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Navigating Beyond the Lodestar: Borrowing the Federal Sentencing Guidelines to Provide Fee-Shifting Predictability

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ABSTRACT

The lodestar has been the dominant calculation method for fee-shifting awards for nearly 40 years. But the lodestar has numerous persistent issues: it leads to extra litigation and judicial effort, it results in highly variable fee awards, and it incentivizes plaintiffs' attorneys to bill extravagantly and reject settlement. This Article argues that these issues with the lodestar, along with many others, result from a mismatch between the lodestar and the purpose of the underlying fee-shifting statutes, which is to encourage attorneys to bring suits that would not normally be economically viable. Encouraging attorneys to do so requires the fee awards to be predictable. This Article concludes that predictability is impossible within the lodestar, which allows an attorney to set the base calculation and asks a judge to use percentage cuts to arrive at a just result. This Article therefore proposes adopting a framework for fee awards that resembles the Federal Sentencing Guidelines, using an automatic calculation to set a fee range that the judge can work within or, in an unusual case, from which the judge can deviate upward or downward. This framework will address each of the lodestar's persistent concerns and provide the predictability that will encourage the cases these fee-shifting statutes intend to encourage.

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INTRODUCTION

> "I actually worked 185.38 so the above hours are exaggerated to help us meet the lodestar but not seeming too far out of line."[1]

The white owner of an auto repair shop specializing in German cars might make for an unlikely civil rights plaintiff. But Mark Zastrow, the owner of Heights Autohaus in Houston's Northside, was thrust into an unusual situation with one of his parts suppliers, Mercedes-Benz of Houston Greenway, in 2013. Months prior, a customer had brought a Mercedes to Zastrow's shop, and Zastrow discovered numerous mechanical problems with the vehicle.[2] The Mercedes belonged to a Black couple, who were alleging in a civil rights lawsuit that Mercedes Greenway had sold it to them in a defective condition.[3] Zastrow agreed to sit for a deposition as an expert witness to discuss the problems with the car.[4]

The day before the deposition, a Mercedes Greenway employee called Zastrow, "advising him not to sit for the deposition and warning him that he would regret it."[5] Zastrow did so anyway, and the day after the deposition, the same employee called Zastrow to tell him "that Mercedes Greenway would no longer sell parts to him."[6] The next week, Mercedes Greenway's lawyer sent Zastrow a letter, which stated: "Pursuant to your expert testimony in the above-referenced matter, this correspondence will serve as notice that Mercedes-Benz of Houston Greenway is terminating their relationship with Heights Autohaus, effective immediately."[7]

These facts set out a claim for retaliation under 42 U.S.C. § 1981, because Mercedes Greenway tried to retaliate against someone "who has attempted to vindicate another's § 1981 rights."[8] And certainly, allowing Mercedes Greenway to suffer no consequences for its actions would render § 1981 ineffective. It was in Zastrow's interest to hold Mercedes Greenway accountable, but it was also

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1. Declaration of David Yeremian in Support of Motion for Final Approval of Class Action Settlement, Attorneys' Fees and Expenses, and Enhancement Award at 51, Haro Lopez v. TW Servs., Inc., No. 30-2019-01044791 (Cal. Super. Ct. Apr. 14, 2021).

2. Zastrow v. Hous. Auto Imps. Greenway Ltd., 789 F.3d 553, 558 (5th Cir. 2015).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 558 n.1.

8. *Id.* at 563.

strongly in the public interest to allow plaintiffs like Zastrow to vindicate their rights.

But the market for legal services would not be able to assist Zastrow here. While Zastrow's claim was strong, his expected recovery was low. And indeed, even though a civil jury returned a verdict in his favor,[9] they awarded a grand total of only $939.29 in damages.[10]

Claims like this are called negative-value claims, because they cost more to bring than the ultimate recovery is worth, if one is even successful at all.[11] In Zastrow's case, the trial alone, which lasted 3 days,[12] would easily cost more than $939 in legal fees per day. And of course, it would be absurd to expect Zastrow to prosecute a trial pro se, let alone a trial governed by a complex legal framework such as the *McDonnell Douglas Corp. v. Green* burden-shifting approach.[13] So how could he find, let alone pay, a lawyer to litigate this case?

Luckily for Zastrow, § 1981 claims, like many others,[14] are governed by a fee-shifting statute, 42 U.S.C. § 1988, allowing him to move for an award of attorneys' fees.[15] Zastrow's attorney took this negative-value case likely knowing that he could be compensated through this fee shifting.[16] And in Zastrow's case, as in most jurisdictions today, these fees are calculated using a method called the lodestar. The lodestar, in theory, is simple math: multiply the number of hours an attorney reasonably expended on a case by the attorney's reasonable hourly rate to arrive at a fee.[17] This formulation makes logical sense, as compensating an attorney based on the work they reasonably did feels almost obvious.

While the lodestar has become the standard baseline for most fee calculations since the Third Circuit proposed it nearly 50 years

9. Zastrow v. Hous. Auto M. Imps. Greenway Ltd., 695 F. App'x 774, 777 (5th Cir. 2017) (per curiam).

10. *Id.*

11. Nicholas Almendares, *The False Allure of Settlement Pressure*, 50 LOY. U. CHI. L.J. 271, 314–15 (2018).

12. Jury Trial Minute Entries, Zastrow v. Hous. Auto M. Imps. Greenway Ltd., No. 4:13-cv-574, 2014 WL 1794897 (S.D. Tex. Mar. 7–9, 2016), ECF Nos. 178, 190, 200.

13. *Zastrow*, 789 F.3d at 564 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

14. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH, § 14.11 (2004).

15. 42 U.S.C. § 1988(a).

16. *See* Martha Pacold, Comment, *Attorney's Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007, 1011 (2001).

17. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167–68 (3d Cir. 1973).

ago,[18] it can produce inconsistent results, it is easily manipulated, and it leads to prolonged litigation, chewing up as much as 10 percent of the entire judicial workload.[19] In *Zastrow*, the parties' initial filings on attorneys' fees demonstrated the wide variance in interpreting a seemingly clear and elegant formula. Zastrow's counsel calculated its fee request at $197,160.[20] Meanwhile, Mercedes Greenway asked for a fee award of $0.[21] The court, finding that the requests made by Zastrow's counsel were largely reasonable, awarded $110,000.[22]

Mercedes Greenway appealed this $110,000 award, and the Fifth Circuit reversed because the trial court had failed to state that it had accounted for Zastrow's degree of success in fashioning the fee award, as his non-§ 1981 claims had been dismissed.[23] On remand, briefing commenced anew on the question of fees.[24] Zastrow's counsel argued for $117,000, to account for the time expended on the previous appeal, and Mercedes Greenway argued for an award of no more than $5,640.[25] The district court, in a brief order, sided with Zastrow's attorney and awarded $117,000.[26]

Up again the case went on appeal. The Fifth Circuit, perhaps as exhausted as anyone by this procedural history, opened its opinion with the following line: "This is the third appeal in this case and the second appeal on the attorneys' fees award."[27] The Fifth Circuit, despite the district court's minimal explanation, affirmed the fee award.[28] Mercedes Greenway sought certiorari, and the Supreme Court denied the petition on February 19, 2019, 6 years after the

18. *Id.*

19. Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 906–07, 907 n.156 (1992).

20. Plaintiffs' Motion for Attorneys' Fees, Zastrow v. Hous. Auto M. Imps. Greenway Ltd., No. 4:13-cv-574, 2014 WL 1794897 at *3 (S.D. Tex. Mar. 22, 2016), ECF No. 205.

21. Defendant Mercedes-Benz of Houston Greenway's Response to Plaintiffs' Motion for Attorney Fees at 7–17, *Zastrow*, 2014 WL 1794897, ECF No. 211.

22. Zastrow v. Hous. Auto M. Imps. Greenway Ltd., 695 F. App'x 774, 777 (5th Cir. 2017) (per curiam).

23. *Id.* at 779.

24. Plaintiffs' Renewed Motion for Attorney Fees, *Zastrow*, 2014 WL 1794897, ECF No. 244.

25. Defendant Mercedes-Benz of Houston Greenway's Response to Plaintiffs' Renewed Motion for Attorney Fees at 16–17, *Zastrow*, 2014 WL 1794897, ECF No. 250.

26. Zastrow v. Hous. Auto M. Imps. Greenway, Ltd., 736 F. App'x 496, 497 (5th Cir. 2018) (per curiam), *cert. denied*, 139 S. Ct. 1217 (2019).

27. *Id.* at 496.

28. *Id.* at 497.

inception of the lawsuit and almost 3 years after fees were first awarded.[29]

Even as various courts adopted the lodestar method, they simultaneously warned of its dangers. The Supreme Court, perhaps envisioning a case bouncing up and down on appeal like *Zastrow*, cautioned when adopting the lodestar that "[a] request for attorney's fees should not result in a second major litigation."[30] But additional litigation, inconsistency, and manipulability are just a subset of the issues associated with the lodestar method. The Third Circuit, barely a decade after adopting the lodestar, commissioned a task force report to address its failings.[31] The Task Force determined that in addition to the problems illustrated in *Zastrow*, the lodestar also led to increased workloads for district judges; perverse incentives for attorneys, especially regarding settlement; a false sense of mathematical precision; and a bias against public interest lawyers.[32]

Indeed, many of these concerns are in tension with one another, and addressing one often results in sacrificing another. For example, it is often unrealistic to review every individual time entry in complex cases, leading district courts to use percentage cuts to adjust the overall award rather than excising problematic entries.[33] In short, they are ceding fairness and consistency in the name of judicial economy.[34]

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29. Hous. Auto M. Imps. Greenway, Ltd. v. Zastrow, 139 S. Ct. 1217 (2019); Order Awarding Attorneys' Fees, *Zastrow*, 2014 WL 1794897, ECF No. 218; Plaintiffs' Original Complaint and Demand for Jury Trial, *Zastrow*, 2014 WL 1794897, ECF No. 1.

30. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

31. THIRD CIRCUIT TASK FORCE, COURT AWARDED ATTORNEY FEES (1985), *reprinted in* 108 F.R.D. 237, 245–49 (1985); *see also* Justin Lamb, Comment, *The Lodestar Process of Determining Attorney's Fees: Guiding Light or Black Hole?*, 27 J. LEGAL PRO. 203 (2003) (providing a summary of the Third Circuit Task Force's potential drawbacks to the lodestar method).

32. THIRD CIRCUIT TASK FORCE, *supra* note 31, at 245–49. A full accounting of the Third Circuit Task Force's findings can be found below in Part II.A.

33. *See, e.g.*, Copeland v. Marshall, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc) ("It is neither practical nor desirable to expect the trial court judge to have reviewed each paper in this massive case file to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours."); *see also* Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1202 (10th Cir. 1986) ("There is no requirement, either in this court or elsewhere, that district courts identify and justify each disallowed hour.").

34. And when fees motions are litigated, those attorney hours are recoverable in several circuits and thus subject to the same considerations above. *E.g.*, Env't Def. Fund, Inc. v. Env't Prot. Agency, 672 F.2d 42 (D.C. Cir. 1982); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980).

True improvement in the fee-shifting framework should be based on an understanding of why fee shifting is necessary. Fee-shifting statutes exist because Congress has decided that people like Mark Zastrow should be encouraged to enforce certain rights. In a scenario where Zastrow's attorney could be awarded $0 or $5,640 for a case successfully litigated through trial, he might be entirely deterred from taking Zastrow's case, even though the case was meritorious. The goal of a fee-calculation method should be to produce awards high enough to encourage litigation of meritorious claims, but not so high as to result in frivolous litigation that might chill economic activity. And if the goal is encouraging meritorious suits, attorneys will be more likely to take such cases if the fee award is predictable, even if predictable awards sacrifice the fiction of the billable hour. As explained below, district courts currently have three distinct opportunities in the lodestar calculation process to adjust the fee calculation, and the vast majority of those adjustments are downward adjustments.[35]

This Article argues that if the goal of fee shifting is to encourage meritorious suits, the solution to the lodestar puzzle has to include more fundamental change than the Third Circuit Task Force or other scholars have proposed so far. Creating predictable fee awards requires standardizing the baseline from which judges work. In the current framework, the starting point is always the time records of the moving party. But law practices are heterogeneous, from solo practices to large multinational firms. Even among firms of the same size, two firms might employ vastly different staffing practices on the same case. Two attorneys submitted time records in Zastrow's case.[36] What if the firm had decided four attorneys were needed instead, leading to twice as many attorneys present for each case meeting? Are those additional attorney hours reasonably expended?

The answer already exists in federal practice but from an unexpected source. Consider the Federal Sentencing Guidelines (the Guidelines): Implemented in the 1980s in order to curtail broad, nearly unchecked judicial discretion in federal sentencing, the Guidelines remove virtually all discretion from the initial calculation, which yields a precise sentencing range.[37] Although judges can

35. *See infra* Part III.B (discussing the three distinct places where district courts can adjust the lodestar calculation); *see also infra* Part I.C (discussing the Supreme Court's rejection or narrowing of virtually every upward adjustment).

36. Order Awarding Attorneys' Fees, Zastrow v. Hous. Auto M. Imps. Greenway Ltd., No. 413-cv-574, 2014 WL 1794897 (S.D. Tex. Apr. 7, 2016), ECF No. 218.

37. Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 432–33 (2011).

choose to stay within this sentencing range and typically benefit from a presumption of reasonableness if they do, they retain discretion at the end of that process to vary downward or upward from that range for numerous reasons.[38]

Given the tens of thousands of lodestar calculations in the federal courts in the last few decades, a Fees Commission can individually examine each fee-shifting statute to determine what types of firms typically take cases implicating specific fee-shifting statutes, which elements of a case create work in that statute's context, and thus what monetary value should be assigned to each phase of a case. The Commission would then create a calculation, similar to the calculation of a defendant's Sentencing Guidelines range, that would result in a fee award range. If a district court awarded fees in that range, the award would be presumptively reasonable, but the district court would retain the ability to award an amount outside that range if it provided specific reasons for doing so.

While judges should retain discretion to adjust the fee award according to the precise circumstances of the case, as judges do in the criminal sentencing context, a Guidelines-style framework would provide a much more consistent floor for fee awards nationwide. Unlike criminal sentencing, where the Sentencing Guidelines calculation has been criticized for its overly rigid approach to individualized determinations of defendants' personal liberty, the predictability provided by the rigidity of a Guidelines-style fee calculation would align with the goals of the underlying statutes better than an exhaustive search for the precise amount of compensation. Indeed, this Article argues that a Sentencing Guidelines-style calculation of fees is both feasible and desirable for all parties involved: the plaintiff,[39] the plaintiff's attorney, the judge, and the defendant.

This framework has the power to drastically curtail lengthy fees litigation, preserve some discretion for judges to adjust the fee award based on the particular details of the case, and remove uncertainty for prospective litigants and their lawyers regarding fee calculations at both the high and the low ends of the current spec-

38. *See* 18 U.S.C. § 3553(a) (laying out seven factors that should be considered in conjunction with the Guideline range when imposing a sentence); United States v. Booker, 543 U.S. 220 (2005) (holding that the Sentencing Guidelines cannot be mandatory under the Sixth Amendment).

39. This Article uses the terms "plaintiff" and "defendant" here to represent the party moving for fees and the party liable for fees, respectively, as the vast majority of statutory fee-shifting schemes overwhelmingly compensate prevailing plaintiffs for their legal bills. The use of these terms is not meant to imply that fee-shifting does not occur in the other direction.

trum of fee awards. The framework should also better serve the purpose of the fee-shifting statutes underlying these awards: encouraging private parties to enforce their legal rights, especially for negative-value claims.

This Article proceeds in four parts. In Part I, it discusses the passage of fee-shifting statutes to fill a gap in enforcing negative-value claims and the lodestar's adoption as the prevailing method to calculate fee awards. Then, in Part II, it discusses the practical drawbacks of the lodestar method and proposals that have been put forward to solve some of the method's difficulties. Part III explains that the lodestar calculation itself, as a series of discretionary choices, is fundamentally in tension with a goal of predictability, and thus cannot satisfy Congress's intent in enacting fee-shifting statutes. Finally, in Part IV, this Article discusses the broad strokes of the Federal Sentencing Guidelines and why the same framework is a particularly good fit to replace the lodestar calculation.

I. THE RISE OF THE LODESTAR IN FEE-SHIFTING CASES

A. The Origins and Legislative Intent of Fee Shifting

Traditionally, U.S. litigants have borne their own costs in litigation, a principle known as the American Rule.[40] The American Rule was actually created in order to encourage poor litigants to bring claims without the fear of a fee-shifting penalty, but with the rise of statutes with private rights of action and of civil rights lawsuits, the American Rule served just as much to deter worthy plaintiffs from filing claims.[41] As a result, statutes started to include fee-shifting provisions to incentivize attorneys to take these cases.[42]

The existence of a fee-shifting statute is typically evidence that Congress thinks that suits involving a particular class of plaintiffs are in the public interest and would not be brought without a provi-

40. Baker Botts, L.L.P. v. ASARCO, L.L.C., 576 U.S. 121, 126 (2015).

41. Risa A. Lieberwitz, *Attorneys' Fees, the NLRB, and the Equal Access to Justice Act: From Bad to Worse*, 2 HOFSTRA LAB. L.J. 1, 4, 6–7 (1984).

42. *E.g.*, 42 U.S.C. § 2000e-5(k) (establishing fee provisions enacted as part of Civil Rights Act of 1964). Many early statutes did not have fee-shifting provisions originally included, and the courts were often ordering attorneys' fees of their own volition, but the Supreme Court limited the use of courts' equitable powers to award attorneys' fees in 1975, necessitating the creation of further fee-shifting statutes. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247–57 (1975) (discussing the history of the American Rule and its exceptions, leading up to a holding that courts cannot use their equitable power to award attorneys' fees in private attorney general contexts).

sion for attorneys' fees.[43] The implication is that the claims covered by the fee-shifting statute are negative-value claims, where the cost of litigation exceeds the potential benefit.[44] Fee-shifting statutes exist to encourage enforcement of the rights underlying negative-value claims. Two of the most common fee-shifting statutes, 42 U.S.C. § 1988[45] and the Equal Access to Justice Act (EAJA),[46] both include a discussion of this purpose in their legislative history.

The stated purpose of § 1988, in the Senate report, was "to remedy anomalous gaps in our civil rights laws . . . and to achieve consistency in our civil rights laws."[47] Like the civil rights statutes passed in the 1960s, older statutes such as 42 U.S.C. § 1983 depended "heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."[48] The report recognized that "the citizen who must sue to enforce the law [in many cases] has little or no money with which to hire a lawyer," and that an ability to recover attorneys' fees was vital "if those who violate the Nation's fundamental laws are not to proceed with impunity."[49] Indeed, this was the exact dilemma Zastrow faced in vindicating his claim against Mercedes Greenway.

The Senate recognized that many fee-shifting statutes already existed by 1976, when the report on § 1988 was published, and that "fees are an integral part of the remedy necessary to achieve com-

43. Not all fee-shifting serves this purpose. Fee-shifting under Federal Rule of Civil Procedure 37, for example, is meant to compensate a party for the work they do addressing the misconduct of the other party in discovery. To make a party whole, the court must necessarily look to the actual work done. This Article does not pertain to the calculations for mechanisms, such as Rule 37, that are merely meant to make the other party whole.

44. Negative-value claims are often determined strictly on the idea that the monetary cost of bringing an action outweighs the potential monetary award, but litigants may make the decision not to bring a claim because the totality of "transaction costs of bringing an individual action exceed the potential relief." *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 179 (3d Cir. 2013).

45. 42 U.S.C. § 1988 allows for an award of fees under 42 U.S.C. § 1983 or related civil rights statutes. 42 U.S.C. § 1988(b). Virtually every Supreme Court case mentioned in this Part involved fee shifting under 42 U.S.C § 1988 or a statute whose fee calculation was judicially deemed identical to that of 42 U.S.C. § 1988.

46. 5 U.S.C. § 504. EAJA allows for an award of fees for plaintiffs with a net worth of under $2,000,000 in a suit against the United States government. 28 U.S.C. § 2412(d).

47. S. REP. NO. 94-1011, at 1 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5909.

48. *Id.* at 5910.

49. *Id.*

pliance with our statutory policies."[50] The report incorporated strong Supreme Court language, stating that "[n]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Without counsel fees the grant of Federal jurisdiction is but a gesture."[51] Indeed, given the recognition of the efficacy of fee shifting, "[s]ince 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions."[52] The Senate report concluded: "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditional effective remedy of fee shifting in these cases."[53]

The legislative history of EAJA is similar. The explicit purpose of the bill, in the 1980 House report, was to "reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States."[54] The report recognized that the American Rule was actually deterring litigation in potential suits against the government, an effect inconsistent with the purpose of the American Rule.[55] The report specifically invoked the case where "the cost of contesting a government order . . . exceeds the amount at stake," noting that a potential plaintiff would find it "more practical to endure injustice than to contest it."[56] EAJA was therefore a recognition "that the expense of correcting error on the part of the government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of federal authority."[57]

With fee-shifting statutes becoming commonplace in the 1960s and 1970s, courts were left to determine how to calculate attorneys' fees under these statutes.[58] During this time, courts tested a few competing methods.

The Fifth Circuit formulated a list of twelve factors to consider when determining a fee award in *Johnson v. Georgia Highway Ex-*

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50. *Id.*

51. *Id.* (quoting Hall v. Cole, 412 U.S. 1, 13 (1973)).

52. *Id.*

53. *Id.* at 5913.

54. H.R. REP. NO. 96-1418, at 6 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4984, 4984.

55. *Id.* at 4988.

56. *Id.*

57. *Id.* at 4989.

58. Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 745 (1993).

press, Inc.[59] Although the factors were relevant to the question of what fee award might be reasonable, the factors overlapped substantially and provided "very little actual guidance" to courts regarding the process for calculating attorneys' fees.[60] The Ninth Circuit quickly adopted the *Johnson* framework,[61] but the lack of a clear formula and the overlap between the factors led to implementation troubles. Even so, the echoes of *Johnson* persisted for over a decade: 42 U.S.C. § 1988 itself discussed *Johnson* approvingly in its legislative history, leading courts to look to the *Johnson* factors as a key part of the legislative history of § 1988.[62] It was not until 1989 when the Supreme Court, in moving away from legislative history as an interpretive tool, disowned *Johnson* as a standalone method for setting attorneys' fees.[63]

But even as some courts were applying the *Johnson* factors in the context of § 1988, many were adopting a fee calculation method that appeared much more administrable: the lodestar. The following Subpart explores the development of the lodestar in the federal courts and the development of courts' obsession with precision at the expense of the legislative intent of the fee-shifting statutes.

B. Lindy*: The Lodestar's Initial Formulation*

The Third Circuit was the first to articulate the lodestar method as the preferred method for calculating attorneys' fees in its 1973 decision in *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*[64] Within a decade,

59. Johnson v. Ga. Highway Express, 488 F.2d 714, 717–19 (5th Cir. 1974). These twelve factors are as follows: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship between the attorney and the client, and (12) awards in similar cases. *Id.*

60. Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 563 (1986).

61. Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69–70 (9th Cir. 1975).

62. *See* Hensley v. Eckerhart, 461 U.S. 424, 430–31 (1983) (analyzing *Johnson* and three district court cases cited approvingly in the legislative history to interpret § 1988).

63. *See* Blanchard v. Bergeron, 489 U.S. 87, 94 (1989) ("The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation.").

64. Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Corp., 487 F.2d 161 (3d Cir. 1973).

the lodestar method had been blessed by the Supreme Court[65] as well as the Fifth Circuit,[66] which had originally forged its own path with *Johnson* in 1974.

The district court in *Lindy* had very little guidance when it awarded attorneys' fees. As a result, the district court merely created and weighed four factors it considered relevant to the fee award: (1) the percentage of a claimant's recovery awarded as attorneys' fees in other cases in the district, (2) the amount of the recovery in this case, (3) the amount the attorneys had received from their clients under preexisting private agreements, and (4) the time spent in connection with the litigation.[67]

In vacating the fee award, the Third Circuit commented that this listing, without any additional insight into process, "makes meaningful review difficult and gives little guidance to attorneys and claimants."[68] The animating principle the Third Circuit articulated for the basis of a fee award was compensation for "the reasonable value of services."[69] The court then detailed the three-step process that would be required of district courts to ensure that they properly captured that value.

The first step is to inquire "into the hours spent by the attorneys—how many hours were spent in what manner by which attorneys."[70] The court cautioned that although absolute precision was not necessary, there needed to be "some fairly definite information as to the hours devoted to various general activities," divided by activity and the type of person undertaking them.[71]

The second step requires an "attempt to value those services," a question that typically starts with the attorney's normal billing rate.[72] The court noted that different attorneys might have different reasonable rates, and that even the same attorney might have dif-

65. *See Hensley*, 461 U.S. at 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.").

66. *See* Graves v. Barnes, 700 F.2d 220, 222 (5th Cir. 1983) ("The Fifth Circuit recently adopted the 'lodestar' method of calculating attorney's fees relied upon by the Second, Third, and District of Columbia Circuits.").

67. *Lindy*, 487 F.2d at 166. This list of factors seems to have very little in common with standard fee award analyses, but *Lindy* was a complex antitrust case that involved multiple classes of plaintiffs, some of whom were unrepresented. *Id.* at 164. *Lindy* therefore includes a substantial discussion about the proper way to situate the taxing of fees from an award to unrepresented plaintiffs, one which is beyond the scope of this article and thus omitted here. *Id.*

68. *Id.* at 166–67.

69. *Id.* at 167.

70. *Id.*

71. *Id.*

72. *Id.*

ferent reasonable rates depending on the activity.[73] The court concluded that the first two steps together would provide "the only reasonably objective basis for valuing an attorney's services."[74] The court therefore concluded that the amount derived from the hours spent and the reasonable rate "should be the lodestar of the court's fee determination."[75]

The court cautioned that the inquiry could not end there, though, as a "court cannot properly fix attorneys' fees" with only this calculation.[76] Instead, the court added a third step. "[A]t least two other factors" had to be addressed after the calculation, if applicable: (1) the contingent nature of success and (2) the quality of an attorney's work, based on "the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained."[77] The Third Circuit noted that the second factor was "designed to take account of an unusual degree of skill, be it unusually poor or unusually good," and that the lodestar was the fairest calculation of value of the work of most attorneys.[78]

The Third Circuit continued to clarify this three-step process over the next few years, but it repeatedly endorsed the steps that it outlined in *Lindy*, all while noting that "[i]t was not and is not our intention that the inquiry into the adequacy of the fee assume massive proportions."[79]

C. The Supreme Court and the Increasing Primacy of the Lodestar Calculation

In 1983, the Supreme Court first weighed in on the lodestar method in *Hensley v. Eckerhart*, stating that the lodestar calculation was "[t]he most useful starting point for determining the amount of a reasonable fee."[80] And in the intervening 40 years, the Supreme Court has relied largely on the lodestar calculation itself, functionally narrowing the enhancements under the contingency and per-

73. *Id.*

74. *Id.*

75. *Id.* at 168.

76. *Id.* at 167.

77. *Lindy*, 487 F.2d at 168.

78. *Id.* at 168–69.

79. Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102, 116 (3d Cir. 1976).

80. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). *Hensley*, though, did not mention the lodestar by name or cite *Lindy*'s approach to fees. *Id.*

formance factors out of existence.[81] This gradual shift has placed a de facto ceiling on fees awarded under the lodestar calculation, a ceiling that is set unilaterally by the plaintiff's attorney rather than by the judge.

1. The Disappearance of the Upward Performance Adjustment

The *Hensley* Court endorsed the possibility that "results obtained"[82] might warrant an upward or downward fee adjustment, usually through a multiplier, and that "in some cases of exceptional success an enhanced award may be justified."[83] But because the question presented involved a party who obtained only partial relief, the Court did not address the question of a performance adjustment directly.

In subsequent cases, the Supreme Court has largely foreclosed the possibility of enhancing the lodestar calculation through upward adjustments for performance, although opinions continue to insist that these positive multipliers are possible.[84] Just one term after *Hensley*, the Supreme Court issued its opinion in *Blum v. Stenson*.[85] The district court in *Blum* awarded a 50 percent increase over the lodestar calculation "for the complexity of the case, the novelty of the issues, and the 'great benefit' achieved," and the court of appeals affirmed.[86] The Supreme Court reversed.

Recognizing that *Hensley* specifically contemplated upward fee adjustments, the *Blum* Court held that upward fee adjustments were not prohibited.[87] But the Court placed the burden on the fee applicant to show that an upward adjustment was appropriate, and it determined that the plaintiff had not carried this burden in the instant case.[88] The Court surmised that the complexity and novelty of the case "presumably were fully reflected in the number of billable hours recorded by counsel."[89] The Court rejected even a scena-

81. It is important to note that despite the Supreme Court's pronouncements, they do not apply to state fee-shifting statutes, and many state courts have the freedom to adjust the lodestar calculation upward or downward. *See* Matthew D. Klaiber, Comment, *A Uniform Fee-Setting System for Calculating Court-Awarded Attorneys' Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-Based Mathematical Model*, 66 MD. L. REV. 228, 244–46 (2006) (discussing the range of discretionary tools available to state courts).

82. *Hensley*, 461 U.S. at 434.

83. *Id.* at 435.

84. Sisk, *supra* note 58, at 756–58.

85. Blum v. Stenson, 465 U.S. 886 (1984).

86. *Id.* at 891.

87. *Id.* at 897.

88. *Id.* at 898.

89. *Id.*

rio where "the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue," determining that the hourly rate would capture the appropriate value of the attorney in this scenario.[90]

The Court also assumed that the quality of the representation would normally be captured in the reasonable hourly rate.[91] Therefore, any upward adjustment for quality of representation would require a showing that the results were truly exceptional compared to the time expended and the hourly rate charged, or the adjustment would constitute "a clear example of double counting."[92]

Finally, the Court rejected the district court's rationale that the novel legal issues made the representation risky.[93] Because there was no record evidence identified regarding the risk, the Court avoided the question about whether the risk of losing might justify a fee enhancement.[94]

Recall that the Third Circuit's performance factor in *Lindy* was defined as "the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained."[95] The district court in *Blum* relied on these exact rationales, and yet the Supreme Court rejected the enhancements anyway.

Two years later, the Supreme Court decided *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*.[96] The Court was unequivocal: "[P]erformance ordinarily should not be used to adjust the lodestar" due to the danger of "double counting."[97] But the Court rejected an upward adjustment in a scenario it had explicitly identified in *Blum* as the rare case that would justify one. In *Blum*, the Court stated that the results of a case could be exceptional rela-

90. *Id.*

91. *Id.* at 899.

92. *Id.* at 899–900.

93. *Id.* at 901.

94. *Id.* at 901 n.17 (Brennan, J., concurring in part and dissenting in part). Justice Brennan, joined by Justice Marshall, wrote in a concurrence that the particular statute's legislative history included a reference to the *Johnson* factors, one of which was regarding whether the fee was fixed or contingent. *Id.* at 902–03. The legislative history also cited a subsequent district court case that granted an upward adjustment for exactly this reason. *Id.* at 903; *see also* Stanford Daily v. Zurcher, 64 F.R.D. 680, 685–86 (N.D. Cal. 1974), *rev'd on other grounds*, 436 U.S. 547 (1978).

95. *Lindy*, 487 F.2d at 168.

96. Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986).

97. *Id.* at 566.

tive to the reasonable number of hours expended (due to efficiency) and the reasonable rate (due to the qualifications of the attorney).[98] The *Delaware Valley* Court instead rejected a multiplier because the district court had eliminated some of the claimed hours and because the attorney for the relevant phase of litigation was an "'inexperienced attorne[y]' without 'any prior significant litigation experience.'"[99] An inexperienced attorney working for a limited number of hours and still returning quality results was the kind of exceptional case that the *Blum* Court carved out, and yet the Supreme Court, just two years later, identified it as self-defeating evidence.

The most recent Supreme Court guidance on the matter is *Perdue v. Kenny A. ex rel. Winn*,[100] a foster care class action that led to a consent decree. The district court awarded a 75 percent enhancement due to counsel's outlay of $1.7 million in costs and the fact that counsel had shown "a higher degree of skill, commitment, dedication, and professionalism . . . than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench."[101] The district court continued: "[A]fter 58 years as a practicing attorney and a federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale."[102] Each member of the Eleventh Circuit panel wrote separately but ultimately voted to uphold the fee enhancement.[103]

The Supreme Court reversed, noting that "we have never sustained an enhancement of a lodestar amount for performance."[104] The Court laid out three scenarios in which an enhancement might be appropriate. First, when specific proof existed that the calculated hourly rate "does not adequately measure the attorney's true market value."[105] This situation, however, would not be considered an enhancement under *Blum*, as the *Blum* Court included this question in the determination of the hourly rate. Second, an enhancement might be appropriate if the attorney had substantial expenses

98. *Blum*, 465 U.S. at 899.

99. *Del. Valley*, 478 U.S. at 567 (alteration in original) (quoting Del. Valley Citizens' Council for Clean Air v. Pennsylvania, 762 F.2d 272, 279 n.10 (3d Cir. 1985)).

100. Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542 (2010).

101. *Id.* at 548.

102. *Id.* at 548–49.

103. *Id.* at 549–50.

104. *Id.* at 552.

105. *Id.* at 554–55.

during drawn-out litigation.[106] And third, an enhancement might be appropriate if the fees were exceptionally delayed.[107] But in these latter two scenarios, the Supreme Court concluded that a district court would have to use a specific calculation, such as a standard interest rate for qualifying costs, to allow for appellate review.[108]

Given this narrow interpretation of enhancements, the Supreme Court determined that the district court's enhancement was "impressionistic" and "did not employ a methodology that permitted meaningful appellate review."[109] Even though the district court properly cited counsel's $1.7 million in costs as a factor, the fact that the district court did not calculate interest or use another quantitative method to account for those costs was fatal.[110] The Supreme Court therefore reversed the award and remanded for further proceedings.[111]

2. City of Burlington *and the Rejection of the Contingency Adjustment*

Delaware Valley returned to the Supreme Court one term after its original consideration, this time to determine whether the contingency factor was applicable to the fee award—that is, whether a multiplier would be appropriate to account for the plaintiff's risk of losing the case.[112] The Court deadlocked on this question, with four Justices prepared to strike down the contingency factor broadly as impermissible double counting[113] and four endorsing the use of the contingency factor as an enhancement in the instant case.[114] The controlling opinion, by Justice O'Connor, insisted that the contingency enhancement should remain available to other plaintiffs but that in the instant case, the lodestar properly reflected the level of risk.[115] Her proposed test would require a plaintiff to establish "that without an adjustment for risk [they] 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'"[116]

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106. *Id.* at 555.
107. *Id.* at 555–56.
108. *Id.* at 556–58.
109. *Id.* at 558.
110. *Perdue*, 559 U.S. at 557–58.
111. *Id.* at 560.
112. Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987).
113. *Id.* at 731 (plurality opinion).
114. *Id.* at 735 (Blackmun, J., dissenting).
115. *Id.* at 731–34 (O'Connor, J., concurring in part and concurring in the judgment).
116. *Id.* at 733 (quoting *id.* at 731).

Despite leaving the question of contingency enhancements open in *Delaware Valley II*, the Supreme Court revisited the matter five years later in *City of Burlington v. Dague*, after two Justices favorable to the enhancement had been replaced with two Justices who disfavored it.[117] The *City of Burlington* Court rejected Justice O'Connor's test as unmanageable and unpredictable.[118] The Court determined that the proper and most efficient solution was to fully foreclose the possibility of an enhancement based on the riskiness of a case.[119] The Court rooted its preference for efficiency in a line from *Hensley*, noting that the setting of attorneys' fees "should not result in a second major litigation."[120] The Court reasoned that allowing the contingency enhancement would "make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable."[121] In essence, the Court's assumption that lower courts should not be tied up with fees litigation led the Court to discard the contingency adjustment, a major financial incentive for plaintiffs' attorneys to take fee-shifting cases.

Although the rejection of the contingency enhancement does not apply to all fee-shifting statutes,[122] the Supreme Court has incorporated the enhancement's prohibition by reference into the analysis of many of the most common fee-shifting statutes.[123] As a result, the lodestar calculation does not account for the low likelihood of winning a case through a direct multiplier; instead, the risk of losing a case can only be accounted for through the hourly rate or the number of reasonable hours expended, where it will likely have a smaller effect.

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117. City of Burlington v. Dague, 505 U.S. 557 (1992). Justices Brennan and Marshall were replaced, respectively, by Justices Souter and Thomas, who both voted in the *City of Burlington* majority. *Id.*

118. *Id.* at 563–64. Justice O'Connor, unsurprisingly, dissented. *Id.* at 575 (O'Connor, J., dissenting).

119. *Id.* at 566–67 (majority opinion).

120. *Id.* at 566 (quoting *Hensley*, 461 U.S. at 437).

121. *Id.*

122. For example, in the Social Security context, a contingency factor of two is still routinely applied. *E.g.*, Damron v. Comm'r of Soc. Sec., 104 F.3d 853 (6th Cir. 1997). It is important to note, though, that in the Social Security context, fees are taken out of the claimant's award and explicitly capped at 25 percent of the recovery. 42 U.S.C. § 406(b)(1)(A).

123. *See City of Burlington*, 505 U.S. at 562 (noting that the relevant language in the fee-shifting statute "is similar to that of many other federal fee shifting statutes; our case law construing what is a 'reasonable' fee applies uniformly to all of them").

3. Partial Relief and Downward Adjustments

Despite prohibiting virtually all upward adjustments, the Supreme Court, very early on, endorsed downward adjustments for cases in which plaintiffs did not obtain all of the relief requested in the complaint, which was the primary dispute in *Hensley*.[124] As a general matter, plaintiffs are prevailing parties for fees purposes "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[125] The Court recognized that if "a plaintiff has obtained excellent results . . . the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."[126] But the lodestar calculation "may be an excessive amount" in the case where a plaintiff "has achieved only partial or limited success."[127]

The *Hensley* Court refused to articulate a formula but merely cautioned that a district court should "make clear that it has considered the relationship between the amount of the fee awarded and the results obtained."[128] The Court suggested that district courts may "attempt to identify specific hours that should be eliminated" or "simply reduce the award to account for the limited success."[129] As with many early fees opinions, the *Hensley* Court ultimately determined that the district court's reasoning had not quite followed the proper standards, and so the case was remanded to determine whether the calculated fee was reasonable in light of the level of success.[130]

Although the Court has not issued much additional guidance, the *Hensley* rule is still in effect. In *Marek v. Chesny*, the Supreme Court followed *Hensley*'s suggestion to disallow a portion of the hours expended because they occurred after an offer of judgment that ultimately exceeded the judgment obtained.[131] In *Farrar v. Hobby*, the Court took this rule to its logical conclusion and determined that a victory of only nominal damages would normally entitle plaintiffs' counsel to no fee.[132]

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124. Hensley v. Eckerhart, 461 U.S. 424 (1983).

125. *Id.* at 433 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978)); *accord* Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 790–93 (1989).

126. *Id.* at 435.

127. *Id.* at 436.

128. *Id.* at 437.

129. *Id.* at 436–37.

130. *Id.* at 438–40.

131. Mark v. Chesny, 473 U.S. 1, 10–11 (1985).

132. Farrar v. Hobby, 506 U.S. 103, 114–16 (1992).

D. The State of Practice

The preceding sections lay out the development of the lodestar and the limits that the Supreme Court has placed on its use. An appendix has been attached to this Article that includes a hypothetical example of the lodestar's operation in modern practice. Two more features of fee calculations are worth discussing to provide a complete picture of fees litigation: the calculation of the hourly rate and the adjustments made to hours worked.

1. Methods for Calculating the Hourly Rate

The Supreme Court in *Blum* built on the idea that the lodestar was meant to approximate private fee arrangements, stating that district court should calculate hourly rates by looking to the prevailing market rate in the relevant community.[133] But the Court failed to define the "relevant community," instead stating in a footnote only that "the rates charged in private representations may afford relevant comparisons."[134] The Court placed the burden on the party requesting fees to establish that the rate requested was "in line with those prevailing in the community," again without defining the relevant community.[135] Circuit courts have experimented with four distinct ways of calculating the hourly rate.

Most circuits define the community broadly, with lawyers primarily differentiated by their level of experience and by the complexity of the work they engage in.[136] While there are still variations in the application of the complexity factor,[137] and thus broader and narrower approaches within this general rule, this broader-community approach is the most common among the circuits.

Other circuits, such as the Seventh and Eleventh Circuits, narrow the size of the community to the specific public interest legal communities relevant to the immediate case.[138] The distinction be-

133. Blum v. Stenson, 465 U.S. 886, 895–96 (1984).

134. *Id.* at 895 n.11.

135. *Id.*

136. *E.g.*, Student Pub. Int. Rsch. Grp. of N.J., Inc. v. AT&T Bell Lab'ys, 842 F.2d 1436, 1448–49 (3d Cir. 1988); *see also* Christensen v. Stevedoring Servs. of Am., 557 F.3d 1049, 1055 (9th Cir. 2009).

137. *Compare* Hall v. Ochs, 817 F.2d 920, 928 (1st Cir. 1987) (determining the "market rate for skilled litigation services"), *with* Hubbell v. FedEx SmartPost, Inc., 933 F.3d 588, 575 (6th Cir. 2019) (reducing an hourly rate because the reduced hourly rate was still above the 75th percentile for solo practitioners, above the 50th percentile for employment lawyers, and above the 75th percentile for attorneys with offices in the same county).

138. This distinction from the broader approach was first noted by the Third Circuit panel in *SPIRG*, 842 F.2d at 1442–48 (citing Lightfoot v. Walker, 826 F.2d 516, 524 (7th Cir. 1987); Mayson v. Pierce, 806 F.2d 1556 (11th Cir. 1987).

tween this approach and the broader-community approach is not a hard and fast one, but the difference is most noticeable in substantive practice areas in which large firms do not typically practice, therefore depressing prevailing hourly rates in those practice areas.

A few circuits, most notably the Eighth and the D.C. Circuits, have experimented with a community of one; that is, the attorney's own historical billing rates are the relevant community.[139] The community of one is the most straightforward method of calculation. But as an example, the D.C. Circuit, after some time applying this rule, ultimately rejected it due to its unfairness to firms who engaged in representation that had both private sector and public interest elements, as it lowered an attorney's billing rates despite not reflecting their skill level or experience.[140]

The Second Circuit, in 2007, created a framework that it termed the "presumptively reasonable fee," which deviated from the lodestar primarily in its method of calculating an hourly rate.[141] The panel, which included retired Justice O'Connor sitting by designation, stated that the lodestar, as it had been applied, had "deteriorated to the point of unhelpfulness" and should no longer serve as a starting point.[142] Instead, the Second Circuit substituted the rate calculation with a "reasonable hourly rate," which could take the *Johnson* factors into account but should be based on "the rate a paying client would be willing to pay."[143] Although this approach has been criticized as more subjective and problematic for low-value claims,[144] it remains the law of the Second Circuit, similar to but distinct from any of the above methods.[145]

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139. *E.g.*, Johnson v. GDF, Inc., 668 F.3d 927, 933 (7th Cir. 2012); Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, 771 F.2d 1153 (8th Cir. 1985); Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), *overruled by* Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988).

140. *Hodel*, 857 F.2d at 1520–21. The D.C. Circuit now uses the broad definition of community, although its application of "complexity" in public interest cases does place it toward the narrower end of that category. *See* Eley v. Dist. of Columbia, 793 F.3d 97, 103–04 (D.C. Cir. 2015) (reversing because plaintiff had failed to carry their burden of demonstrating that the claimed rates were appropriate for the specific type of case they brought, in this instance an IDEA case).

141. Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 493 F.3d 110 (2d Cir. 2007), *amended opinion and superseded on denial of reh'g*, 522 F.3d 182 (2d Cir. 2008).

142. *Arbor Hill*, 522 F.3d at 190.

143. *Id.*

144. *See* John A. Beranbaum, *Attorney Fees: The Death of Arbor Hill*, 84 N.Y. ST. BAR J. 42, 44–45 (2012).

145. *See* Lilly v. City of New York, 934 F.3d 222, 231–33 (2d Cir. 2019). There is at least some argument to be made that this method is the correct application of the Supreme Court's repeated discussions in the 1980s that upward adjustments were unnecessary because the hourly rate could capture almost every justification

2. *Percentage Cuts as Proxy*

Given the Supreme Court's rejection of most enhancements of the lodestar, the "mathematical" lodestar calculation—that is, the hours expended multiplied by the hourly rate—has functioned for almost thirty years as a hard ceiling in the federal courts. If a judge disallows certain hours from the calculation, there is no enhancement left to make up the difference.

Because fee awards are only reviewed for abuse of discretion, appellate courts largely affirm district courts' cuts to a fee award, by definition, unless those cuts are wildly disproportionate or clearly erroneous. Mere disagreement with the number of hours disallowed or the ultimate size of the award is not, in and of itself, grounds for reversal.[146]

As cases become increasingly complex in nature and the number of time entries for any given case skyrockets, courts have given themselves leeway to avoid having to comb through hundreds or thousands of pages of time entries. Instead, district courts are empowered to employ percentage cuts as opposed to identifying specific time entries to disallow.[147]

3. *An Illustrative Calculation*

Consider Ms. A, an attorney, who wins an employment discrimination case at the summary judgment stage.[148] Ms. A worked with an associate, Mr. B, on the case, and both prepared contempo-

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for an upward adjustment. Justice O'Connor's presence on the *Arbor Hill* panel supports this argument, especially as the 1980s opinions discussed above included her in the majority. However, this does not take away from concerns about the administrability of this approach in particular. *Id.*

146. *See* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 549 (2010) (noting that the Eleventh Circuit had affirmed the award despite commenting that it "would have cut the billable hours more if . . . deciding the matter in the first instance").

147. *See, e.g.*, N.Y. State Ass'n for Retarded Child., Inc. v. Carey, 711 F.2d 1136, 1146 (2d Cir. 1983) (allowing a percentage cut in a case with 16,410 claimed hours, for "[i]n similar cases with voluminous fee applications, courts have recognized that it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application"); Copeland v. Marshall, 641 F.2d 880, 903 (D.C. Cir. 1980) (allowing a 22-percent cut to stand even though no specific accounting had been performed); Northcross v. Bd. of Educ. of Memphis City Schs., 611 F.2d 624, 636–37 (6th Cir. 1979) (endorsing a percentage deduction to eliminate duplication of services as "preferable to an attempt to pick out, here and there, the hours which were duplicative"); *abrogation in part on other grounds recognized by* L & W Supply Corp. v. Acuity, 475 F.3d 737, 739–40 (6th Cir. 2007); Davis v. Bd. Of Sch. Comm'rs of Mobile Cnty., 526 F.2d 865, 868–69 (5th Cir. 1976) (affirming a 56-percent cut in the hourly rate as, instead, a 56-percent cut in the hours claimed, which "would have been justified").

148. This calculation is also laid out in the Appendix, *infra*.

raneous timesheets for their work. The case most notably involved a series of protracted disputes at the discovery stage, and Ms. A delegated most of the discovery requests, review, and strategy to Mr. B. While Mr. B was able to secure all of the relevant discovery and draft a winning summary judgment motion, he also made a few missteps during discovery that led to additional time billed on the case, including time spent on a few weekends before court-imposed deadlines. As a result, some of Mr. B's work was duplicative, and he had to engage in some secretarial activities himself as the assigned paralegal, Mr. C, was unavailable. Ms. A's initial request and the district court's calculations and adjustments are reproduced in the Appendix as well.

Ms. A submits a timesheet claiming 192.7 hours worked at a rate of $460 per hour. She also submits a timesheet for Mr. B of 244.1 hours worked at a rate of $400 per hour and a timesheet for Mr. C for 17.6 hours worked at a rate of $150 per hour. Ms. A's total request is therefore $188,922.

The district court identifies three problematic time entries in Ms. A's timesheet: a 5.4-hour entry before the filing of the complaint simply marked "Reviewed case"; a 2.6-hour entry shortly after a motion to dismiss was filed, marked "Phone call and strategy"; and a 3.8-hour entry before the summary judgment hearing, marked "Prep and strategy." The district court disallows these 11.8 hours entirely from Ms. A's request. In doing so, the district court notices that many of Ms. A's entries include multiple activities aggregated into a single entry, a disfavored practice called "block billing" that may make meaningful review of the timesheets difficult.[149] The district court therefore reduces Ms. A's requested hours, after excluding the three entries, by an additional ten percent.

The district court also finds many of Mr. B's entries block-billed, so the district court reduces his requested hours by ten percent. The court deems Mr. B's duplicative discovery work not "reasonably expended" and reduces Mr. B's request by another 20 percent to account for that duplicative work and other perceived inefficiencies. Finally, because Mr. B's weekend work resulted in various secretarial tasks that Mr. B had to take on himself, the court determines that an additional ten percent of Mr. B's work is secre-

149. *See, e.g.*, Welch v. Metro. Life Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007) (noting that "block billing makes it more difficult to determine how much time was spent on particular activities"); Cadena v. Pacesetter Corp., 224 F.3d 1203, 1215 (10th Cir. 2000) (refusing to adopt a mandatory reduction for block billing but discussing controlling precedent that "admonishes attorneys who wish to recover attorneys' fees not to utilize the practice of block billing").

tarial in nature and thus subject to exclusion under the circuit's rules. The district court thus reduces Mr. B's requested hours by a total of 40 percent. The district court finds Mr. C's hours largely reasonable, but also reduces Mr. C's requested hours by 20 percent due to the inclusion of some secretarial work.

The district court looks to caselaw and determines that each of the hourly rates claimed is too high. Ms. A, as an experienced attorney, receives a rate of $425 per hour rather than $460. But for Mr. B, a junior attorney, the court sets a rate of $295 per hour. Mr. C receives the circuit's standard paralegal rate of $120 per hour. The final award, as a result of the district court's cuts and finding of rates, is $114,099.50.

* * *

Even in state courts, where the *Johnson* factors are largely available to adjust a lodestar calculation upward or downward,[150] the lodestar has almost universally become the starting point, if not the endpoint, for fee analyses. The lodestar has gained acceptance despite a task force report from the Third Circuit itself discussing the lodestar method's drawbacks, barely a decade after the Third Circuit proposed the lodestar as a framework. The next Part is a deep dive into this report, the criticisms that courts and commentators have raised over time, and the solutions proposed to address the problems with the lodestar.

II. THE THIRD CIRCUIT TASK FORCE AND THE LODESTAR'S DRAWBACKS

The lodestar has a certain logic: In order to fairly compensate the attorney for the work they have done, the starting point for the calculation should be the manner in which the attorney would have billed a private client for their work. But even without probing whether the lodestar ultimately encourages attorneys to take fee-shifting cases, the downsides of the lodestar quickly became apparent.

A. The Task Force Report

The Third Circuit became concerned about the impact of its lodestar framework after some practical concerns arose, and it commissioned a task force to recommend either improvements to the

150. Klaiber, *supra* note 81, at 245.

Lindy formulation or an alternative method entirely.[151] In 1985, shortly after the Supreme Court decided *Hensley* and *Blum*, the Task Force issued its report.[152] The report identified nine specific shortcomings of the *Lindy* formulation, condensed here into seven categories. In the fee-shifting context, virtually all, if not all, criticisms of the lodestar that have been offered in the last 50 years fall into one of these 7 categories.[153]

1. Increased Workload and Difficulty of Calculation

First, the Task Force noted that the burden of assessing fee requests largely fell upon the shoulders of district courts.[154] The *Lindy* formulation required "increased documentation" compared to a pure discretion-based regime, and in particular, the advent of "fee hearings (including the use of 'experts')" contributed to a greater use of district court resources.[155] Indeed, especially as litigation becomes more complex, district courts must often review thousands of pages of time entries totaling tens of thousands, or even hundreds of thousands of hours. Even with the use of percentage cuts,[156] courts are likely to expend substantial effort simply to apply the cuts to the appropriate claimed hours, to re-tabulate the hours at various different rates determined by the court, and to confirm the math.[157] Some scholars have estimated that federal judges spend as much as ten percent of their time solely on fee disputes.[158]

2. Lack of Predictability

Despite the theoretical allure of *Lindy*, in practice, the lodestar did not provide a predictable baseline for fee awards.[159] The Task Force singled out the fact that different judges regularly produced

151. THIRD CIRCUIT TASK FORCE, *supra* note 31, at 238 ("In response to Chief Judge Aldisert's question, 'If not *Lindy*, then what?,' the Task Force respectfully submits the following report and recommendations.").

152. *Id.*

153. The Task Force also spent considerable time attempting to address *Lindy* within the context of common-fund cases, a scenario outside the scope of this Article.

154. *Id.* at 246.

155. *Id.*

156. *See supra* Part I.D.2.

157. *See, e.g.*, Pope v. Cnty. of Albany, No. 11-cv-736, 2015 WL 5510944, at *16 (N.D.N.Y. Sept. 16, 2015) (breaking out, in table form, the eight hourly rates applied to members of the two plaintiffs' firms, demonstrating the cuts from each of the eight categories of hours, and the component fees awarded to arrive at a total fee award of $1,602,886.75).

158. Silver, *supra* note 19, at 906–07, 907 n.156.

159. *See* THIRD CIRCUIT TASK FORCE, *supra* note 31, at 246.

wildly divergent fee awards,[160] leading to "a loss of predictability as to treatment, as well as a loss of confidence in the integrity of the fee-setting procedure."[161] The Task Force mentioned, as an example, that courts were far from uniform in addressing ambiguities in the lodestar calculation, including what location's billing market was the proper baseline for a reasonable billing rate.[162]

3. False Sense of Mathematical Precision

The Task Force noted that the number that resulted from the lodestar calculation would "feel" precise in a way that was misleading.[163] The report illustrated this false sense of precision through the example that many lawyers who work primarily on contingent fee agreements do not typically have a customary billing rate, and thus the setting of a customary rate was a legal fiction.[164]

Perhaps more directly, part of this sense of mathematical precision likely comes from the idea of significant figures, a scientific expression of a number's precision.[165] Fee awards, despite attempts to simplify the calculations, typically result in uneven numbers. Taking a random sample—the week of February 24, 2020—federal courts issued fee awards of $17,100;[166] $2,266,666;[167] $17,808;[168] $60,000,000 split 6 ways, with shares between $3,193,191.83 and $21,943,464;[169] $1,916.50;[170] $179,977.80;[171] and $3,937.50.[172] These awards seem more precise than round-number awards of $20,000 or

160. *Id.*

161. *Id.* at 246–47.

162. *Id.* at 249. The Task Force noted a circuit split on the matter of whether the baseline should be the standard rate within the district of the reviewing court or in the locale that the attorney typically practices in. *Id.* at 249 n.39. This circuit split has now been resolved, largely due to the efforts of the Task Force. *See* Bywaters v. United States, 670 F.3d 1221, 1233 n.10 (Fed. Cir. 2012) (collecting cases).

163. THIRD CIRCUIT TASK FORCE, *supra* note 31, at 247.

164. *Id.*

165. Significant figures indicate the degree of uncertainty in a number in scientific contexts. For example: "92.00 is different from 92: a scientist who measures 92.00 milliliters knows his value to the nearest 1/100th milliliter; meanwhile his colleague who measured 92 milliliters only knows his value to the nearest 1 milliliter." *Chapter 5, Significant Figures*, COLUM. CTR. FOR TEACHING & LEARNING, bit.ly/3NkfBpN [https://perma.cc/A2RY-8GWV] (last visited Aug. 9, 2022).

166. Rios v. Wal-Mart Stores, Inc., No. 11-cv-1592, 2020 WL 1000469, at *2 (D. Nev. Feb. 28, 2020).

167. Stevens v. SEI Inv. Co., No. 18-cv-4205, 2020 WL 996418, at *15 (E.D. Pa. Feb. 28, 2020).

168. Baker v. Allstate Ins. Co., No. 19-cv-8024, 2020 WL 978729, at *5 (C.D. Cal. Feb. 28, 2020).

169. Ark. Tchr. Ret. Sys. v. State St. Bank & Tr. Co., 512 F. Supp. 3d 196, 271 (D. Mass. 2020).

170. Morguard, LLC v. Rowe, No. 19-cv-1996, 2020 WL 1479857, at *5 (N.D. Tex. Feb. 26, 2020), *adopted*, 2020 WL 1470967 (N.D. Tex. Mar. 26, 2020).

$2 million. But how precise are these numbers in terms of either the value that the attorneys brought their clients or the actual work the attorneys put into the case? Can we say with any certainty that the $17,808 award was for a greater value of time than the $17,100 award?

Awards specified to the cent strongly imply a degree of precision. The $3,193,191.83 award has nine significant figures, which suggests that $3,193,191.84 would be too high and $3,193,191.82 would be too low. But even if we could estimate the actual value derived—the calculation the lodestar method purports to replicate—that estimate would probably come with uncertainty of hundreds of thousands of dollars in each direction. Indeed, the standard of review on appeal does not directly deal with the amount awarded, at least in part because the conception of fair value itself varies from judge to judge.[173]

4. Manipulation by Results-Oriented Judges

The Task Force noted concerns that judges were too results-oriented in their calculations, aiming for a certain dollar amount or percentage of the overall request.[174] At least one study had indicated that certain judges were systematically awarding roughly 25 percent of the underlying damages award in all cases, regardless of the hours worked, type of case, amount of recovery, or any other factor.[175]

Indeed, the typical deliberative process of a judge encourages this results-oriented thinking, even if it is not malicious in nature. Consider, for example, a judge addressing a substantial fee motion at the end of a civil rights case. The judge sets an hourly rate, disallows some portion of hours, and runs the calculation. Perhaps they end up with a number that they feel is too low. They know that an enhancement for performance or for contingency is not available to them, so instead, they look to the hourly rate to see if they can justify an increase there. If not, perhaps the judge decides to take a

171. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, No. 16-cv-763, 2020 WL 906273, at *3 (S.D. Ind. Feb. 25, 2020).

172. Johnson v. Johnson, No. 17-cv-4840, 2020 WL 901517, at *7 (N.D. Cal. Feb. 25, 2020).

173. *See supra* Part II.A.2; *cf. Perdue*, 559 U.S. at 549 ("The [Eleventh Circuit] held that the District Court had not abused its discretion . . . but the panel commented that it 'would have cut the billable hours more if we were deciding the matter in the first instance' . . . .").

174. THIRD CIRCUIT TASK FORCE, *supra* note 31, at 247.

175. *Id.* at 247 n.31.

closer look at the hours they disallowed to see if the percentage cuts were too large or the invalidation of hours too punitive.

Or perhaps the calculated number seems too high. The judge may think that a fee award larger than the damages, such as the award in *Zastrow*, is absurd. Or perhaps, with a governmental defendant, the judge wishes to avoid wasting public money. But there is no occasion for a *Hensley*-style cut in the number of hours for limited success. Instead, the judge goes searching for other cuts. Perhaps the five-percent cut for overbilling becomes a ten-percent cut. Perhaps the judge identifies an additional cut for conference calls or a similar practice other judges have criticized in the past. The judge knows that the more it looks like they scrutinized the record closely, the less likely it is that the appeals court questions their ultimate award number.

Again, this manipulation does not have to be malicious. But it can still lead to patterns that lack any direct correlation to the value of the attorney's time. And aside from the most egregious cases, such as the 25 percent example above, it is impossible to tell whether a judge was aiming for a particular number based solely on the cuts and adjustments they carried out.

5. Perverse Incentives for Attorneys

The Task Force noted that plaintiffs' lawyers had recognized the benefit of "running the meter" so as to inflate their fee awards in the decade since *Lindy*.[176] Even after accounting for likely percentage cuts and disallowed hours, the general assumption is that an inflated fee request will result in a larger fee award than a by-the-book request. The Task Force also recognized that maximizing the number of hours included in the lodestar calculation was a strong disincentive for the early settlement of cases.[177]

6. Limited Flexibility in Discretion

To build off of the previous point, judges often interpret the efficient administration of justice as encouraging speedy resolution, including settlement, of cases.[178] But despite the wide latitude courts are given in finding an appropriate number of hours worked and a reasonable hourly rate, the lodestar itself does not provide an

176. *Id.* at 248.

177. *Id.*

178. *E.g.*, Marek v. Chesny, 473 U.S. 1, 10 (1985) (noting a "clear policy of favoring settlement of all lawsuits"); *see also* FED. R. CIV. P. 1 (encouraging the "just, speedy, and inexpensive determination" of each case).

easy method for courts to advance these objectives.[179] The Task Force did not have a ready answer here: "On the other hand, greater discretion is likely to exacerbate the lack of [predictability] and contribute to the concerns of the public interest bar . . . ."[180]

7. Disadvantages for Public Interest Attorneys

Hourly rates are typically lower for civil rights cases than they are for "the so-called 'money' cases, such as securities and antitrust actions."[181] A plausible explanation for this discrepancy is that civil rights cases often seek nonmonetary relief, and proper compensation for time reasonably expended may appear to dwarf the actual relief obtained.[182] For judges who see the result of their initial calculation and feel that the recovery is too high, the hourly rate is an easy place to adjust downward, and once the lower rate is in the caselaw, it can perpetuate indefinitely. The Task Force recognized that there was at least some reluctance among attorneys to accept civil rights cases due to low award amounts.[183]

B. The Third Circuit Task Force's Recommendations

The Task Force recommended preserving the lodestar for statutory fee-shifting cases.[184] However, the Task Force recognized many of the lodestar's shortcomings and suggested three major reforms that might improve the administration of lodestar calculations, although it recognized that *Blum* in particular might limit the flexibility available to courts in implementing their suggestions.[185]

The first reform the Task Force suggested was to set a uniform hourly rate schedule in each district so that parties would not have to engage in fees litigation on the hourly rate portion of the calculation.[186] Although the Task Force preferred a single rate for all legal work, it recognized the value of differentiating at least by experience, and so suggested a simple experience-based table that would be "uniformly applied to all lawyers and in all cases."[187] The Task

179. THIRD CIRCUIT TASK FORCE, *supra* note 31, at 248.
180. *Id.*
181. *Id.*
182. *Id.* at 248–49.
183. *Id.* at 249.
184. *Id.* at 259.
185. *Id.* at 259–60. Two other major reforms were suggested, but one has since been mooted by the Supreme Court and the other was a suggestion to apply all reforms equally. *Id.* at 265–70.
186. *Id.* at 260.
187. *Id.* at 260–61. The Task Force did believe that a district court should retain the power to deviate in an exceptional case, but only in an exceptional case. *Id.* at 261–62.

Force therefore recommended that the Third Circuit adopt the "forum rule": Courts should generally set rates based on the location of the litigation, except when "the special expertise of counsel from a distant district" is necessary or local counsel is unwilling to handle the case.[188] The Task Force concluded that the gains in objectivity and efficiency would offset the potential overpayment or underpayment that might result.[189]

Second, the Task Force suggested that encouraging discussion of fees as early in the litigation as possible would be useful, recommending mechanisms similar to current case management conferences under Rule 16 or Rule 26 of the Federal Rules of Civil Procedure.[190] Establishing a benchmark number or range at an early stage in the litigation might discourage "excessive discovery or any other lawyer hyperactivity."[191] Although judges would retain their full power to address individual time entries at the fee litigation stage, an earlier understanding of a case's fee award potential might encourage both plaintiffs' counsel and defense counsel to treat settlement more realistically.[192]

Third, the Task Force suggested eliminating the performance multiplier and mandating the contingency multiplier.[193] The performance multiplier would be implicitly accounted for by the hourly rate schedule described above, and its elimination would remove the potential for its discriminatory application.[194] However, in statutory fee cases, "[p]laintiffs' attorneys always face the prospect of receiving no compensation."[195] Even if the enhancement were minimal in most cases, mandating application of the contingency multiplier would best capture the actual incentive that an attorney would have to take a case.[196]

The Task Force also noted that courts would be prudent to consider two timing factors, although they did not frame these as full-fledged recommendations. First, the delay in receiving fees, which might merit either interest or an award at current hourly rates

188. *Id.* at 261 (quoting Polk v. N.Y. State Dep't of Corr. Servs., 722 F.2d 23, 25 (2d Cir. 1983)).

189. THIRD CIRCUIT TASK FORCE, *supra* note 31, at 261.

190. *Id.* at 262.

191. *Id.* at 263.

192. *Id.*

193. *Id.* at 264–65.

194. *Id.* at 265.

195. *Id.*

196. *Id.* The Supreme Court's subsequent rejection of the contingency multiplier, which made this recommendation impossible for judges to implement on their own, is discussed above in Part I.C.2.

rather than at historical rates.[197] Second, any influence that the fee applicant had on the slow resolution of the case, so that any indication of delay by the applicant in an attempt to inflate the lodestar calculation would be grounds for a reduced award.[198]

The Third Circuit did ultimately adopt the forum rule recommended by the Task Force, although the court did not speak unambiguously on the issue for some years.[199] But the Third Circuit did not adopt any of the three major reforms in full. The Supreme Court's rejection of the contingency multiplier rendered the Task Force's third major reform impossible for judges to implement, and widespread adoption of rate schedules[200] and fee discussions at case management conferences have not yet occurred.

C. Other Proposed Solutions

A wide range of other options have been proposed in the last several decades.[201] A common starting point for scholarly commentary is the Task Force's conclusion that "[e]arly, frank discussion of fee matters . . . should have the salutary effects of identifying problems at the outset and improving the process' predictability should plaintiffs prevail."[202]

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197. *Id.* at 265.

198. *Id.*

199. *See* Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 704–05 (3d Cir. 2005) (adopting the forum rule by invoking the Task Force report).

200. *See, e.g.*, Harrell v. City of New York, No. 14-cv-7246, 2017 WL 9538163, at *7 (S.D.N.Y. July 20, 2017) ("The reality is that courts in this District have approved a wide range of rates for attorneys engaged in civil rights work. As has often been noted, '[p]recedent in the Southern District of New York demonstrates that a reasonable hourly rate for a civil rights attorney can range from $250 to $650' . . . .") (quoting Coakley v. Webb, No. 14-cv-8438, 2016 WL 1047079, at *3 (S.D.N.Y. Mar. 10, 2016)).

201. One obvious but ultimately irrelevant outlier is Alaska Rule of Civil Procedure 82, which explicitly provides for an award-taxing scheme for both plaintiffs and defendants. Rule 82 states that the prevailing party in a civil case, upon motion, "shall be awarded attorney's fees calculated under this rule." ALASKA. R. CIV. P. 82(a). The rule then provides a rate schedule in a case with a monetary award and states that in cases with no monetary award, the fees are set at a proportion of "the prevailing party's reasonable actual attorney's fees which were necessarily incurred." ALASKA. R. CIV. P. 82(b)(1)–(2). The calculation is allowed to be adjusted based on 11 enumerated factors which largely resemble the *Johnson* factors. ALASKA. R. CIV. P. 82(b)(3). Oddly, despite the seeming wide effect that this rule should have, only about 10 percent of civil cases result in an award of Rule 82 fees, and most attorneys stated that Rule 82 was only a minor consideration in the way that litigation proceeded. Susanne Di Pietro, *The English Rule at Work in Alaska*, 80 JUDICATURE 88, 89 (1996). Because this award is explicitly designed to only partially compensate an attorney, and because Rule 82 yields to other fee-shifting statutes in Alaska law, it has little practical import as a solution here.

202. THIRD CIRCUIT TASK FORCE, *supra* note 31, at 262.

One such proposal would require the plaintiff to submit a fee arrangement with their complaint, after agreeing upon one with their attorney. Any defense objections to the reasonableness of the arrangement would be referred to a special magistrate at an early stage in the litigation.[203] The magistrate would make every effort to have the parties resolve the issue themselves, but would occasionally step in to reduce an award if a defendant could demonstrate by clear and convincing evidence that a reduction was warranted.[204] Once the issue was resolved, whether by the magistrate or by the parties, the agreement reached would govern the ultimate award of fees and, if an hourly fee structure was chosen, the magistrate would hear any disputes over claimed hours after the litigation concluded.[205] A similar proposal suggests that rather than allow the plaintiff and plaintiff's attorney flexibility, a brief hearing with a special master should simply set an hourly rate for counsel at the outset of litigation.[206]

Other proposals fiddle with the calculation rather than the timing. One commentator has called on the Supreme Court to promote predictability by explicitly disavowing the *Johnson* factors as potential adjustments to the lodestar calculation.[207] Another has stated that a defendant's challenge to a plaintiff's hours should identify specific time entries, and that a plaintiff should be required to justify the specified time entries or concede them, leaving the judge a clear record of time entries that require resolution.[208]

Another proposal insists that contingency fee frameworks be considered as an alternate method of calculation, either in every case as a lodestar alternative or specifically in cases where counsel has entered into a contingent fee agreement with their client.[209] Although this alternative creates extra work, the argument is that it more closely approximates a practice area where contingent fee agreements are common.[210]

These are all admirable proposals to tackle a difficult issue. And it is clear that something must be done. But many of these

203. Silver, *supra* note 19, at 901–07.

204. *Id.* at 904.

205. *Id.* at 904–06.

206. Klaiber, *supra* note 81, at 255.

207. Kristin A.C. Olin, Comment, *Unreasonable Calculations of "Reasonable" Fees:* Perdue v. Kenny A. ex rel. Winn *and the Supreme Court's Ongoing Struggle with 42 U.S.C. § 1988*, 44 LOY. L.A. L. REV. 1113, 1130–31 (2011).

208. Klaiber, *supra* note 81, at 257–58.

209. *See* George Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31 LOY. U. CHI. L.J. 599, 633–36 (2000).

210. *Id.* at 637.

proposals are designed to address one concern of fee-shifting by exacerbating another, often judicial workload. Proposals for the parties to create a specific record of contested time entries might save a judge from combing through voluminous records. But these proposals simply shift the work from the judge to the defendant, resulting in the exact same "second major litigation" that the Supreme Court discouraged.[211] And these proposals do not save the judge from having to rule on each of these objections, potentially creating more work than the current percentage-cut scheme does. And an early-stage hearing on the question of fees not only results in the same second major litigation, but also forces that second major litigation in cases when the plaintiff may not prevail at all.

Considering contingent fees would require the court to engage in a second onerous calculation. And disavowing the *Johnson* factors would simplify the calculation, but it would also exacerbate the influence of an attorney trying to maximize their fee award by overbilling. And perhaps more importantly, none of these proposals is designed to address most, let alone all of the concerns about fee shifting identified by the Task Force report. For example, after implementing almost any of these reforms, the incentive for plaintiffs' lawyers to bill heavily and prolong litigation would still exist.

In the next Part, this Article argues that an examination of the use of discretion in the framework, and of our understanding of discretion itself, is the key to finding a solution that will be both fair and administrable.

III. IN SEARCH OF PREDICTABILITY: DEGREES OF DISCRETION

A. The Legal Fiction of the Lodestar Mirroring the Market

Given the legislative history of fee-shifting statutes,[212] it is curious that judges, practitioners, and commentators uniformly insist on calculating fees in a way that mirrors the operation of the market. The fee-shifting mechanisms exist because the market has failed to encourage enforcement of these laws. Bringing a negative-value claim is inherently non-economic in nature.

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211. Further, this only works if current practice results in overbroad and careless objections by defendants. Carefully reasoned and judicious objections should, at least in theory, look similar to the responses that defendants already file. And if in practice defense objections to fee requests are already overly broad, this mechanism does not meaningfully discourage defense objections from being similarly broad.

212. *See supra* Part I.A.

Four methods of calculating hourly rates were discussed in Part I.[213] But if we assume that we are setting hourly rates for an area of law that largely produces negative-value claims, three of those four methods require data from prior fee-shifting awards in order to work. Only defining the relevant community by location and complexity, the first method discussed above, allows for an attorney specializing in negative-value claims to logically calculate a rate from first principles. The approaches based on market rates in the attorney's practice area and on the attorney's prior billing rates must draw from other awards for negative-value claims in order to arrive at a number. And the "reasonable hourly rate" is based on "the rate a paying client would be willing to pay,"[214] which logically caps the fee award at the level of the monetary recovery.

Do these attempts to approximate the market make sense? Courts have managed to muddle through with them, but the insistence on finding fixes and workarounds within this framework directly creates many of the issues outlined by the Third Circuit Task Force.

What's more, the market that the lodestar tries to approximate may not even exist. Contingent-fee arrangements are and have been common for the entire duration of the lodestar's existence. In addition, the billable hour appears to be on its way out. Although most firms still retain hourly billing in certain contexts or for certain clients, 94 percent of firms reported using some form of non-hourly billing for some clients as early as 2010.[215]

If the lodestar has to engage in economic fictions to work, and the economic fictions are no longer accurate, the lodestar's present value is limited, even if the lodestar is consistent with the legislative intent of fee-shifting statutes. But the lodestar does not even fulfill the stated purpose of those statutes: to encourage enforcement of certain rights.

Under the lodestar framework, there is still considerable risk for plaintiffs' attorneys taking on fee-shifting cases, due to the potential reductions that the court could assess years into the future.

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213. *See supra* Part I.D.

214. Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 493 F.3d 110 (2d Cir. 2007), *amended and superseded on denial of reh'g by* Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182 (2d Cir. 2008).

215. Ellen Freedman, *Alternative Fee Arrangements: Not a Passing Fad*, 39 PA. LAW. 30, 31 (2017); *see also* Steven T. Taylor, *Alternative Fee Spending Spikes as Some Firms Embrace Change*, 35 OF COUNS. 1, 1 (2016) (noting $21.3 billion in legal fees assessed through alternative fee arrangements other than contingent or hourly billed fees).

When an attorney decides to take on a representation covered by a fee-shifting statute, the lodestar's allowance of only downward adjustments[216] creates an expectation that the attorney will ultimately be somewhat undercompensated for their time. And given that the Supreme Court has deemed upward adjustments for contingency impermissible, the only way for an attorney to account for that risk is by inflating their initial fee request. In a system such as this, uncertainty is unavoidable.

B. Degrees of Discretion

At its heart, the problem with the lodestar is one of discretion. Attorneys have the discretion to adjust their billing practices to maximize their initial request, and judges have the discretion to use percentage cuts to arrive at almost any award. The supposed elegance of the lodestar method has been swallowed by the adjustments, and the adjustments are almost as standardless as the *Johnson* factors. Indeed, in the Fifth Circuit, where Zastrow's case arose, the *Johnson* factors are explicitly used to adjust the lodestar calculation.[217] These adjustments ensure that substantial unpredictability is baked into the process.

Judges have three different opportunities to adjust the numbers as they see fit: (1) adjusting the total number of hours worked, (2) adjusting the hourly rate, and even (3) adjusting the total after multiplication.[218] These options are three separate degrees of discretion[219] that a judge can introduce individually or in combination. Think of them as three separate numerical sliders that a judge is allowed to move up and down until the judge reaches a result that they think makes sense.

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216. *See supra* Part I.C.

217. *Zastrow*, 695 F. App'x at 779.

218. Even if the fee-shifting statute does not allow a contingency enhancement, judges retain the ability to adjust downward as discussed in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

219. Modeled off of degrees of freedom, a term in use in numerous scientific contexts but referring generally to the number of independent variables that can change while remaining within the constraints of the system. *See, e.g.*, Anascape, Ltd. v. Nintendo of Am., Inc., 601 F.3d 1333, 1334 (Fed. Cir. 2010) (describing the six standard degrees of freedom as they relate to movement through space); Renishaw P.L.C. v. Marposs Societa' Per Azioni, 974 F. Supp. 1056, 1064–65 (E.D. Mich. 1997) (describing the six standard degrees of freedom as they relate to movement though space); *Degrees of Freedom: What Are They?*, STAT. HOW TO, https://bit.ly/3PhV85P [https://perma.cc/6FLD-F4EJ] ("Degrees of freedom of an estimate is the number of independent pieces of information that went into calculating the estimate.") (last visited Aug. 9, 2022).

Having multiple sliders can be useful, if some or all of them are reasonably constrained and the differences in the final result are easily traceable to one of the three sliders. A framework that has reasonable constraints can be both predictable and reviewable on appeal. But aside from the ceiling the Supreme Court has set, the judge has nearly absolute control over the sliders in the fees context, which means they can freely rely on any of these adjustments for any cut that they can justify subjectively.

The availability of percentage cuts exacerbates this problem. Percentage cuts might be necessary to ensure that courts do not get bogged down in reviewing individual time entries, but if courts do not actually have to identify time entries to adjust hours worked, moving those sliders becomes much easier for judges.

The Third Circuit Task Force identified this issue, at least indirectly, in discussing the follies of "results-oriented judges."[220] But the Task Force did not take the next step: identifying why these three degrees of discretion were granted to courts in the first place. This wide toolbox of adjustments only exists because the plaintiff's attorney, rather than the judge, sets the baseline for the fee inquiry: the total number of hours worked and the requested hourly rate. There are essentially no constraints on the plaintiff's initial fee request, meaning that the lodestar method necessarily begins with variability and unpredictability at its heart. And the only way for the judge to counteract that variability is with more variability. In a system with any consistent starting point, such a complex system of adjustments would not be necessary. And although the hope is that the judge could appropriately create consistency from case to case with the sliders they retain, doing so would be difficult enough in a simpler system. The initial variability, on top of the lengthy time between cases and the numerous circumstantial differences, makes it virtually impossible.

C. Reducing Degrees of Discretion by Unchaining Fees from Hours Worked

The use of a self-reported number of hours as the starting point for every calculation renders predictability impossible. Instead, a more consistent starting point would simplify all aspects of the calculation process and simultaneously encourage greater enforcement of civil rights statutes governed by fee shifting.

Standardizing that starting point likely would allow the courts to condense their discretion, or at least make exercises of that dis-

220. *See supra* Part II.A.4.

cretion more reviewable. Fee awards will always need some freedom for adjustment, as no two cases are ever the same, and some are wildly different. But courts might not need more than one degree of discretion to properly adjust the fee award to a satisfactory level, as long as the courts start from a robust baseline.

The Supreme Court's prohibition on the contingency multiplier, and other similar quirks of caselaw, can even be preserved in this new hypothetical framework.[221] A more useful change for plaintiffs' attorneys would be to provide a clearer minimum bound for fees. Doing so would create welcome predictability for all parties involved, especially if it would regularize the starting point of any calculation.

Notably, the panel in *Lindy* implied that they were creating the lodestar method based on necessity, stating that this baseline was "the only reasonably objective basis for valuing an attorney's services."[222] But in the present day, we have the benefit of something that the Third Circuit in 1973 and the Third Circuit Task Force in 1985 did not have: several decades of experience with the lodestar.[223] And the caselaw created in the meantime can be used to set a more predictable baseline for fee awards that is not dependent on the billing practices of the plaintiff's attorney.

D. Who Benefits from Predictability?

1. Plaintiffs' Attorneys

Plaintiffs' attorneys are often disadvantaged in the context of fee shifting. Although the lodestar is generally the law of the land, many judges balk at fee awards that are similar in size to, or perhaps even larger than, the monetary recovery of the plaintiff. But these negative-value claims, where the attorneys' fees are likely to be greater than the potential recovery, are precisely the cases for which attorneys must be compensated properly if we endorse the legislative history of the fee-shifting statutes. The legislative history

221. Reinstating that contingency multiplier, even if it worked properly in practice, would likely only address cases in which the plaintiff lost altogether, rather than cases in which the plaintiff won but had a fee award reduced. And it would still likely leave plaintiffs' attorneys with a substantial risk when assessing a representation unless the chances of a low fee were curtailed.

222. Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

223. *Cf.* Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1608–13 (2016) (discussing the data-driven tweaks to the Sentencing Guidelines being made over the last decade and other areas where data can inform adjustments to the Sentencing Guidelines).

insists that attorneys should not be deterred from taking meritorious cases due to the risk of a meager fee recovery.

A predictable baseline for fee awards removes substantial uncertainty from an attorney's decision to take a meritorious case at its inception. If the attorney knows the approximate value of the case ahead of time, these cases are easier for the attorney to accept, and they can sustain an attorney or firm's practice. Attorneys can specialize more sustainably in the litigation that fee-shifting statutes are meant to encourage. These developments in turn allow attorneys to build expertise and become more effective in enforcing plaintiffs' rights.

2. Plaintiffs

The ability of plaintiffs' attorneys to take negative-value claims clearly benefits plaintiffs. Plaintiffs with negative-value claims are more likely to find attorneys willing to represent them under this predictable scheme. Legal communities with this expertise will also lead to higher visibility and more opportunities for outreach to plaintiffs who are unaware their claims exist. And to the extent that creating a more predictable fee framework generates more cases, this threat may cause a potential defendant to take more care ahead of time and may deter them from the conduct giving rise to the claims in the first place.[224]

3. Defendants

While it may seem counterintuitive at first, a more predictable fee structure also benefits defendants. For the defendant, a standardized calculation ensures that the extent to which the other party can run up fees is limited. This backstop allows the defendant to better understand the potential liability they might face and make litigation decisions, or even compliance decisions, with more information.

Consider: In statutory fee-shifting cases, the purpose of the fee award is expressly not to punish the party liable for fees.[225] However, given the wide disparity of current legal practices, a prospective plaintiff's choice of lawyer might significantly influence the ultimate fee award. If a plaintiff chooses a large firm to represent

224. *Cf.* NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, FIVE THINGS ABOUT DETERRENCE (2016), bit.ly/3yh5n5f [https://perma.cc/X59V-J69V] (noting in the criminal context that the certainty of consequences has a far greater effect on deterrence than the severity of the consequences).

225. *E.g.*, Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981) (quoting Perez v. Univ. of P.R., 600 F.2d 1, 2 (1st Cir. 1979)).

them, the defendant may ultimately be on the hook for a fee award several times larger than if the plaintiff had chosen a solo practitioner, even if the firm's litigation strategies were similar to the solo practitioner.

In addition, defendants benefit from the weakening of perverse incentives that discourage plaintiffs' attorneys from settling. To the extent that early settlement can be more easily encouraged, a defendant's potential exposure to large fee awards also decreases. A defendant should therefore welcome additional predictability in the fee-setting context.

4. Judges

Judges, by some estimation, spend ten percent of their time and resources on fee requests.[226] Any regime that reduces this proportion frees up judges and clerks to work on other matters. In particular, if a judge no longer has to consult voluminous time records to rule on a fee request, the amount of time spent on these requests may be reduced to a tiny fraction of judges' current efforts.

E. Why Lodestar Tweaks Fail

In this context, it becomes clearer why the alternatives proposed in the literature do not solve the problem. Simply addressing the hourly rate at the outset of litigation does not fix the inherent problem with allowing the plaintiff's attorney to set the baseline and then giving the judge discretion to adjust that baseline. Disallowing consideration of the *Johnson* factors without addressing the variability of the baseline might even worsen the lack of predictability in the current system and deter plaintiffs' attorneys from taking the cases Congress meant to encourage them to take. And considering a contingent fee arrangement as an alternative is also unhelpful, at least for negative-value claims.

The problem, and thus the solution, lies deeper. But the federal courts already have some experience in taking a regime with nearly unfettered discretion and providing more constraints while preserving limited discretion.

IV. THE FEDERAL FEES COMMISSION: A SENTENCING FORMAT FOR FEES

To set a predictable baseline for fee requests, a standardized calculation is necessary. But that standardized calculation must al-

226. Silver, *supra* note 19, at 906–07, 907 n.156.

low a judge to retain at least one degree of discretion to adjust the award upward or downward to account for external factors. A system like this already exists in federal practice: the Federal Sentencing Guidelines. Creating a Guidelines-style system for fee awards would finally solve the puzzle of fairness and predictability while also curbing the sprawl of fees litigation.

A. An Overview of the Federal Sentencing Guidelines

1. Purpose of the Federal Sentencing Commission

The Federal Sentencing Guidelines were the product of the Federal Sentencing Commission, an agency created by the Sentencing Reform Act of 1984.[227] The goal of the Commission was to replace a regime where federal judges had virtually unfettered discretion to sentence within the statutory ranges. The Commission sought to create a framework that provided more predictability while still allowing judges some level of discretion.[228] The original members of the Commission studied early guidelines experiments in places like Minnesota, Pennsylvania, and Washington,[229] and they analyzed more than 10,000 federal sentences in order to create a series of guidelines that approximated the average sentencing practice at the time.[230]

The Guidelines, and any subsequent amendments, are approved by Congress and thus have the force of law,[231] although they are advisory in nature.[232] The Sentencing Commission has published periodic amendments to the Guidelines, which now number over 800,[233] although plenty of concern remains as to whether the Commission is sufficiently responsive to changing attitudes.[234]

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227. Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1183–87 (2017).

228. *Id.* at 1169–76.

229. *Id.* at 1197.

230. *Id.* at 1198–99. However, in certain areas where the Commission believed that sentence lengths should increase, they adjusted the Guideline calculations accordingly. *Id.* at 1272–74.

231. United States v. Mistretta, 488 U.S. 361, 393–94 (1989).

232. *See* United States v. Booker, 543 U.S. 220, 259 (2005).

233. *Policymaking*, U.S. SENT'G COMM'N, bit.ly/3Ab6hlj [https://perma.cc/M9GC-J9WM] (last visited Aug. 7, 2022).

234. For example, practitioners and scholars have decried the specific offense enhancements for child pornography as outdated and unmoored from facts for a decade, but no reform has occurred as of February 2021. *See e.g.*, TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES (2009); Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16

2. Initial Calculation: Careful Guidance

The Sentencing Guidelines, much like the lodestar, are geared toward an initial calculation that combines two numbers. For the Sentencing Guidelines, these numbers are the offense level and the criminal history category. But, unlike the lodestar, these two numbers exist on finite scales with discrete steps. Currently, the offense level for a conviction can range from 1 to 43,[235] and there are 6 criminal history categories. This structure results in a sentencing table that makes it easy to look up any combination of offense level and criminal history category to identify a preliminary sentencing range.[236]

The Sentencing Guidelines are split into eight chapters, three of which (Chapters 2–4) are directly relevant to the calculation.[237] Chapter 2 is by far the most voluminous, making up over half of the Guidelines' total page count.[238] Chapter 2 sets the offense level for 59 separate types of offenses, distilling hundreds of criminal statutes into broader categories.[239] A description of Section 2K2.1, which addresses firearms possession and transfer offenses, may be instructive for present purposes.[240]

Subsection (a) of each section of Chapter 2 sets out the possible base offense levels for the crime described using various broad distinctions. In the case of Section 2K2.1, there are 8 possible base offense levels ranging from 6 all the way up to 26, largely depending on the defendant's criminal history and the type of firearm involved.[241] Subsection (b) then sets out "Specific Offense Characteristics," which can increase or decrease the offense level based on more specific facts that may be present or absent in a defendant's

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RICH. J.L. & TECH. 8, 12–25 (collecting judicial objections to the operation of the relevant child pornography guidelines).

235. Calculations may result in an offense level greater than 43, but the Guideline sentence for a conviction carrying an offense level of 43 or greater is life. *See* U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (2016).

236. *See id.*

237. Chapter one outlines the general principles of the Guidelines, Chapter five discusses the types of sentences available to judges, Chapter six discusses general sentencing procedures, Chapter seven discusses violations of supervised release, and Chapter eight discusses sentencing of organizations. *See* U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL (2016).

238. *See* U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL (2018) (spanning from pages 50–344).

239. *See id.*

240. As stated in the commentary, this covers virtually all federal firearm possession statutes, including not only provisions of 18 U.S.C. §§ 922 and 924, but also 18 U.S.C. §§ 1715 and 2332g and 26 U.S.C. § 5861. *Id.* § 2K2.1 cmt. Statutory Provisions.

241. *See id.* § 2K2.1(a).

case.[242] For example, if the firearm was used in connection with another offense, that merits a 4-level increase in the offense level and, if the resulting offense level is below 18, an increase to level 18.[243] Section 2K2.1 also includes a Subsection (c), which discusses instances in which a different guideline's provisions should be used—for example, if death resulted, the homicide guideline should be used if the resulting guideline range would be higher than the result under Section 2K2.1.[244] Each Chapter 2 guideline comes with extensive commentary, typically devoted to defining terms[245] and providing additional guidance on how to apply specific offense characteristics.[246]

Chapter 3 discusses potential adjustments to the offense level calculated in Chapter 2 for non-offense-specific reasons. This includes adjustments for role in the offense,[247] obstruction,[248] and acceptance of responsibility,[249] but it also includes a detailed process for merging the offense levels of multiple counts into a single combined offense level.[250]

Chapter 4 determines a defendant's criminal history. Each prior conviction is generally assigned one, two, or three points based on the length of sentence imposed,[251] unless the conviction is either too old or too minor to qualify.[252] A defendant also receives two points if they were under supervision at the time of the offense.[253] These points are combined and then distilled into a criminal history category.[254]

For example, consider a defendant, Mr. A, who recently served 13 months in state custody for a drug trafficking felony, is out on parole, and has several convictions from 20 to 25 years ago. Mr. A is stopped on the street for suspected drug activity, and the police

242. *See id.* § 2K2.1(b).
243. *Id.* § 2K2.1(b)(6)(B).
244. *Id.* § 2K2.1(c)(1)(B).
245. *See id.* § 2K2.1 cmts. 1–3.
246. *Id.* § 2K2.1 cmts. 5–6, 8–9, 13–14. Although the commentary to the Guidelines is often treated as definitive, some jurisdictions have determined that because they are not reviewed by Congress, they cannot supersede contradictory provisions of the Guidelines themselves. *See* United States v. Havis, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc).
247. *See* U.S. SENT'G COMM'N, *supra* note 238, §§ 3B1.1–.2.
248. *See id.* § 3C1.1.
249. *Id.* § 3E1.1.
250. *See id.* §§ 3D1.1–.5.
251. *Id.* § 4A1.1.
252. *See id.* § 4A1.2.
253. *See id.* § 4A1.1(d).
254. Provisions for special cases such as career offender status under §§ 4B1.1–.5 are not relevant to the question of fees and are thus not covered here.

frisk him for safety. They find a handgun with a scratched-off serial number in Mr. A's jacket, and he is charged and pleads guilty to being a felon in possession of a firearm.[255] Because of Mr. A's prior conviction for a controlled substance felony, his base offense level is 20.[256] The 2-level enhancement for an obliterated serial number applies, raising his total offense level to 22.[257] But Mr. A pleads guilty and receives a 3-level reduction in his offense level, resulting in a final offense level of 19.[258]

As for Mr. A's criminal history, his recent 13-month sentence on the prior drug trafficking felony receives 2 criminal history points.[259] But his older convictions are too old to qualify.[260] However, since Mr. A was still on parole when police found him with the gun, two criminal history points are added.[261] This results in a total criminal history score of four, which is a criminal history category III.[262] An offense level of 19 and a criminal history category of III, according to the current version of the Sentencing Table, result in a Guideline-range sentence of 37 to 46 months.[263]

3. Sentencing Discretion: Departures and Variances

The voluminous guidance provided by the Sentencing Guidelines does not mean that courts lack discretion in calculating the Guideline range. If a judge determines that a case is atypical and "falls outside the 'heartland' to which the United States Sentencing Commission intends each individual guideline to apply," they can impose a departure, either full or partial, from that Guideline provision.[264] A departure does not directly shift a defendant's sentence; instead, it shifts the entire Guideline range from what was initially calculated. In addition to these departures, courts may impose variances, where the sentence pronounced is outside the post-departure Guideline range.[265]

For example, a sentencing judge could use Mr. A's lack of criminal history for 20 years or the relatively minor offense conduct on his drug offense to determine that category III would "substan-

255. *See* 18 U.S.C. § 922(g)(1).
256. *See* U.S. SENT'G COMM'N, *supra* note 238, § 2K2.1(a)(4)(A).
257. *Id.* § 2K2.1(b)(4)(B).
258. *See id.* §§ 3E1.1(a)–(b).
259. *Id.* § 4A1.1(b).
260. *See id.* § 4A1.2(e).
261. *Id.* § 4A1.1(d).
262. *See* U.S. SENT'G COMM'N, *supra* note 235, ch. 5, pt. A.
263. *Id.*
264. United States v. Rita, 551 U.S. 338, 344 (2007) (quoting U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL § 5K2.0(a)(2) (2005)).
265. *See* United States v. Booker, 543 U.S. 220, 259 (2005).

tially over-represent[ ]" Mr. A's criminal history.[266] This determination would allow the court to *depart* downward to criminal history category II, which would result in a new Guideline range of 33 to 41 months.[267] Or, in the alternative, the sentencing judge could simply *vary* downward to impose a below-Guideline sentence of 33 months, based on any mitigating factors the judge identifies on the record. In the fiscal year 2019, roughly half of all sentences were within the original Guideline range, with the remaining half split roughly evenly between departures and variances.[268]

4. Appellate Review

Appellate review of criminal sentences is cabined into two related but distinct inquiries: procedural reasonableness and substantive reasonableness.[269] These inquiries are subject to the abuse of discretion standard shared by fee awards, but their scope is different. Procedural reasonableness focuses on the accuracy of the guideline calculations, whether the court considered improper factors, and the sufficiency of the explanation for the sentence imposed.[270] Substantive reasonableness focuses on the actual length of the sentence, the totality of the circumstances, and whether any variance from the Guideline range (or any non-variance) was justifiable given the facts of the case.[271] As a general matter, most circuits require a defendant to object at the sentencing hearing with some particularity, or the arguments will be subject to plain error review.[272]

B. The Federal Fees Guidelines

The Sentencing Guidelines are the subject of many critiques. They may unfairly disempower judges to make difficult fact-based decisions about sentencing.[273] They may not actually eliminate bias

266. U.S. SENT'G COMM'N, *supra* note 238, § 4A1.3(b)(1).

267. *See* U.S. SENT'G COMM'N, *supra* note 235, ch. 5, pt. A.

268. *See* U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 (2019). Only about 0.5 percent of cases resulted in an upward departure and 2 percent resulted in an upward variance. *Id.* The rest were all downward departures and variances. *Id.*

269. *See* Gall v. United States, 552 U.S. 38, 51 (2007).

270. *See id.*

271. *See id.*

272. *See, e.g.*, United States v. Flores-Mejia, 759 F.3d 253, 256–57 (3d Cir. 2014) (en banc); United States v. Bostic, 371 F.3d 865, 872–73 (6th Cir. 2004).

273. *See, e.g.*, James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. ECON. 271, 302 (1999) ("By giving prior actors (law enforcement officials, probation officers, and prosecutors) more influence over the ultimate

from the system.[274] Regardless, guidelines make sense for fees in a way that they might not for criminal sentencing. Again, the purpose of each endeavor informs this distinction.

Criminal sentencing is meant to be an individualized determination, one that takes relevant aggravating and mitigating facts into account.[275] Whether or not these facts are accounted for in the Guidelines calculation, a judge is required by statute to consider over a dozen other factors, which include: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; (4) the need to afford adequate deterrence to criminal conduct and to protect the public from further crimes; and (5) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment.[276]

The Guidelines are inherently in tension with these goals of sentencing. They tend to reduce variation between individuals, whether or not that is desirable.[277] But in the fee-setting context, reducing variation is consistent with the goals of the underlying fee-shifting statutes. The ability to expect a certain level of compensation, rather than an inscrutable maze of adjustments, is therefore valuable in the context of calculating fees even when that same predictability may not make sense in the context of a criminal defendant's liberty. As a result, a Guidelines-style framework serves the purpose of fee-shifting statutes even more effectively than it serves the purposes of criminal sentencing.

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sentence, the Guidelines provide opportunities for these earlier actors to pursue their own agendas that did not exist pre-Guidelines."); Don J. DeBenedictis, *How Long is Too Long?*, 79 A.B.A. J. 74, 74, 79 (1993) ("Seventy-six percent of federal judges, compared to 59 percent of state judges, think sentencing guidelines give prosecutors too much power in plea bargaining.").

274. *See* Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of* Gall*,* Kimbrough*, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 145–46 (discussing the bias inherent in the sentencing ranges created by the Sentencing Commission).

275. *See* Rita v. United States, 551 U.S. 338, 348 (2007) (quoting 28 U.S.C. § 991(b)).

276. 18 U.S.C. §§ 3553(a)(1)–(2); *see also* §§ 3553(a)(3)–(7).

277. *See* Griffin Edwards, Stephen Rushin & Joseph Colquitt, *The Effects of Voluntary and Presumptive Sentencing Guidelines*, 98 TEX. L. REV. 1, 41–55 (2019) (noting a substantial drop in sentencing variance between judges when switching to presumptive sentencing guidelines and, within a small sample size, virtual elimination of racial disparities in sentencing as a result).

1. The Federal Fees Commission: Distilling Current Practice

This Article proposes that Congress create a Federal Fees Commission, a body in the style of the U.S. Sentencing Commission with the power to promulgate Guidelines-style rules about initial calculations.[278] In the same way that the Sentencing Commission attempted to gauge the average of criminal sentencing practices and create standards responsive to that average, the Fees Commission could do the same for fee award calculations. Given that federal courts have calculated tens of thousands of fee awards in the last few decades, each fee-shifting statute can be individually examined to determine what types of firms typically take cases under each fee-shifting statute, which elements of a case run up time in that statute's context, and thus which elements should be preserved in the initial hours calculation. This process may require more data analysis than the Sentencing Guidelines did, but the improvements in computing power in the 35 years since the formation of the Sentencing Commission should allow data scientists to better inform what the Fees Commission considers.[279] To emphasize uniformity and to dispel the notion that mathematical precision is possible in the fee-setting process, this Article proposes that the initial hours calculation produces a "high bound" and a "low bound" of reasonable fees, at a ratio of *2:1*, within which any fee award is presumptively reasonable. In other words, the highest presumptively reasonable fee would always be twice the lowest presumptively reasonable fee for any given case.

2. Procedural Regularity

a. Initial Calculation: Careful Guidance

The initial calculation of fee awards under a Guidelines-style framework will mirror the initial calculation undertaken by the Sentencing Guidelines. Unlike the time-consuming step of assessing the time records of the plaintiff's attorney, a Sentencing Guidelines-

278. The courts could choose to adopt this framework without Congressional action, but given the entrenched nature of the lodestar calculation, *see supra* Part I.C, and the current Court's aversion to data science, Transcript of Oral Argument at 40, Gill v. Whitford, 138 S.Ct. 1916 (2017) (No. 16-1161) (statement from Chief Justice Roberts describing the efficiency gap, a straightforward mathematical formula to illustrate map unfairness, as "sociological gobbledygook"), it seems unlikely to upend settled precedent on the lodestar or do so in the near future.

279. This will likely require the presence of data scientists on the Fees Commission who can analyze and explain the data to practitioners and policy-minded members of the Commission. This Article declines to endorse a particular proportion of data scientists that would be appropriate for the Commission as a balance to attorney representatives from the plaintiffs' bar and the defense bar.

style document can guide a judge through a similar flowchart-style series of steps to arrive at a fee range in minutes. It is beyond the scope of this Article to propose a fully realized version of this table, but a general outline of its elements is below.

One axis of the fee table would represent the calculation of a case's complexity and required effort, and it could start with the simplest possible litigation victory: a default judgment. And based on the existence and variable complexity of additional phases of litigation, such as discovery disputes, an interlocutory appeal, or a post-trial briefing, the case would progress down the fee table to higher and higher levels. Specific case characteristics, such as substantial settlement negotiations while the litigation was not moving forward, could also serve to increase or decrease the level of complexity and required effort.

The other axis of the fee table would represent the substantive subject of the suit. Fee-shifting statutes in areas that require greater resources to prosecute could be appropriately compensated on the same table by having different columns of the table increase at greatly different rates for different kinds of suits. Discovery, in particular, might mean something different in a hiring discrimination case with few relevant documents as compared to complex environmental litigation, which might result in much the environmental litigation column increasing quickly from, say, complexity level 20 to complexity level 30.

A judge would next find the entry on the table that corresponds to the appropriate complexity level and substantive area, which would provide a number. The judge would then multiply that number by a district-specific multiplier for their own district (unless they deemed that an exception to the forum rule applied),[280] and then round the resulting figure as directed by the Fees Commission, resulting in the calculated lower bound.[281] This district-specific multiplier would be set by the Fees Commission yearly—or chained to a specified measure of inflation—to account for inflation and geographical differences in the cost of legal services.[282] Multiplying the

280. While judicial districts may not be the ideal baseline for a single multiplier, as many districts include highly variable costs of living, it is beyond the scope of this Article to determine whether there is an administrable solution to this issue, whether or not the solution may dovetail with potential Fees Guidelines.

281. This Article recommends rounding to promote regularity and demonstrate that precision is impossible in setting a reasonable fee, as it makes bottom-of-range and top-of-range fee awards round numbers with fewer significant figures.

282. In the alternative, the Fees Commission could simply publish separate tables for each district, with multipliers, inflation, and rounding already accounted for. The result would be the same.

calculated lower bound by two would then produce the upper bound.

Consider our example from Part I.D.3 above, with Ms. A and her associate, Mr. B, who win an employment discrimination case and are entitled to fee shifting. The Appendix, attached at the end of this Article, provides an example of a hypothetical calculation under these proposed guidelines side-by-side with its lodestar counterpart.[283] The calculation starts at complexity level one for the work Ms. A and Mr. B did on the case before it was filed. For the contested motion to dismiss, the Fees Guidelines add two levels, plus an additional level for a hearing on the motion to dismiss and associated preparation. Discovery results in five additional levels, plus two levels due to protracted disputes between the parties, and an additional level because of a four-month extension of the discovery period. Finally, cross-motions for summary judgment add six levels of complexity, and the hearing on the summary judgment motions add one additional level. This results in a total case complexity level of 19.

The district court then cross-references complexity level 19 with substantive case category III, which is used for employment discrimination cases, much like the court would refer to the sentencing table for Mr. A, our defendant who pleaded guilty to a firearm possession charge. The fees table outputs a value of $92,000. The district court multiplies this by a location factor, updated yearly by the Fees Commission to account for both inflation and appropriate hourly rates within the district. In this case, a multiplier of 1.58 results in a $145,360 figure, which is rounded to $145,000. This figure serves as the lower bound of the presumptive fee range, and the amount is doubled to find the high bound of $290,000.

Why not simply map the primary lodestar considerations—hours worked and hourly rate—onto the table that governs the Sentencing Guidelines? The resulting framework would retain too many elements of the lodestar method and therefore incorporate all of the previously mentioned problems with the lodestar, even if the court were not allowed to adjust the number of hours. Additionally, the Guideline-style framework allows for a table that includes uneven increases across different substantive areas, where different elements of litigation require different amounts of effort.

As in the Sentencing Guidelines context, there are judgment calls in this calculation. Determining whether a discovery dispute is "protracted" or not, for example, might require guidance from the

283. *See supra* Part I.D.3.

Commission or from circuit courts. But those judgment calls are clearly identifiable and reviewable, and the parties should be able to object to them in front of the court and on appeal.

Even a case like Ms. A and Mr. B's would likely have close to 1,000 time entries to review if the lodestar method were used to calculate the fee award. Instead of going through these 1,000 entries by hand, the judge's burden under the Fees Guidelines is instead to go through a straightforward sequential process that can be completed in mere minutes.

b. Deviations from the Initial Calculation: One Degree of Discretion

If the court believes that the fee range provided by the initial calculation captures a reasonable value of the efforts plaintiff's counsel has made, the court can simply select a number within that range for the fee award. But if the court has reason to believe that the range does not properly represent the efforts reasonably expended on the plaintiff's behalf, the court can still deviate from the range calculated.[284]

To prevent this system from exhibiting the same unpredictability of the current fee-shifting system, deviations based on hours actually worked would be generally prohibited. There might be a situation in which a timesheet would be useful to demonstrate grounds for a separate adjustment, such as bad faith or vexatious litigation on the part of one of the parties. However, such an inquiry would only happen in relatively rare circumstances, and these problems likely could be addressed through means other than a review of time records.

Upward deviations for reasons such as performance and contingency could continue to be discouraged or barred as they are in the current framework, but they could also work within this framework, whether included in the initial calculation by the Fees Commission or as a permissible ground for a deviation, as long as the rationale was adequately explained by the court.

In any case, these deviations would start at the relevant end of the fee range. Percentage adjustments would likely be preferred in these scenarios, although other calculations could be acceptable if properly justified by the court.

284. Because the criminal sentencing framework provides specific and distinct definitions for variances and departures, a separate, neutral term is used here for these purposes, although this concept is closer to the idea of a variance than a departure.

c. The Problem of Partial Relief

One issue not directly captured by the new framework is the question of partial relief.[285] Partial relief, unfortunately, is incredibly fact-specific and tends to resist any attempt at standardization. And as in the current framework, the proposed framework would necessarily require judges to engage in fact-specific comparisons of the relief gained and the relief requested.

But that factual inquiry should still be preceded by the standardized fee calculation. This starting point ensures that the inquiry regarding partial relief is about comparing the relief requested to the relief obtained, rather than about economic value of the award obtained or the size of the fee award relative to the relief obtained. Starting with the same baseline would be necessary to incentivize attorneys to take partially meritorious cases, just as with other negative-value claims. And declining to do so would create perverse incentives for attorneys to avoid plaintiffs who have some clearly meritorious claims and some potentially dubious claims arising out of the same incident.

3. Procedural Posture

a. Fee Application Simplified

Under this framework, the plaintiff would merely need to notify the court that they were a prevailing party, and the court could calculate the fee award using a series of objective guidelines. The procedure could mirror that of the preparation of the pre-sentence investigation report, prepared as a matter of course after a plea hearing or trial but before sentencing and judgment, containing facts relevant to the Guidelines calculations. Even before a final judgment issues, a district court, upon a motion, could calculate an expected fee range and advise the parties whether it was considering an award outside the fee range in either direction.[286] This filing would therefore serve a similar function as the pre-sentence report in criminal sentencing.[287] The parties could then submit any objec-

285. *See* Hensley v. Eckerhart, 461 U.S. 424 (1983); *see also supra* Part I.C.3.

286. Placing this fee calculation before parties have an opportunity to address fee disputes would also have the effect of excluding all efforts made by plaintiffs' counsel in support of the fee award.

287. In the federal criminal system, the Probation office first distributes the pre-sentence investigation report (PSR) to the parties. The parties can then make objections to the factual information in the PSR as well as Guidelines objections. Only then is the final PSR made available to the district court, at which point the parties may also file sentencing memos. Because the concerns about confidentiality and potential bias from inaccurate information are less compelling in the context

tions to the calculation or requests for an award outside the fee range, as they do with pre-sentence report objections. The court, with or without a hearing, would then rule directly on the objections and requests.

With this process, fees litigation could be concluded in a month or less. It would allow fees to be determined before a final judgment issues, just as sentencing is conducted before a criminal judgment issues. Moving the fee award calculation before judgment would nearly extinguish any need for a "second major litigation" regarding fees and would allow appellate court review on all issues—merits and fees—at once. The district court in *Zastrow* actually did this, ruling on the first fees motion before the first judgment issued in 2016.[288] If the court had not done so, the initial determination of fees might not have been made until after the 2017 appeal, and subsequent appeals might still be pending today.

A fee hearing or a fee order would then parallel the current process for a sentencing hearing. The court would address any objections to the calculation first. Although either party would be allowed to challenge the fee calculation process, time records from the plaintiff showing more hours worked would be presumptively insufficient to justify modifying the award. A more particularized showing would be necessary; otherwise, this framework would exhibit too many similarities to the current system. Any claim by the defendant that the plaintiff's fee was disproportionate to their work would be similarly insufficient, unless the claim were tied to a similar particularized showing, such as a question of partial recovery as in *Hensley*.

The court could then address any requests from the parties for the ultimate award, regardless of whether those requests were inside or outside the calculated range. The court would award an amount inside or outside the fee range and specify the amount. If the award were outside the fee range, the court would be required to state specific reasons for that deviation. The Fees Commission might even consider publishing enumerated lists of reasons for upward or downward deviations so as to give courts affirmative guidance, although the fact-specific nature of litigation would likely mean that those lists would necessarily be non-exhaustive.

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of attorneys' fees, this intermediate step is likely unnecessary, and there is no need for an entity other than the court to create this intermediate filing.

288. (First) Final Judgment, Zastrow v. Hous. Auto M. Imps. Greenway Ltd., No. 4:13-cv-574, 2014 WL 1794897 (S.D. Tex. Apr. 7, 2016), ECF No. 219.

b. Appellate Review

Just as with federal criminal sentences, parties could challenge fee awards on appeal for procedural reasons, such as an improper initial calculation, consideration of a prohibited fact or factor, or failure to state sufficient reasons on the record, as well as for substantive reasonableness. However, a within-range fee award should be presumptively reasonable. And the Fees Commission could go one step further, using a standard that already exists in the current framework: a within-range award could only be reversed if the appellant showed "exceptional circumstances" that clearly warranted a deviation outside of the range.[289]

And because a sentencing-style procedure at the trial court level would give the parties an opportunity to raise fee calculation issues in a written filing, anything not raised in the filing or at the hearing would be unpreserved at the appellate level and thus subject to a higher "plain error" standard.[290] Thus, an appellate court reviewing a challenge to the trial court's fee award would have a limited, clearly delineated record of documents to scrutinize, and would likely be able to deny any previously unraised objections to the fee award without expending substantial time and effort.

The Fees Commission could determine whether or not fees would be recoverable for the appeal. At the termination of the appeal, an affirmance could simply result in an automatic calculation of additional fees based on a simple appellate fees table, while a partial affirmance might require a remand for a brief determination (or redetermination) of the *Hensley* partial-relief issue. Although post-appeal fees proceedings could not be completely curtailed,[291] the likelihood of substantial post-judgment sprawl would be much lower.

4. Maintenance and Adjustments

The Fees Commission's initial tasks—analyzing data and constructing the fee tables—would be substantial. But the work would not end with the construction of the initial table. As legal practice evolves, the Fees Commission would be tasked with collecting continuing data[292] and amending and adjusting its framework much

289. *See supra* Part I.C.1.

290. *See* United States v. Olano, 507 U.S. 725, 732 (1993).

291. A prevailing party who loses at the trial court level but wins a reversal and an order to enter judgment in their favor on appeal will also necessarily have fees determined after the appeal.

292. *See Data and Statistics*, U.S. SENT'G COMM'N, bit.ly/3nAJcAX [https://perma.cc/XN57-V8QN] (last visited Aug. 9, 2022).

like the Sentencing Commission does. The obvious adjustments would be to district multipliers and fee table values, but adjustment might include tweaking an individual enhancement or reduction that was too large or small in a previous version. And changed circumstances would affect the calculations as well: If, for example, technological advancements make document review substantially less taxing, either the fees table or the guidelines would have to be adjusted.

Given what is likely to be a heavy reliance on aggregated data, adjustments made by the Fees Commission probably would not need to go through a notice and comment process, but using this process would bind judges more effectively.[293]

C. Addressing the Concerns of the Current System

A stricter baseline with more limited judicial discretion will raise the floor for attorneys' fees by eliminating lodestar fee awards that are reduced due to a plaintiff's relatively modest recovery. Plaintiffs with negative-value claims would then be more likely to find attorneys willing to represent them. Attorneys could more easily carve out a comfortable practice acting as a private attorney general, thereby increasing potential plaintiffs' awareness of these claims, both through public consciousness of a specialized bar and additional targeted attorney advertising. Moreover, the threat of increased enforcement of these claims might cause a potential defendant to take proper care ahead of time and deter them from the conduct that the underlying statutes proscribe. In addition to better serving the underlying purpose of fee-shifting statutes, this framework also directly addresses each of the seven concerns the Third Circuit Task Force had with the lodestar method.

1. Decreased Workload and Simplification of Calculation

As an initial matter, this proposal would create substantially less work for judges. A sentencing calculation, even done carefully and deliberately, typically takes about 15 to 30 minutes. This is far less time than it would take to review even the simplest of time records. While the judge would still be asked to rule on objections by the parties, those objections could not be exclusively based on the amount of time spent, and thus should themselves not require the review of extensive time records except in highly unusual circumstances.

293. *See* United States v. Mead Corp., 533 U.S. 218, 227, 230–31 (2001).

And if the process were condensed enough to begin and conclude before the issuance of a judgment, the concern in *Hensley* about fee disputes becoming a "second major litigation" would be largely addressed. Fee-related appellate issues would normally reach the appeals courts along with any other appellate issues, dispensing with the current rule that fee awards are to be passed upon when the fee is fully finalized; that is, typically after appeal.[294] The barrage of voluminous filings that routinely accompany the end of a merits appeal would no longer occur, and successive appeals would become far less common. This change alone would substantially reduce workloads not only for the courts but for the parties as well.

2. Increased Predictability

If the Fees Guidelines create a strong presumption for a within-range fee award, most judges would be likely to award a fee in that range in the first place.[295] Indeed, even with advisory sentencing guidelines in place, Guideline-range sentences are still the norm today, regardless of the soundness of that policy. Despite a cultural shift in attitudes away from lengthy terms of incarceration, roughly three-quarters of all criminal sentences are still within a court's ultimately determined guideline range.[296] It seems reasonable to predict that in cases where plaintiffs obtain functionally full relief, the within-range fee award incidence will be at least 75 percent, if appellate review is severely limited for within-range fee awards as described above.[297] This is particularly likely if it is clear to judges that they cannot generally adjust the fee award based on the actual number of hours worked. And if the ultimate fee award is nearly guaranteed to fall in a known or predictable range, sufficient predictability will exist to encourage suits despite the existence of deviations outside that range.

3. Discarding the Fiction of Mathematical Precision

This framework may feel divorced from the amount of work attorneys do. But mathematical precision is not possible when valu-

294. *See, e.g.*, 28 U.S.C. § 2412(d)(1)(B) (stating that an EAJA fee request should be made "within thirty days of final judgment in the action").

295. Aside from the instances where only partial relief was obtained.

296. *See* U.S. SENT'G COMM'N, *supra* note 268, at 84. This number includes cases where an upward or downward departure was assessed, as those modifications affect the Guideline range itself.

297. The desire for lenience in a defendant's term of incarceration, a consideration that directly implicates an individual's liberty, is also a much more compelling reason to vary outside a Guideline range and to expend the effort to do so than awarding a different amount of money in a case.

ing the work of an attorney in a context that is inherently non-economic in nature. A calculated range in which the high bound is twice the amount of the low bound provides judges with the ability to select a round number within that range that seems fair, promoting an understanding that a reasonable fee cannot be definitively calculated as a single specific number.

4. Reduced Potential for Manipulation by Results-Oriented Judges

The Third Circuit Task Force decried judges' "manipulation" of the lodestar calculation to create certain results, singling out a report that certain judges were awarding a similar percentage of the actual monetary damages in every case. This level of manipulation is clearly undesirable, and it would be much more difficult to achieve under a Guidelines-style framework.

But less malicious manipulation of the lodestar was often necessary because a judge had three numerical sliders to work with, and many valid reasons for increasing or decreasing a fee award had to be shoehorned into one of the three. A framework where a judge has a single slider that is meant to encompass all reasons not otherwise prohibited is therefore a more appropriate framework. A single slider will allow judges to freely and transparently use their discretion to reach results that are either tied to the calculated fee range or are justifiable deviations from it.

5. Removal of Perverse Incentives for Attorneys

One of the most common concerns with the current fee-shifting system is that the lodestar encourages plaintiffs' attorneys to overbill in the hopes of increasing their ultimate fee award. This Guidelines-style framework removes that incentive entirely, given that fee awards increase not based on hours worked but rather based on the developments in front of the court over time.

And although the Guidelines-style framework does not provide any additional incentive for attorneys to settle early, this could be solved by either preserving or affirmatively codifying *Marek v. Chesny*[298] in the Fees Commission's framework. As a reminder, the Supreme Court limited fees in *Marek* because an unaccepted offer of judgment under Rule 68, which included an offer of attorneys' fees, was more favorable than the ultimate recovery in the case.[299]

298. Marek v. Chesny, 473 U.S. 1 (1985).

299. Rule 68 allows a defendant to offer to allow judgment on specified terms, along with costs. FED. R. CIV. P. 68(a). If this offer is not accepted and the ultimate judgment obtained is less favorable than the Rule 68 offer of judgment, costs in-

As such, the attorneys were not entitled to any attorneys' fees incurred after the offer of judgment, as the Court concluded that the post-offer fees were not reasonably incurred.[300] Whether by rule or by statute, doctrines like *Marek* can easily be included in a Guidelines-style calculation of fees.

6. More Transparent Discretion

While the Task Force report decried the limited "flexibility" of the lodestar method, its underlying concern was the lodestar's limited ability to blunt the impact of attorneys attempting to manipulate the calculation.[301] A method with a single degree of discretion solves this concern, as a judge can simply use case-specific reasons to justify a higher or lower award, without having to tie it to a number of hours worked or an hourly rate. In this framework, a judge can be clearer about the reasons they used to arrive at the award and the amount that it affected their calculation.

7. Benefits to the Public Interest Bar

The Fees Commission, in constructing the table and removing hourly rates from the equation, will have substantial discretion in setting fee schedules that fairly compensate attorneys in each area of practice. The Commission should be willing to understand that public interest attorneys, 35 years after the Task Force report, still tend to be compensated at lower rates than private firm attorneys. It should consider setting schedules that close, or at least reduce, this discrepancy.[302] Increasing their compensation modestly to create more certainty for those attorneys will be offset by the reining in of overbilling on more sprawling cases.

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curred after the time of the Rule 68 offer must be paid by the plaintiff. FED. R. CIV. P. 68(d).

300. *Marek*, 473 U.S. at 11. Notably, the Supreme Court did not hold that the plaintiffs were in any way liable for the defendants' costs and fees after the post-judgment offer, which is consistent with a policy to encourage suits in the fee-shifting context. *Id.*

301. *See* THIRD CIRCUIT TASK FORCE, *supra* note 31, at 248.

302. This is particularly true given that large law firms typically do not handle what is considered core private attorney general work, such as plaintiff-side employment representations, unless they are doing so pro bono. On the flipside, concerns might arise that this framework will substantially inconvenience firms that embrace larger legal teams on individual cases and might create windfalls for smaller firms. To the extent that a substantive area requires more manpower, perhaps because of the typical scope of discovery, the Commission should be prepared to account for this as well.

D. A Note on Windfalls

The legislative history of most fee-shifting statutes calls for the awarding of a reasonable fee that does not create a windfall for the plaintiff's attorney. Much of the Supreme Court's disdain for upward adjustments indicates a similar aversion to windfalls. And placing a higher floor on a fee award will likely overcompensate some attorneys. But if those attorneys can secure relief for their client in a more efficient manner, compensating that attorney for doing so is not a windfall, especially if flat-fee billing is an ethically acceptable billing method in the private sector. After all, that attorney must still do enough work to ensure success in the case. And judges have accepted lodestar overcompensation in the common-fund context, with lodestar "checks" commonly noting that fee awards are double or triple a lodestar request.[303]

If a court believes that the attorney won the case despite deficiencies in performance that may have placed the outcome in jeopardy, it can still award a fee at the bottom end of the range or deviate downward from the calculated range. And if a contingent fee, which accounts for the risk of taking on a losing case, is not considered a windfall on its own terms, then simply setting a higher floor for all fee-shifting awards should not be considered a windfall either.

However, because this proposal would require a statute to pass, these issues can be dealt with through the legislative history of that statute or through artful drafting of the statute itself.[304] These concerns are surmountable and do not create an impossible barrier to the passage of this proposed framework or its simplification of the fees process.

CONCLUSION

The lodestar method has provided a framework for attorneys' fees for nearly half a century. But as cases and thus billing records become exponentially more complex, as billing methods diversify, and as attorneys and judges have learned how to manipulate the

303. *See* Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. REV. 937, 963–65 (2017).

304. Certain other issues would have to be addressed as well, including the Equal Access to Justice Act's requirement that the hourly rate of any fees obtained under the Act not exceed $125 per hour. *See* 28 U.S.C. § 2412(d)(2)(A). But these can be solved at the time of a bill's passage, or even identified by the Fees Commission while it is undertaking its initial study. Or perhaps provisions like EAJA could be exempted from the initial trial run of the Commission and added one by one as the mechanism is monitored and improved.

lodestar calculation, it has become clear that the procedure does not result in precision.

And precision is not the goal. The goal is to incentivize the enforcement of statutes through the availability of reasonable attorneys' fees. Replacing the lodestar framework with a Sentencing Guidelines–style framework that reduces the risk of a meager award does exactly that. And adopting a simple calculation aided by references to tables created by a Federal Fees Commission solves virtually every administrability issue identified with the lodestar.

APPENDIX

This Appendix mirrors the calculation of a fee award under both the lodestar framework and the Guidelines-style framework proposed in this Article. The hypothetical case here is an employment discrimination suit won at summary judgment after protracted discovery disputes.

Lodestar calculation

Attorney request

Lead attorney: total hours claimed	192.7
Hourly rate claimed	$460
Total request for lead attorney	$88,642
Junior attorney: total hours claimed	244.1
Hourly rate claimed	$400
Total request for junior attorney	$97,640
Paralegal: total hours claimed	17.6
Hourly rate claimed	$150
Total request for paralegal	$2,640
Initial request:	$188,922

Court calculation

Lead attorney: total hours claimed	192.7
Court exclusion of vague time entries	–11.8
	180.9
Downward adjustment for block billing	–10%
Total hours allowed	162.8
Hourly rate claimed	$460
Hourly rate awarded	$425
Total award for lead attorney	$69,190
Junior attorney: total hours claimed	244.1
Court exclusion of secretarial work	–20%
Downward adjustment for block billing	–10%
Downward adjustment for inefficiency	–10%
Total hours allowed	146.5
Hourly rate claimed	$400
Hourly rate awarded	$295
Total award for junior attorney	$43,217.50
Paralegal: total hours claimed	17.6
Court exclusion of secretarial work	–20%
	14.1
Hourly rate claimed	$150
Hour rate awarded	$120
Total award for paralegal	$1,692
Final award:	$114,099.50

Plaintiff appeals the size of secretarial work cuts for junior attorney, block billing cut, and junior attorney's hourly rate.

Defendant appeals district court's decision not to exclude additional hours as vague.

Fees Guidelines calculation

Court calculation

Default judgment complexity level	1
Contested motion to dismiss	+2
Hearing on contested motion	+1
Discovery	+5
Protracted discovery disputes	+2
Extension of discovery period	+1
Cross-motions for summary judgment	+6
Hearing on contested motion	+1
Total complexity level	19
Employment discrimination:	
- substantive category	III
Fees table entry for level 19 / category III	$92,000
Northern District of Ohio multiplier	x1.58
	$145,360
Rounding to obtain lower bound:	$145,000
Doubling to obtain upper bound:	$290,000

"Given the relative simplicity of the complaint and the summary judgment motions, this Court finds that a lower-bound award is appropriate."

Final award:	$145,000

Presumptively reasonable award, no appeals.

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