exception applies).

[97] *See infra* Part III.C.1 (noting when the law forces courts to balance the purpose of the statute with their analysis in § 1988, the resulting analysis generally leans pro-plaintiff).

[98] *See* Love v. Mayor of Cheyenne, 620 F.2d 235, 237 (10th Cir. 1980) ("While there have been decisions denying attorney's fees as unjust, these have been few and very limited."); *see also* John E. Kirklin, *The Recovery of Attorney's Fees in Civil Rights Cases Pursuant to 42 U.S.C. Section 1988*, 512 PRAC. L. INST. 455, 570 (1994), *available at* 512 PLI/Lit 455 (Westlaw) ("The courts have rejected most of the factors and considerations advanced by defendants as special circumstances warranting the denial of Section 1988 fees to the prevailing plaintiff.").

[99] *See, e.g.*, Jones v. Orange Hous. Auth., 559 F. Supp. 1379, 1384 (D.N.J. 1983) (citing Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1045 (4th Cir. 1976)) (holding "where the injury of which plaintiff complains is one that a defendant did not create and is powerless to prevent, and

exceptions "extremely narrow"[100] with fees generally awarded as "as a matter of course," the law has limited the lower courts discretion to prevent anti-enforcement ideology from undermining the purpose of § 1988.[101]

C. The Reasonableness Analysis and The Anti-Plaintiff Development

1. A Balance Approach in the Reasonableness Analysis: *Blanchard's* Disincentive

Although the law has developed a procedure to balance anti-enforcement influences at the statutory threshold, the law has not required lower courts to consider the purpose of § 1988 when determining a reasonable fee request.[102] The effect of not *expressly* connecting the purpose of § 1988 with the reasonableness analysis should not be understated. As also demonstrated at the statutory threshold, where the law has required lower courts to expressly balance the purpose of the statute with the reasonableness analysis, the resulting analysis tends to lean pro-plaintiff.[103] For instance, the law instructs lower courts to consider, at least for purposes of determining the number of hours reasonably expended, the private sector's use of "billing judgment," drawing an analogy between § 1988's reasonable fee request and private attorney-client fee arrangements.[104] When the law has balanced the purpose of the statute when considering whether to extend the analogy to a new situation, the result has been strikingly pro-plaintiff. For instance, in *Gisbrecht v. Barnhart*, the Court considered whether a prevailing party's attorney may recover additional fees pursuant to their private contract.[105] The Court decided to extend the private fee arrangement analogy here because the

where that defendant in fact makes unsuccessful efforts to redress that injury, special circumstances exist which make the award of fees against that defendant unjust")

[100] *See* Espino v. Besteiro, 708 F.2d 1002, 1005 (5th Cir. 1983); Ellwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 954, 955 (5th Cir. 1981) (using language "exceedingly narrow").

[101] *See* Kirchberg v. Feenstra, 708 F.2d 991, 998 (5th Cir. 1983).

[102] *See* Hensely v. Eckerhart, 461 U.S. 424, 434–40, 444 (1983) (majority op.; Brennan, J., dissenting) (noting the majority failed to recognize the incentive element "to ensure that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them").

[103] *See supra* Part III.B. Although the Court does not use the purpose of the statute as a consideration for determining prevailing party status expressly, the results have had the same effect because the Court initially pronounced the test as a "generous formulation," a pro-plaintiff consideration. *See* Hensely v. Eckerhart, 461 U.S. 424, 433 (1983) (majority op.).

[104] *See Hensley*, 461 U.S. at 434.

[105] 535 U.S. 789, 806 (2002).

extension supported the pro-plaintiff purpose of the statute.[106] As the Court said, "depriving plaintiffs of the option of promising to pay more than the statutory fee[,] if that is necessary to secure counsel of their choice[,] would not further § 1988's general purpose of enabling such plaintiffs . . . to secure competent counsel."[107] However, in *Blanchard v. Bergon* the Court decided *not* to extend the private fee arrangement analogy, holding that a contract between the plaintiff and attorney did not cap the attorneys' fees recoverable under § 1988.[108] Once again, the Court hinged its analysis upon the purpose of § 1988, reasoning an extension of the analogy here would "create an artificial disincentive for an attorney who enters into a contingent-fee agreement [to take civil rights cases]," which is not consistent with the purpose of the statute—to "encourage . . . civil rights litigation."[109] By applying the purpose of the statute when considering whether to extend the private fee arrangement analogy, the law has extended the analogy only when the resulting analysis would tend to produce pro-plaintiff results.[110]

2. The Reasonableness Analysis: *Hensley* Factors of Reduction

When the law has not expressly balanced the purpose of the statute with the reasonableness analysis, the resulting analysis has tended to create more anti-plaintiff results. For example, the Court in *Hensley v. Eckerhart* established the reasonable fee analysis by focusing on factors justifying a reduction in the prevailing party's initial fee request.[111] Although the *Hensley* Court stated the pro-plaintiff purpose of § 1988 while citing the statutory threshold analysis,[112] § 1988's purpose was not mentioned or applied to the list of five separate factors that justified a lower court reducing an initial fee request.[113] By not applying the statute's purpose to

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[106] *Id.*

[107] *Id.* (quoting Venegas v. Mitchell, 495 U.S. 82, 89 (1990)).

[108] 489 U.S. 87, 95–96 (1989).

[109] *Id.* at 95 (this is "*Blanchard*'s disincentive").

[110] *See, e.g.*, Inmates of the R.I. Training Sch. v. Martinez, 465 F. Supp. 2d 131, 138, 141–42 (D.R.I. 2006) (holding the prevailing party's attorneys were entitled to the § 1988 attorney's fee and the 40% contingency fee agreement on the 2.08 million dollar compensatory damages verdict after considering the purpose of the statute as required by the rule in *Blanchard* and other Supreme Court authority).

[111] *See generally* 461 U.S. 424 (1983).

[112] *See id.* at 429.

[113] The five factors include:

the factors of reduction, the law emphasized *reduction* of the initial fee request in reasonableness analysis, an anti-plaintiff leaning result.[114] Lower courts have followed suit by expanding *Hensley*'s factors of reduction, reducing awards for such inadequacies as block-billing and vague entries.[115] The failure to balance the purpose of the statute in the reasonable analysis has also resulted in an anti-plaintiff analysis in determining lodestar adjustments.[116] Lodestar adjustments are factors considered by the lower courts to adjust an initial fee request upward or downward when determining whether the request is reasonable.[117] Unlike the special circumstances exception (where the law limited the lower courts' discretion to avoid anti-enforcement ideology from influencing the analysis) the law has granted the lower courts broad discretion to make anti-plaintiff, downward adjustments of the lodestar.[118] Conversely, the law has limited the lower courts' discretion to find pro-plaintiff, upward adjustments.[119]

> (1) inadequate documentation; (2) a failure to exercise billing judgment, which is emphasized twice and broken into three sub-components of excluding hours spent on excessive, redundant or otherwise unnecessary work; (3) excluding hours spent on unsuccessful claims (emphasized twice); (4) failure to maintain a billing record enabling the reviewing court to identify distinct claims; and (5) reducing fee requests for limited or partial success,

emphasized four separate times in the opinion. *See id.* at 434–40 (1983).

[114] *See* Colker, *supra* note 13, at 99, 160 (noting windfalls as an anti-plaintiff goal).

[115] *See, e.g.*, Robinson v. City of Edmond, 160 F.3d 1275, 1284 n.9 (10th Cir. 1998) ("The term 'block billing' refers to 'the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.'") (quoting Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533, 1554 n.15 (10th Cir. 1996)).

[116] *See Hensley*, 461 U.S. at 434–36.

[117] *See supra* Part II.A.

[118] Although the *Hensley* Court says post-lodestar reduction adjustments may be made when the plaintiff achieves only partial or limited success, since the prevailing party is only entitled to the full fee request when results are "excellent," a lower court effectively has broad discretion to reduce the lodestar for any results that are less than excellent. *See Hensley*, 461 U.S. at 435–36. Since a party need not achieve "excellent results" to be considered prevailing, understandably many prevailing parties will *automatically* face a reduced fee request. *See supra* Part II.B. (noting prevailing party status is a low barrier).

[119] *See Hensley*, 461 U.S. at 433, 435–36 (enhancing for achieving exceptional success and reducing for achieving partial or limited success and inadequate documentation). The Court functionally closed the exception of enhancement for exceptional success in Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 564, 565–66 (1986) (limiting the factors justifying an enhancement by saying "the lodestar figure includes most, if not all, of the relevant

Even where the law has allowed such upward adjustments, arguably, the adjustments do not provide a pro-plaintiff result, but merely avoid creating an unjust disincentive.[120]

The law's failure to balance this purpose has also resulted in a heavier burden placed upon the prevailing party than what perhaps was originally envisioned by Congress. The *Hensley* Court describes the prevailing party's burden as an evidentiary burden of persuasion in the reasonableness analysis as satisfied by presenting evidence sufficient to support a finding under the lodestar, or evidence satisfying a burden of production.[121] However, because the burden is on the lower court to determine the amount is "reasonable,"[122] in determining the reasonableness of the request, the law

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factors constituting a 'reasonable' attorney fee"). Other enhancement factors which would have created an additional incentive for the prevailing party have also been denied. *See, e.g.*, City of Burlington v. Dague, 505 U.S. 557, 566 (1992) (holding enhancement for contingent fee, or risk taking, is not appropriate since this factor is incorporated into the lodestar). One possible exception is the court's consideration of upward enhancement if the lawsuit served the public's benefit. *See supra* notes 43, 46, 54.

[120] *See* Missouri v. Jenkins, where the Court held enhancements for delay in payment are allowed, allowing an attorney to use current market rates in the lodestar as opposed to the historical rate (which would result in rates far less than what the attorney would be able to charge a fee-paying client). 491 U.S. 274, 284 (1989).

[121] *Hensley* states the determination of a reasonable fee request begins with a determination of the lodestar, which requires "[t]he party seeking [the] award . . . [to] submit *evidence supporting* the hours worked and rates claimed." *Hensley*, 461 U.S. at 433 (emphasis added). The Court indicates the prevailing party's burden in the reasonableness analysis is satisfied by presenting the court with evidence sufficient to support a finding under the lodestar when it stated, "the fee applicant bears the burden of *establishing* entitlement to an award [indicating a burden of persuasion at the statutory threshold analysis] and *documenting* the appropriate hours expended and hourly rates [indicating a burden of production to determine the lodestar in the reasonableness analysis]." *Id.* at 437 (emphasis added). This was later supported by the Court noting the burden was on the fee applicant to produce satisfactory evidence to determine a reasonably hourly rate. Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984); *Blum* indicates this showing of evidence sufficient to support a finding supports a rebuttable presumption that establishes a reasonable fee request. *See* Pennsylvania v. Del. Valley Citizen's Council for Clean Air, 478 U.S. 546, 564 (1986) ("'[If] the applicant for a fee has carried his *burden of showing* that the claimed rate and number of hours are reasonable, the resulting product is *presumed* to be the reasonable fee' to which counsel is entitled") (quoting *Blum*, 465 U.S. at 896). .

[122] *Del. Valley*, 478 U.S. at 565 ("[S]uch [upward] modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings *by the lower courts*.") (citing *Blum*, 465 U.S. 898–901) (emphasis added); *See* Contin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 337 (1st Cir. 1997) ("[A] fee-awarding court that makes a substantial reduction [in the lodestar] . . . should offer reasonably explicit findings, for the court, in such circumstances, 'has a *burden* to spell out the whys and wherefores.'")

is easily construed (and courts have often required) a prevailing party to support the fee request under a higher burden.[123] For instance, the *Hensley* opinion presumes that a prevailing party recovers a fully compensatory fee when they obtain excellent results.[124] Contrasted with the *many* reasons why a full compensatory fee may be reduced, this implies that anything short of excellent results should presumably result in a reduction.[125] Under this rationale, for a prevailing party to avoid a reduction to their initial fee request, the party must demonstrate why the results obtained were excellent, or should not be reduced under one of the many *Hensley* factors of reduction.[126] This construction results in a burden upon the prevailing party that is inconsistent with the evidentiary burden—present evidence to support a finding under the lodestar—stated by the Court.[127] But even this mere evidentiary burden may be construed as one of proof because the law fails to explain with specificity what level of evidence is needed to support a finding under the lodestar.[128] For instance, the evidentiary burden for supporting billable hours is apparently met if the "billing time records . . . enable a reviewing court to identify distinct claims" of the "general subject matter of [the] time expenditure."[129] However, in cases where "lawsuits cannot be viewed as a series of discrete claims" and

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[123] *See, e.g.*, Heard v. Dist. of Columbia, No. 02-296, 2006 U.S. Dist. LEXIS 62912, at *21 (D.D.C. Sept. 5, 2006) (unpublished opinion) (suggesting that because "the burdens of production and persuasion regarding the reasonableness of the number of hours spent on various tasks always remain with the plaintiff," a prevailing party support of a fee request with evidence sufficient to support a finding does not presumptively meet their burden in reasonable fee request inquiry) (citing Am. Petroleum Inst. v. U.S. EPA, 72 F.3d 907, 915 (D.C. Cir. 1996)).

[124] *See Hensley*, 461 U.S. at 435.

[125] *See id.*; *see also supra* note 118.

[126] *See id.* at 434–40; *see also supra* note 118.

[127] *See supra* note 121.

[128] For instance, in determining the attorney's reasonable market rate, in Blum v. Stenson, the Court reinforced the idea that the prevailing party's burden is satisfied by producing "satisfactory evidence," in addition to their own affidavits, to determine a reasonably hourly rate. 465 U.S. 886, 896 n.11 (1984). The Court indicates that this "showing" of evidence sufficient to support a finding in *Blum* creates a presumption that establishes a reasonable fee request. *See* Pennsylvania v. Del. Valley Citizen's Council for Clean Air, 478 U.S. 546, 564 (1986) ("'[If] the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is *presumed* to be the reasonable fee' to which counsel is entitled.") (quoting *Blum*, 465 U.S. at 897). However, it is not difficult to imagine a lower court construing the language of "showing" in *Blum* as requiring a much higher burden than what Congress or the Court perhaps initially envisioned. *See infra* note 133.

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

"counsel's time [is] devoted to the litigation as a whole," the court awards the hours in light of the overall relief.[130] Since the law only awards fully compensable fees when the prevailing party achieved excellent results, the law indicates when the billing statement must be viewed as a whole, even if the prevailing party is able to demonstrate discrete claims, nevertheless, the prevailing party *must* show it obtained excellent results in order to receive their requested billable hours.[131] Whether a party meets its evidentiary burden to establish a market rate is even more difficult to determine, requiring at least an attorney's own affidavits and other "satisfactory evidence" which "justify the reasonableness of the request."[132] Hence, though the law characterizes prevailing parties as having an easy burden to meet,[133] depending upon how a lower court applies the law, a lower court may not only require the prevailing party to *prove* the reasonableness of the request beyond the evidence supporting a claim under the lodestar, but to *disprove* contentions of unreasonableness raised by the court or the opposing party.[134] In light of the factors that the lower courts weigh in determining whether to reduce the fee request, the net result of the law's ambiguity—as applied by lower courts—is that the prevailing party carries a burden to overcome a presumption of reduction.[135]

3. A Segregated Purpose in the Reasonableness Analysis: *Farrar*'s Windfall

The law not only fails to consider the pro-plaintiff purpose of the statute in the reasonableness analysis, but it also characterizes the reasonableness

[130] *See id.* at 435.

[131] *See supra* notes 125, 126.

[132] *See* Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984) (noting "determining an appropriate 'market rate' is 'inherently difficult'").

[133] The Court indicates the burden is not high, emphasizing the request for attorney's fees should not result in a second major litigation and settlements should be encouraged as much as possible. *Hensley*, 461 U.S. at 437 & n.12 ("[C]ounsel, of course, is not required to record in great detail how each minute of his time was expended."). If the law is to avoid litigation and encourage settlement, the prevailing party should have an easy evidentiary burden to meet, rather than an easily contestable burden to prove. *See id.*

[134] *See infra* Part III.D. (noting the lower court's subjecting the prevailing party to a burden of in supporting claims for a reasonable hourly rate).

[135] Though this Comment argues this is not a correct interpretation of the statute, this is certainly a reasonable interpretation of how the law can be applied. *See infra* Part III.D.

analysis' purpose as achieving an anti-plaintiff end—avoiding windfalls.[136] Several years after the Court's decision in *Hensley*, a plurality of the Court in *City of Riverside v. Rivera* described the purpose of the reasonableness analysis as balancing a pro-plaintiff factor with an anti-plaintiff factor "to award fee amounts adequate to attract competent counsel, but . . . not [so excessive to] produce windfalls."[137] The Court explained the balance was achieved simply by the lower courts applying the statute's scheme.[138] This perspective was altered several years later in *Farrar v. Hobby*, where the Court effectively ignored the structural balance (arguably even the balance itself) by emphasizing that the purpose of the reasonableness analysis was to avoid windfalls to attorneys.[139] By emphasizing the anti-plaintiff factor (not produce windfalls) in the absence of the pro-plaintiff factor (attract competent counsel), the law segregated the balancing test in the reasonableness analysis.[140] Lower courts consider the pro-plaintiff purpose

[136] This argument was arguably a result of the *Hensley* factors of reduction. *See Hensley*, 461 U.S. at 444 (Brennan, J., dissenting) ("The Court today emphasizes those aspects of judicial discretion necessary to prevent 'windfalls,' but lower courts must not forget the need to ensure that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them.").

[137] 477 U.S. 561, 580 (1986) (Brennan, J., plurality) (quoting S. REP. NO. 94-1001, at 6 (1976)).

[138] While the *Riverside* plurality admitted avoiding windfalls was a legitimate competing policy consideration—as evidenced in the legislative history—the Court explained windfall avoidance was not an independent rationale but the natural result from applying the reasonableness analysis. *See Riverside*, 477 U.S. at 580–81; *see also Hensley*, 461 U.S. at 446 (arguing a windfall is avoided in the very nature of the statutory scheme, saying, "[y]et Congress also took steps to ensure that § 1988 did not become a 'relief fund for lawyers'") (quoting Sen. Kennedy). The Court had rejected the windfall argument numerous times before, insisting the structural scheme of the lodestar "by definition" prevented windfalls. *See, e.g.*, Blanchard v. Bergon, 489 U.S. 87, 96 (1989) ("[T]he very nature of recovery under § 1988 is designed to prevent any such 'windfall.'"); Blum v. Stenson, 465 U.S. 886, 895 (1984).

[139] 506 U.S. 103, 115 (1992) ("heed our admonition . . . fee awards under § 1988 were never intended to 'produce windfalls to attorneys.'") (citing *Riverside*, 477 U.S. at 580); *see also* Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711, 727 (1987) (deciding that an enhancement based on a contingency fee would result in a windfall). The Court's authority for characterizing windfall avoidance as an independent rationale under the reasonableness analysis—as opposed to a part of a balancing test—is especially suspect. The Court cites the plurality opinion of *Riverside* as its authority for this proposition, but the Court in *Riverside* had rejected this very rationale, viewing windfall avoidance as a structural aspect of the statute and *not* an independent rationale under the reasonableness analysis. *See Riverside*, 477 U.S. at 580.

[140] The dissent in *Hensley* actually warned the court of this potential segregation between the two balancing policies within the reasonableness test. *Hensley*, 461 U.S. at 442–44. The dissent criticized the majority for "emphasiz[ing] those aspects of judicial discretion necessary to prevent

of the statute—a need to encourage litigation—at the threshold inquiry (or outside the determination of a reasonable fee request)[141] and the anti-plaintiff purpose—avoidance of windfalls—in the reasonableness analysis.[142] This segregated approach places a greater emphasis on windfall avoidance than presumably intended by Congress[143] while compounding the effect of the law's emphasis of anti-plaintiff factors of reduction under *Hensley*.[144] Thus, the emphasis of the reasonableness analysis, where the law did not expressly balance the purpose of the statute in its analysis, is directly contrary to the emphasis expressed in *Blanchard*, where the law did balance the purpose of the statute in its analysis.[145] The end result is an analysis that produces anti-plaintiff leaning results.

D. Segregated Purpose Applied

Although the law indicates a lower court's consideration of the purpose of the statute at the statutory threshold will uphold the pro-plaintiff purpose,

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'windfalls,'" a legitimate policy concern of Congress found in S. REP. NO. 94-1011, at 6, but failing to remind lower courts of the overall purpose of the statute, "the need to ensure that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them." *Id.* at 444.

[141] *See supra* Part III.B (stating the low bar set for a party to gain prevailing party status effect the general purpose of the statute). For examples of lower courts considering the purpose of the statute outside the reasonableness analysis, see *Thomas v. City of Tacoma*, 410 F.3d 644, 648–49 (9th Cir. 2005) (noting the courts test for determining whether a special circumstance warranting a denial of a fee request begins with considering the purpose of the statute) and *Goad v. Macon County*, 730 F. Supp. 1425, 1431 (M.D. Tenn. 1989), considering the purpose of the civil rights litigation as balanced against the effect of applying either federal or state law to determine whether to set-off punitive damages.

[142] *See, e.g.*, *Thomas*, 410 F.3d at 648–49 (reversing a lower court for utilizing the windfall analysis in considering whether there was a "special circumstance"—part of the statutory threshold inquiry—justifying a denial of the fee request). In *Thomas*, the district court had confused the *Farrar* test for nominal damages as part of a special circumstances exception instead of a factor in the reasonableness analysis. *Id.* at 648.

[143] While the Senate Report only mentions the need to avoid windfalls once, the Report mentions the need to encourage civil rights litigation throughout the legislative history. *See generally* S. REP. NO. 94-1001 (1976). From at least the perspective of the Senate Report—where the windfall consideration takes its genesis—the courts generally overemphasize this "congressional warning." See, for example, the language in Beazer v. New York City Transit Authority, 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568, 571 (1979), a pre-*Hensley* case noting the "need to scrutinize attorneys' fee applications with an 'eye to moderation,' seeking to avoid either the reality or the appearance of awarding 'windfall fees.'" *Id.* at 101 (quoted source omitted).

[144] *Cf. supra* Part III.C.2 *with Farrar*, 506 U.S. at 114.

[145] *See supra* Part III.C.1.

this seems a doubtful proposition. Arguably, reductions of initial fee requests by thirty, forty, fifty percent or more can be as much of a disincentive to an attorney taking future cases as a complete denial of a fee request.[146] For example, in *Barrow v Greenville Independent School District*, the court cut attorney's fees by approximately two-thirds of the prevailing party's initial request.[147] The litigation, involving a civil rights claim against the Greenville school district's superintendent, had become very costly after stretching for more than five years.[148] Upon determining prevailing party status, the court considered the fee request by applying the *Hensley* factors of reduction.[149] The court first made percentage reductions for problems with the attorneys' billing statements, finding errors of block-billing and vague entries, which mandated a reduction in the requested time.[150] The court then considered the reasonableness of the entered time, chipping away at the requested time spent for reasons of duplicative billing, unnecessary time spent, and for time spent on claims which the court determined "did not further settlement of [the] case."[151] Finally, the court considered the requested hourly rate and reduced it accordingly.[152] The court did two things in its analysis. First, the court required the prevailing party to prove the reasonableness of the request by requiring evidence beyond that which supported a request under the lodestar.[153] For instance, at one point the court reduced 114.8 hours from one attorney's time and 70.1 hours from another predominantly because the prevailing party failed to "meet her burden of demonstrating why . . . [the claims were] necessary,"

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[146] *See, e.g.*, McKevitt v. Meriden, 822 F. Supp 78, 80–81 (D. Conn. 1993) (reducing the fee request from $102,027.75, the amount supported by the evidence presented by the prevailing party, to $11,800, approximately a 90% reduction).

[147] *See* Barrow v. Greenville Indep. Sch. Dist., No. 3:00-CV-0913-D, 2005 U.S. Dist. LEXIS 34557, at *1, *3, *59 (N.D. Tex. Dec. 20, 2005) (unpublished opinion) (reducing the original fee request of $ 2,093,521.91 to $ 631,293.00).

[148] *See id.* at *1, *3.

[149] *Id.* at *7–8.

[150] *Id.* at *38–41, *58 (reducing for vagueness and block-billing). Courts will often reduce requested hours or even fee awards for the practice of "blocked billing." *See, e.g.*, Robinson v. City of Edmond, 160 F.3d 1275, 1284 n.9 (10th Cir. 1998) (quoting Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533, 1554 n.15 (10th Cir. 1996)).

[151] *Barrow*, 2005 U.S. Dist. LEXIS 34557, at *45–50.

[152] *Id.* at *53–54 (deciding to reduce the hourly rates requested because the attorneys did not state "[they had] ever been paid at this rate").

[153] *See, e.g.*, *id.* at *9–10 (presuming, along with the defendant—the counsel opposing the fee request—that the prevailing party bears the burden of proof when discussing block-billing).

that is, reasonable.[154] Second, the court required, albeit implicitly, the prevailing party to support their claim with evidence sufficient to overcome a presumption of reduction. For instance, although hourly rates were supported by evidence, the court reduced the rate on the basis of what the evidence was unable to prove, namely, that the attorneys had been paid this amount before.[155] Throughout its analysis, the court stayed true to the *Hensley* presumption of reduction almost to a point of contradiction, at one point reducing the prevailing party's time requested for legal research because it was unreasonable in light of the requested hourly rate,[156] yet subsequently reducing the very rate that justified the reduction of the time in legal research.[157] Of course, the real issue is not that the court found occasion to reduce the fee request, but that the law allowed the court to reduce the fee request without *once* mentioning the purpose of the statute.[158] In silence as to statute's purpose, the *Hensley* factors of reduction ensured the award would not result in a *Farrar* windfall, ultimately supporting an anti-enforcement, pro-establishment goal of limiting a fee award against an individual working for the school district.

[154] *See id.* at *50. The court did this again when it reduced one attorney's time spent by 3.9 hours for lack of evidence demonstrating how a press conference helped settle the case. *Id.* at *45–46.

[155] *See supra* note 152. The court did this by first discounting the prevailing party's attorneys' affidavits and expert testimony supporting their requested hourly rate with the defendant's experts' affidavits supporting an hourly rate for the prevailing party's attorneys substantially less than what the attorneys' requested. *See Barrow*, 2005 U.S. Dist. LEXIS 34557, at *53–54. If the plaintiff's and defendant's affidavits cancelled each other out, the court based its reason to reduce the fee award upon the prevailing party's failure to disprove the unreasonableness of the hourly rate, that is, to overcome the presumption of reduction. *See id.* This analysis is consistent with the *Hensley* reduction tendency, to carry a presumption in favor of a reduction and place a burden on the prevailing party which extends beyond just a burden of production. *See supra* Part III.C.2.

[156] The rationale was that higher fee requesting attorneys should not have to spend as much time doing legal research. *Barrow*, 2005 U.S. Dist. LEXIS 34557 at *37–38.

[157] *See id.* (making a 5% reduction in time requested in legal research because it was unreasonable in light of the requested hourly rate). This reduction was made *before* the court had reduced the requested hourly rate. *See id.* This gives the impression that the court used the higher requested hourly rates as a justification for reducing the requested time under legal research rather than the rate actually found reasonable for the attorneys' services. *See id.* at *38, *53–54.

[158] For example, the court did not consider whether this net result would create a *Blanchard*'s disincentive, net results that undermine the purpose of the statute as a whole. *See* Blanchard v. Bergeron, 489 U.S. 87, 95–96 (1989); *supra* Part III.C.1.

IV. A BURDEN-SHIFTING ANALYSIS

While the analysis of § 1988 predominantly leans pro-plaintiff, the reasonableness analysis does not. The combination of the law's failure to require the lower courts to expressly or procedurally balance the purpose of the statute in the reasonableness analysis not only fails to balance lower courts' anti-enforcement tendencies, but, to some extent, encourages them, which is counter to the fundamental purpose of § 1988. But even a solution requiring lower courts to consider the purpose of the statute when making the reasonableness determination will not necessarily balance the anti-plaintiff tendencies in the reasonableness analysis or the anti-enforcement goals espoused by some lower courts.[159] Instead, as the Supreme Court indicated in both *Blanchard v. Bergeron* and *City of Riverside v. Rivera*, a proper balancing of the statute's purpose will only be achieved by altering the structure of the reasonableness analysis itself.[160]

A. The Burden-Shifting Analysis

This Comment suggests a prevailing party argue that a lower court should adopt a burden-shifting approach to determine a reasonable fee request. First, the prevailing party must present evidence sufficient to support a lower court's finding of the lodestar amount by supporting the fee request through adequate documentation.[161] If the prevailing party meets this evidentiary burden,[162] the presumption is that the requested fee is

[159] For instance, in *Rock Against Racism v. Ward*, No. 85 Civ. 3000-CSH, 1989 U.S. Dist. LEXIS 14869, (D.N.Y. Dec. 7, 1989), though the judge explicitly considered the purpose of the statute and determined his decision would undermine the purpose of the statute, the judge determined the circumstances at hand mandated a reduction in the fee request. *See supra* notes 73–75 and accompanying text.

[160] These two cases state the windfall analysis is not a separate factor to be considered but avoided by the procedure required as part of the statutory scheme. *Blanchard*, 489 U.S. at 96 (1989); City of Riverside v. Rivera, 477 U.S. 561, 580–81 (1986). Hence, the statutory analysis itself is the balancing test.

[161] *See supra* note 121.

[162] Since the law is ambiguous as to what meets the evidentiary standard, establishing when the prevailing party meets their evidentiary burden might begin as a point of advocacy before a court. *See supra* Part III.C.2. This Comment contends focusing advocacy on this point will help lower courts draw brighter lines so a prevailing party might be better equipped to meet their evidentiary burden. However, ultimately the evidentiary burden should be a pre-determined and an easily met standard. *See supra* note 133 and accompanying text. The real focus a reasonable fee determination should not be upon whether a party meets their evidentiary burden, but whether—as *Hensley* suggests—the requested hourly rate or hours billed are *reasonable*. This is

reasonable and the burden then shifts to the one opposing the initial fee request to rebut this presumption.[163] If the fee request remains unchallenged, the court should ordinarily presume the fee is reasonable.[164] Should the opposing party contest the evidence establishing the lodestar, the opposing party must specifically allege which entries in the billing statement are unreasonable or develop concrete reasons why the alleged prevailing market rate is unreasonable.[165] Because the policy behind § 1988 favors recovery of attorney's fees adequate to attract adequate counsel, the court should resolve close disputes in favor of the prevailing party. If the court determines the opposing party rebutted the presumption of reasonableness, the court should then consider whether to reduce the amount found under the lodestar again, resolving its doubts in favor of the prevailing party.

This procedure corrects the anti-plaintiff leaning tendencies of the law on several levels. First, the procedure will help curve anti-enforcement ideology from directly influencing a lower court's determination of the fee request. For example, in *Rock Against Racism*, this procedure would have required the lower court to explain why the city's inability to pay the full fee request overcame the lower court's presumption of awarding fee requests supported by the evidence.[166] Hence, this procedure would have

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the point where parties should advocate their positions and where the burden shifts in favor of the fee-petitioning party.

[163] *See* Watkins v. Vance, 328 F. Supp. 2d 27, 31–32 (D.D.C. 2004) ("Once the plaintiff has provided such information, there is a presumption that the number of hours billed and the hourly rate are reasonable, and the burden shifts to the defendants to rebut plaintiff's showing of reasonable hours and reasonable hourly rates for attorneys of this skill level and experience for this kind of case").

[164] *See* Beazer v. N.Y. City Transit Auth., 558 F.2d 97, 100 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568, 571 (1979) (rejecting the argument that fees were excessive because no challenge had been made by the defendant to contest the prevailing party's itemized costs).

[165] "In the normal case the Government must either accede to the applicant's requested rate or provide *specific contrary evidence* tending to show that a lower rate would be appropriate." Covington v. Dist. of Columbia, 57 F.3d 1101, 1109–10 (D.C. Cir. 1995) (quoting Nat'l Ass'n of Concerned Veterans v. Sec'y of Def., 675 F.2d 1319, 1326 (D.C. Cir. 1982)) (emphasis added). This is at least similar to what the lower courts must demonstrate under *Hensley*. *See supra* note 122 (noting lower courts must provide clear explanations for their reductions).

[166] Arguably, because the parties in *Rock* reached a determination of reasonable fee amount by settlement, the court should have done this anyway, since the agreed amount of the fee request was presumptively reasonable under *Hensley*. *See* Hensely v. Eckerhart, 461 U.S. 424, 437 (1983) (majority op.) (noting "[i]deally, of course, litigants will settle the amount of a fee" and the prevailing party's burden to submit evidence is only necessary when a settlement or agreement is not possible); *see also supra* notes 67, 133.

exposed the true rationale for the court's reduction, giving the prevailing party a better opportunity to demonstrate to the lower court the use of inappropriate factors in determining a reasonable fee amount. Second, burden-shifting helps prevent lower courts from inadvertently placing a double burden (burden to prove reasonableness and disprove unreasonableness) on the prevailing party in the reasonableness analysis, resulting in more a pro-plaintiff leaning analysis. For example, in *Barrow v Greenville* the analysis used to reduce the requested hourly rate would not have been supportable. The requested hourly rate was reduced predominately because the prevailing party failed to show it had been paid this amount before.[167] Under the burden-shifting analysis, because the party had supplied sufficient evidence to support the requested rate, the court would presume the fee request was reasonable.[168] Hence, the prevailing party's inability to *disprove unreasonableness*—that the attorneys could not show they had been paid the amount before—would not be a sufficient reason to reduce fee requests supported by sufficient evidence, but would require the defendant to affirmatively why the evidence that the attorneys had not been paid this amount before made the request unreasonable.[169] This would likewise apply to the occasions the court reduced the fee request because of the prevailing party's inability to prove reasonableness.[170] However, the court's analysis would likely remain unchanged if the prevailing party were determined to have not supported their fee request by evidence sufficient to support the court's finding of reasonableness.[171] The prevailing party's failure to support a requested hourly rate with sufficient

[167] *See supra* notes 152, 155 and accompanying text.

[168] Barrow v. Greenville Indep. Sch. Dist., No. 3:00-CV-0913-D, 2005 U.S. Dist. LEXIS 34557, at *52–53 (N.D. Tex. Dec. 20, 2005) (unpublished opinion). This Comment presumes the hourly rates met the evidentiary burden because the *Barrow* court reduced the rates on the basis of advocacy and not an easily definable evidentiary standard. *See id.* This presumption is not intended to comment on what evidence is necessary to support a finding of a prevailing market rate. *See* Covington v. Dist. of Columbia, 57 F.3d 1101, 1109–10 (D.C. Cir. 1995) (discussing different ways a prevailing party may meet its evidentiary burden to establish a prevailing market rate).

[169] The defendant seems to attempt this through affidavits, but the court treats the evidence as merely canceling out the affidavits presented by the prevailing party. *See supra* note 155.

[170] *See, e.g.*, *supra* note 154 and accompanying text.

[171] In the case, the court *may* cite an absence of evidence as justification for reducing the hourly rate or fee request. *See* Parker v. Town of Swansea, 310 F. Supp 2d 376, 390 (D. Mass 2004) (awarding a reduced hourly rate because the prevailing party "fail[ed] to meet his burden of providing information sufficient to enable this court to set a rate").

evidence to establish a prevailing market rate[172] or sufficiently recording time to allow the lower court to distinguish between distinct claims goes to the evidentiary burden of the prevailing party.[173] Thus, the percentage reductions for block-billing and vague entries would likely stand under a burden-shifting analysis, since these findings impeded the lower courts' ability to distinguish between distinct claims and determine whether the evidence supported a finding of a reasonable fee request.[174]

Though this procedure is not remarkably different from the procedure applied by the lower court in *Barrow*, the subtlety of defining *when* a party meets its burden and defining what this burden entails could create remarkably different results.[175] For instance, excluding the previously mentioned reductions made because of the prevailing party's failure to meet their evidentiary burden, if all the reductions that were made because of the prevailing party's failure to prove the reasonableness (or disprove the unreasonableness) of the request were resolved according to the burden-shifting presumption—in favor of the prevailing party—the attorneys in

[172] Of course, if the *Barrow* court's evidentiary burden required the prevailing party to show previous hourly rates charged, then even under the burden-shifting analysis, the prevailing party would have failed to meet her evidentiary burden to support the requested hourly rate. The rationale used by the *Barrow* court to make reductions is distinguished because the court made the reductions on the basis of reasonableness—as a response to defendant's argument against the rate—and not for a pre-determined, easy to meet evidentiary burden required under *Hensley*. *See Barrow*, 2005 U.S. Dist. LEXIS 34557, at *52–53.

[173] *See supra* notes 122–33 and accompanying text. *See also*, *Barrow*, 2005 U.S. Dist. LEXIS 34557, at *10–13 (disfavoring block-billing because it impedes the courts ability to distinguish claims, part of the evidentiary burden announced in *Hensley*); *id.* at *31–32 (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) for the proposition that facially unreliable documents fail to meet the prevailing party's evidentiary burden); *id.* at *38–39 (citing the *Hensley* evidentiary burden sentence to support a reduction for vague entries).

[174] Hence, the court's following reductions would likely stand under a burden shifting analysis: a 20% and 10% reduction in time for block billing, *id.* at *12–15; a 20% reduction for facially unreliable records, *id.* at *27–31; a 20% reduction for vague entries, *id.* at *40; and a one hour reduction for clerical tasks, since as a matter of law clerical tasks are not includable as part of one's attorneys' fees, *id.* at *42.

[175] For example, the court in *Barrow* noted that lower courts do not presume that block-billing justifies a complete denial of a fee request, which would liken block-billing to a special circumstances exception. *See id.* at *17–18. But the pervasive use of block-billing and vague entries might equate to a prevailing party's complete failure to meet their evidentiary burden, justifying a denial of a fee request. *See id.* at *20–21 (citing Walker v. U.S. Dep't. of Hous. & Urban Dev., 99 F.3d 761, 773 (5th Cir. 1996)); *but see* Walker v. City of Mesquite, 313 F.3d 246, 251 (5th Cir. 2002) (holding a prevailing party failing to adequately meet the evidentiary standard does not remove the court's discretion to award fees considering the circumstances).

Barrow would have recovered almost double what was awarded.[176] This amount would not presumptively result in a windfall because even this award is almost half the amount initially requested.[177] Further, nothing would have prevented the lower court from reducing the award further after finding the defendant rebutted the presumption in favor of the prevailing party.[178] Hence, this procedure merely helps align the law with the statutory purpose. The need for § 1988 to award fees capable of providing an incentive for prevailing parties to attract adequate counsel is met by establishing a presumption in favor of the prevailing party recovering its initial fee request. Meanwhile, the need to avoid windfalls is obtained by preserving the lower courts' discretion to determine what evidence is needed to support an initial fee request and when the presumption in favor of that request is rebutted.[179]

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[176] The following hours would be added back to attorney Bundren's time as presumptively reasonable under the lodestar: 185.19 hours from the 5% reduction for time spent on legal research and 23.4 hours for time spent on a moot court session, CLE training, and with the media. *Barrow*, 2005 U.S. Dist. LEXIS 34557, at *43–44, *46, *58. This will increase Bundren's hours from 1562.49—the total number of approved hours by the *Barrow* court—to 1771.08. *See id.* at *58. Bundren also met his evidentiary burden in requesting an hourly rate by submitting affidavits and other evidence (such as extensive experience in the area of litigation) to support the claimed rate. *See supra* note 167–69 and accompanying text. Hence the court would multiply the time requested by the hourly rate originally requested by attorney Bundren ($ 450) resulting in a lodestar of $ 796,786 rather than $ 468,742.00. *See Barrow*, 2005 U.S. Dist. LEXIS 34557, at *52, *58. Concerning attorney Shackelford, the lower court would add 28.41 hours for the 5% reduction for unreasonable legal research and the 23.4 hours from the reduction for unreasonable time spent in moot court to the 425.66 hours approved by the *Barrow* court to bring Shackleford's total to 477.47 hours. *See id.* at *43–44, *58–59. The court would multiply this by the hourly rate originally request ($ 400) resulting in a lodestar of $ 190,988 instead of $ 106,415.00. *See id.* at *59. The court would add back 116.9 hours spent in attorney Sasser's time—reduced for duplicative billing—resulting in 220.6 hours. *See id.* Multiplying Sasser's hours by the hourly rate of $ 205.00 yields a lodestar fee of $ 45,223 instead of $ 21,258.50. The court would add 86.9 hours to attorney Saenz's time—reduced for duplicative billing—resulting in 286.2 hours. *See id.* Multiplying Saenz's hours by the hourly rate of $ 175.00 yields $ 50,085 instead of $ 34,877.50. Thus, under the burden switching analysis, a party could arguably recover $1,083,082, about 1.7 times greater than the $ 631,293.00 recovered. *See id.* at *59.

[177] The number initially requested was $ 2,093,521.91. *See id.* at *3; *see also supra* note 160 (noting that windfall avoidance is in the statute's scheme to determine reasonableness).

[178] *See, e.g.*, *Barrow*, 2005 U.S. Dist. LEXIS 34557, at *43–44 (reducing hours requested for a moot court session because attorney was experienced, thus not needing as long to prepare and had already participated in one moot court session).

[179] The presumption functionally realigns the law to the original view of windfall analysis, while allowing lower courts to utilize a *Farrar*'s windfall avoidance approach in their analysis. *See supra* Part III.C.3.

B. Support for a Burden-Shifting Analysis

There is ample support for a court to adopt this procedure. First, the law affords lower courts wide discretion to determine a reasonable fee amount.[180] As the Court in *Hensley* suggests, the discretion of the lower courts is only limited by express holdings of the Supreme Court.[181] Since the Supreme Court has not expressly rejected this burden-shifting analysis, presumably lower courts may adopt this procedure, as demonstrated by both the D.C. and the Seventh Circuits.[182] Second, this burden-shifting analysis does not substantially change the law as applied. For instance, since the ultimate burden is upon the court to determine whether a fee is reasonable the burden-shifting analysis discourages lower courts from requiring the prevailing party to meet a higher burden than what is required to establish the lodestar,[183] and from forcing the prevailing party to overcome a presumption of reduction.[184] In addition, the law already requires a similar burden-shifting approach once the lodestar has been determined.[185] For

[180] *See supra* notes 7, 32 and accompanying text.

[181] *See supra* note 75 (citing Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).

[182] Neither circuit fully explains their rationale for adopting such an approach, but instead just announcing the rule and moving forward. *See* Watkins v. Vance, 328 F. Supp. 2d 27, 31–32 (D.D.C. 2004); *but see* supra note 123 (citing a case which says the burden of persuasion and production is always with the prevailing party). The seventh circuit shifts the burden with respect to determining the market rates. *See, e.g.*, Krislov v. Rednour, 97 F. Supp. 2d 862, 867 (N.D. Ill. 2000) (citing People Who Care v. Rockford Bd. of Educ., 90 F.3d 1307, 1313 (7th Cir. 1996)); *see also* Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 554–55 (7th Cir. 1999) and Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., No. 00 C 7363, 2001 U.S. Dist. LEXIS 11671, at *15 (N.D. Ill. Aug. 2, 2001) (unpublished opinion) (citing Batt v. Micro Warehouse, Inc., 241 F.3d 891, 894 (7th Cir. 2001)).

[183] *See supra* notes 122, 123 and accompanying test; *see also* Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 337 (1st Cir. 1997) ("[A] fee-awarding court that makes a substantial reduction [in the lodestar] . . . should offer reasonably explicit findings, for the court, in such circumstances, 'has a *burden* to spell out the whys and wherefores.'") (quoting Brewster v. Dukakis, 3 F.3d 488, 493 (1st Cir. 1993); Spellan v. Bd. of Educ., 59 F.3d 642, 646 (7th Cir. 1995) ("We have no doubt that the district court has *an independent obligation* to scrutinize the legitimacy of such a submission.") (emphasis added); Cruz v. Beto, 453 F. Supp 905, 908 (S.D. Tex 1977), *aff'd*, 603 F.2d 1178 (5th Cir. 1979) ("[T]he Court is not primarily dependent upon supporting time records of counsel . . . as a means of assessing the correctness of the estimates contained in counsel's affidavits, but *can rely chiefly* on its own observations and experience in this particular litigation.") (emphasis added).

[184] *See supra* notes 134, 135 and accompanying text.

[185] Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 564 (1986) ("[If] the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee contemplated by

instance, some courts have implicitly exercised a burden-shifting analysis when the lodestar, or initial fee request, is uncontested.[186] Even the Supreme Court has exercised a burden-shifting analysis in a similar situation.[187] Lower courts have shifted the burden to the defendant when the prevailing party and defendant enter into a settlement agreement,[188] a presumptively reasonable amount equated to the lodestar.[189] Thus, the law not only allows for a burden-shifting analysis to be used, the law implies this analysis is *correct*. Of course, without expressly adopting the burden-shifting approach, these implied burden-shifting examples remain subject to the anti-enforcement influences mentioned earlier.[190] Only an express adoption of the burden-shifting analysis will help correct the imbalance, ensuring the purpose of § 1988 is applied by the lower courts.

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§ 1988.") (quoting Blum v. Stenson, 465 U.S. 886, 897 (1984)) (emphasis in original). *See also supra* note 122.

[186] Beazer v. N.Y. City Transit Auth., 558 F.2d 97, 100 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568, 571 (1979) (rejecting the argument that fees were excessive because no challenge had been made to prevailing party's itemized costs).

[187] The Supreme Court implicitly stated the burden shifts to the defendant upon the plaintiff satisfying their evidentiary burden when the Court declined to hear arguments concerning the reasonableness of a fee request because the party opposing the fee request had failed to submit "any evidence challenging the accuracy and reasonableness of the hours charged or the facts asserted." *See Blum*, 465 U.S. at 892 n.5 (internal citations omitted).

[188] When defendant settled civil rights case on merits but the settlement failed to address attorneys' fees, the burden was on defendant to show settlement intended to cover attorney's fees. *See* Ellis v. Univ. of Ka. Med. Ctr., 163 F.3d 1186, 1201 (10th Cir. 1998).

[189] *See supra* notes 67, 133, 166.

[190] Compare the 7th Circuit's approach—a Circuit that has adopted a burden-shifting analysis—in *Spellan v. Board of Education* to the 2nd Circuit's approach—a Circuit that has *not* adopted a burden-shifting analysis—as represented in *Rock Against Racism* to see how the rationale supporting the burden-shifting analysis makes a procedural difference. Both cases considered how to handle a lower court's independent challenge to an otherwise presumptively reasonable fee requests—an uncontested fee request in *Spellan* and a settlement agreement in *Rock*. *See* Rock Against Racism v. Ward, No. 85 Civ. 3000-CSH, 1989 U.S. Dist. LEXIS 14869, *6–7 (D.N.Y. Dec. 7, 1989); Spellan v. Bd. of Educ., 59 F.3d 642, 646 (7th Cir. 1995). While *Rock* used an "independent investigation" employing anti-enforcement ideology to reduce the claim without any meaningful judicial review, *Spellan* required the prevailing party have an opportunity to contest results obtained from the lower court's use of a similar independent investigations. *Compare Rock*, 1989 U.S. Dist. LEXIS 14869 at *6–7 *with Spellan*, 59 F.3d at 646 (noting while the lower courts have discretion to independently investigate claims for attorney fees, "if such an independent investigation leads the district court to question certain aspects of the petition that have not been questioned previously by the opposing party, the party submitting the petition ought to have the opportunity to address the concerns of the district court before a final ruling is made on the matter").

V. CONCLUSION

The purpose of § 1988 has and always will be a pro-plaintiff law designed to provide incentives for attorneys. Anti-establishment tendencies and an anti-plaintiff development of the law potentially threatens § 1988's otherwise pro-plaintiff purpose. The proposed solution of a burden-shifting analysis will assist the lower courts in applying the pro-plaintiff purpose of § 1988 to the reasonableness analysis. Although the procedure does not guarantee a change to any specific net result, the procedure does ensure the result will be arrived at through a proper construction and application of the statute's purpose. In this way, § 1988 can balance the anti-establishment ideology in the courtroom and the anti-plaintiff tendencies in the law.