ATTORNEYS' FEES—IN AN ACTION BROUGHT ON THE BASIS OF THE DEPRIVATION OF CONSTITUTIONALLY PROTECTED CIVIL RIGHTS, THE EXTENT OF A PLAINTIFF'S SUCCESS IS A CRUCIAL FACTOR IN DETERMINING THE PROPER AMOUNT OF AN AWARD OF ATTORNEYS' FEES UNDER THE CIVIL RIGHTS ATTORNEYS' FEE ACT OF 1976, 42 U.S.C. § 1988. *Hensley v. Eckerhart* (U.S. S. Ct. 1983).

Respondents brought suit, on behalf of all persons involuntarily confined to a forensic unit of a Missouri State Hospital,[1] in the Federal District Court for the Western District of Missouri against petitioner hospital officials,[2] challenging the constitutionality of treatment and conditions at the hospital.[3] After a trial, the district court found that an involuntarily committed patient has a constitutional right to minimally adequate treatment.[4] The district court also determined that the hospital officials were guilty of constitutional violations in five of the six general areas of treatment.[5]

Subsequent to the district court's findings, the respondents filed a request for attorneys' fees under the Civil Rights Attorneys' Fees Award Act of 1976.[6] The petitioners opposed this request, especially the inclusion of attorney's fees for hours spent in pursuit of unsuccessful claims.[7] The dis-

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1. Eckerhart v. Hensley, 475 F. Supp. 908, 911 n.1 (W.D. Mo. 1979). This case was originally certified as a class action under the federal rules of civil procedure 23(b)(2). Eckerhart v. Hensley, 475 F. Supp. at 911. The class designation consisted of all persons involuntarily confined in the Forensic Unit of the hospital. *Id.* Excluded from this class designation were those persons temporarily confined in the Forensic Unit for pretrial observation and evaluation and those patients who were voluntarily committed. *Id.*

2. *Id.* Petitioners were the public officials responsible for the supervision and operation of the Forensic Unit and also included members of the Missouri Mental Health Commission. *Id.* These petitioners included Dr. Duane Hensley, past Director of the Missouri Department of Mental Health, and Dr. James Ritterbusch, Superintendent of the Fulton State Hospital. *Id.*

3. *Id.* at 912. The respondents contended that the petitioners, by their failure to provide an adequate program of care and treatment for those patients confined to the Forensic Unit, violated the eighth and fourteenth amendments of the Constitution. *Id.* at 912. More specifically, the respondents asserted that the Forensic Unit lacked minimally adequate (1) climatic conditions, (2) bathrooms, (3) sleeping areas, (4) furnishings, and (5) staff. *Id.* at 917-19. The respondents also alleged that confinement in a maximum security unit violated their due process rights and that the patients' non-dangerous behavior could not justify the use of seclusion or restraints. *Id.* at 922.

4. *Id.* at 915. Specifically, the court held that an involuntarily committed patient has a *constitutional* right *only* to minimally adequate treatment. *Id.* (emphasis added).

5. *Id.* at 919-20. Because the staff, though limited and operating with less than optimal resources, was hardworking and efficient, it was deemed to be minimally adequate. *Id.*

6. 42 U.S.C. § 1988 (Supp. IV 1980) (Proceedings In Vindication of Civil Rights; Attorney's Fees). Section 1988 provides that "in any action or proceeding to enforce a provision of sections 1981, 1982, 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

7. Hensley v. Eckerhart, 103 S. Ct. 1933, 1937 (1983) (citing Eckerhart v. Hensley, No. 75-

trict court, upon hearing this request, determined that pursuant to section 1988 the respondents were the "prevailing parties" even though they had not succeeded on every claim presented.[8] The lower court went further, however, by *refusing to eliminate* that portion of the respondent's fee award that pertained to the hours spent by their attorneys on unsuccessful claims presented by the respondents.[9] The trial court reasoned that the "significant import" of the relief clearly justified the award of "reasonable" attorneys' fees.[10] On appeal, the Eighth Circuit Court of Appeals *held*, affirmed.[11] The Supreme Court granted certiorari,[12] *held* vacated, and remanded to permit the district court to determine the proper award consistent with its opinion.[13] The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorneys' fees under the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983).

The decision reached by the Supreme Court in *Hensley* is significant for a number of important and timely reasons. First, this decision represents an enlightened attempt to provide some sort of guidelines regarding the proper standard for setting an attorney's fee award where the plaintiff has achieved only *limited* success. Second, the Court in *Hensley* took the opportunity to clarify the proper correlation between the results obtained and an award of attorney's fees[14] by concluding that the level of a "prevailing party's" success is crucial and directly related to the amount of fees to be awarded.[15] Finally, the Supreme Court in *Hensley* reaffirmed the congressional intent behind section 1988 by holding that the ultimate authority in determining what a "reasonable" fee entails is best left in the hands of the district court.[16] This last reaffirmance by the Supreme Court, however, may ulti-

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CV-87-C, slip op. at 7 (W.D. Mo. Jan. 23, 1981)). The petitioner's opposition to this request was based on the figures submitted by the four attorneys employed by the respondents. *Id.* at 1936. These attorneys claimed "2,985 hours work and sought payment at rates varying between $40 and $65 per hour." *Id.* The respondents also asked that the award be increased by thirty to fifty percent for a total award of between $195,000 and $225,000. *Id.* at 1936-37.

8. *Id.* at 1937 (referring to district court order granting attorneys' fees).

9. *Id.* at 1937 (emphasis added). The lower court refused to adjust the fee award despite the unsuccessful claims because it felt that the opposing party's suggested mathematical method of fee calculation did not give any consideration to the relative importance of each issue or "the interrelation of the issues, . . . or the extent to which a party may prevail on various issues." *Id.* (citing Eckerhart v. Hensley, No. 75-CV-87-C, slip op. at 7 (W.D. Mo. Jan. 23, (1981) Record 220).

10. *Id.* (citing Record 231).

11. Hensley v. Eckerhart, 664 F.2d 294 (8th Cir. 1981). This is an unpublished opinion.

12. Hensley v. Eckerhart, 102 S. Ct. 1610 (1982).

13. Hensley v. Eckerhart, 103 S. Ct. 1933, 1943 (1983).

14. *Id.* at 1938.

15. *Id.*

16. *See generally id.* at 1939.

mately serve to underscore the impact and importance of this decision.[17]

The cornerstone used by the *Hensley* Court in analyzing whether a "partially prevailing" plaintiff can recover attorney's fees, even to the extent of legal services performed on unsuccessful claims, was 42 U.S.C. § 1988.[18] This section, entitled *Proceedings in Vindication of Civil Rights; Attorney's Fees*, provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[19] This statute was calculated to be a congressional response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[20] which reaffirmed the "American Rule" that each party in a lawsuit ordinarily bears its own attorney's fees unless there is an express statute to the contrary.[21] The Court in *Alyeska* felt that it would be inappropriate for the judiciary in absence of legislative guidance to reapportion or reallocate the attorneys' fee burdens imposed on each party in federal civil rights litigation.[22]

Legislative response to the *Alyeska* decision was swift. Congress enacted the Civil Rights Attorney's Fee Awards Act of 1976, authorizing a district court to award reasonable attorney's fees to prevailing parties in civil rights litigation.[23] This legislative solution solidified the federal common law regarding attorney's fees that had developed in the years before *Alyeska*.[24]

Congress, in enacting this prominent piece of legislation, recognized a number of important purposes for its existence.[25] The major purpose of section 1988, as cited by the Court in *Hensley*, was " 'effective access to the

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17. *See generally id.* at 1943-52 (Brennan, J., dissenting) (providing a caveat of which the majority is asked to take notice). See *infra* notes 88-90 and accompanying text for discussion of dissent.

18. *Id.* at 1935.

19. 42 U.S.C. § 1988 (Supp. IV 1980). *See supra* note 6 and accompanying text.

20. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (Brennan and Marshall, JJ., dissenting) (plaintiffs who sought to block Alaskan pipeline construction, even though unsuccessful, were awarded attorney fees by the lower courts but the Supreme Court reversed). Because of its selectivity as to when and to whom fees are available, section 1988 bears little resemblance to either of the common law attorney's fee rules: the "American Rule," which provides that each side is responsible for its counsel fees regardless of the outcome of the case, or the "English Rule," which provides that the losing party, whether complainant or defendant, is responsible for reimbursing the winning party's attorney's fees. *Id. See also* Hensley v. Eckerhart, 103 S. Ct. at 1937.

21. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 271.

22. *Id.*

23. Hensley v. Eckerhart, 103 S. Ct. at 1937 (discussing 42 U.S.C. § 1988).

24. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 260-61 n.33. Section 1988 was based on Congress's experience with over fifty fee-shifting provisions in other statutes, dating back to the post-Civil War era of civil rights statutes. *Id.*

25. For a good discussion of the history and purpose of the Civil Rights Attorney's Fees Award Act, see 42 U.S.C. § 1988 nn.17-20, n.375 (West Supp. 1981). *See also* H.R. REP. No. 1558, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS (90 Stat.) 2641 [hereinafter cited as House Report].

judicial process' " for those parties alleging violations of federally protected civil rights.[26] Because nearly all civil rights legislation depends upon private enforcement, allowing attorneys' fee awards fulfills another purpose of the Act—to provide citizens an opportunity to vindicate important congressional policies embodied in the Act.[27] In other words, without such legislation, many, if not all, civil rights violations suffered by private citizens would go unchecked, mainly because these individuals could not afford to seek redress.[28]

The *Hensley* Court, in determining whether to allow attorneys' fees for unsuccessful claims, next analyzed the language of section 1988.[29] More specifically, the Supreme Court concentrated on how the statutory words, "prevailing party,"[30] should be construed.[31] The Court, relying on a Senate Report, determined that ordinarily a "prevailing party" should recover attorneys' fees unless there are unusual or special circumstances which would render such an award unjust.[32] The *Hensley* Court believed that what

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26. Hensley v. Eckerhart, 103 S. Ct. at 1937 (citing House Report).

27. Hensley v. Eckerhart, 103 S. Ct. at 1945 (Brennan, J., dissenting).

28. *Id. See also* S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976) [hereinafter cited as Senate Report]; *cf.* House Report.

29. Hensley v. Eckerhart, 103 S. Ct. at 1937.

30. 42 U.S.C. § 1988 (Supp. IV 1980).

31. Hensley v. Eckerhart, 103 S. Ct. at 1937.

32. *Id. See* Senate Report, 1976 U.S. CODE CONG. & AD. NEWS, 5912 (quoting Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968) (a case involving racial discrimination in a place of public accommodation)).

Section 1988 requires a *strong* showing of special circumstances to justify denying an award of attorney's fees to the prevailing party in a section 1983 claim. Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980) (emphasis added). For example, in Criterion Club v. Board of Comm'rs, 594 F.2d 118, 120 (5th Cir. 1979) (class action challenging system of electing county board of commissioners), the court stated that as long as a party actively prevailed through a settlement to vindicate its rights, no special circumstances justified a district court decision to deny fees to the prevailing party even though:

> (1) the defendants never admitted liability and there was nothing in the record to indicate that the plaintiffs would have prevailed on the merits . . . (2) the case had not proceeded far before it became moot as a result of legislation . . . and (3) the burden of the award would fall on the present taxpayers of Dougherty County for the alleged discriminatory consequences of a system established 20 years ago.

Id.

Cases such as *Riddell* and *Criterion Club*, which have recognized special circumstances sufficient to deny an award, demonstrate that such special circumstances arise only in unusual instances. *See, e.g.*, Riddell v. National Democratic Party, 624 F.2d at 544. For instance, several cases upholding decisions to deny attorneys' fees involve situations in which the plaintiff filed under section 1983 to recover what was essentially a tort claim for private monetary damages. *Id. See* Zarcone v. Perry, 581 F.2d 1039, 1042-45 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (upholding denial of fees award in damages action for insults suffered from state judge); Buxton v. Patel, 595 F.2d 1182, 1184-85 (9th Cir. 1979) (upholding denial of fees award in damages action involving lease of real property); Bush v. Bays, 463 F. Supp. 59, 66-67 (E.D. Va. 1978) (no fees award to plaintiffs whose lawsuit was not a contributing factor in reforming challenged food stamp procedure). "These cases did not require injunctive relief or confer sig-

constitutes a "prevailing party" becomes the standard for making the threshold determination of whether attorneys' fees should be awarded.[33]

In making this determination, the Supreme Court in *Hensley* reviewed the First Circuit's fairly broad but valid interpretation of a "prevailing party." This interpretation is found in *Nadeau v. Helgemoe*[34] where the court held that a "plaintiff may be considered [a] 'prevailing part[y]' for attorney's fees purposes if [he] succeed[s] on *any* significant issue in [the] litigation which achieves some of the benefit the parties sought in bringing the suit."[35] A prevailing party may be one that prevails on a central issue,[36] obtains a significant concession,[37] or achieves excellent results.[38]

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nificant civil rights to the public." Riddell v. National Democratic Party, 624 F.2d at 544.

A prevailing *defendant* may recover an attorneys' fee award only where the suit brought was unreasonable, frivolous, meritless or brought to harass or embarrass the defendant. *See* Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d 34, 37 (2d Cir. 1978) (plaintiff's staff attorneys denied access to migrant labor camp to distribute booklets on legal rights).

33. Hensley v. Eckerhart, 103 S. Ct. at 1939.

34. 581 F.2d 275, 278-79 (1st Cir. 1978), *quoted in* Hensley v. Eckerhart, 103 S. Ct. at 1939.

35. Nadeau v. Helgemoe, 581 F.2d at 278-79 (emphasis added). The *Nadeau* court held that attorney fee awards are especially appropriate where a party has prevailed on an important matter in the course of the litigation, even when he ultimately does not prevail on all the issues. *Id.*

The issue on appeal in *Nadeau* which the First Circuit (and the Supreme Court) found significant enough to justify the statutory award of attorneys' fees involved a number of prisoners held in protective custody in a state prison. *Id.* at 277. The prisoners claimed that their access to the prison library was unduly restricted and infringed upon their constitutional rights to unimpeded access to the courts. *Id.* This was merely one of numerous other claims regarding the prison conditions to which these inmates were subjected. *Id.* The *Nadeau* court held that the library access issue was a significant enough victory for the plaintiffs to be considered prevailing parties for attorney fee purposes. *Id.* at 279.

36. Busche v. Burkee, 649 F.2d 509, 521 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 396 (1982). A police officer brought a civil rights suit arising out of his termination prior to a hearing. *Id.* at 512. The court of appeals held that the lower court did not err in concluding that the officer was the "prevailing party" where the officer succeeded in demonstrating that he suffered substantial injuries because of the defendant mayor's intentional violation of his civil rights. *Id.* at 521. This was true despite the fact that the officer did not succeed on all issues or against all defendants. *Id.* The court felt that the existence and the extent of the officer's injuries and the willfulness of the mayor's illegal conduct were major issues at the trial. *Id.; cf.* Taylor v. Sterrett, 640 F.2d 663, 669 (9th Cir. 1981) ("[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired primary relief sought.").

The *Hensley* court also endorsed three district court decisions cited approvingly in the Senate Report. *See* Hensley v. Eckerhart, 103 S. Ct. at 1938. These cases held that the plaintiffs all succeeded on a significant issue so as to justify this notion of a "prevailing party". *Id.*

37. In Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), plaintiffs were awarded attorneys' fees for time spent pursuing a preliminary injunction because this injunction aided in obtaining a "significant concession" from the defendants as a result of the motion even though it was ultimately denied. *Id.* at 684. In *Stanford*, a student university campus newspaper and its editors were originally successful in obtaining a declaratory judgment against police officers with re-

This "prevailing party" standard does have its limitations, however, in that this determination is only enough to put the plaintiff across the "statutory threshold" for attorneys' fees purposes.[39] The mere finding that a plaintiff is the "prevailing party" in the litigation is not in and of itself sufficient to justify a complete attorney's fees award, including an amount for time spent on unsuccessful claims.[40] For example, there have been recent civil rights cases where the plaintiff, although deemed to be the "prevailing party," was denied an award based on all the issues presented.[41] Therefore, it is still within the domain of the district court to have a determinative voice as to what a "reasonable" award should be.[42]

Applying this "prevailing party" formulation to the facts it would appear that the district court in *Hensley* correctly found the respondents to be the prevailing parties under section 1988.[43] The respondents had "obtained relief of significant import"[44] which appeared to fit within the above analysis of what constitutes a prevailing party. Therefore, the district court awarded what it considered to be a "reasonable" award of attorneys' fees.[45]

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spect to a search of their newspaper office without probable cause. Stanford Daily v. Zurcher, 366 F. Supp. 18, 19 (N.D. Cal. 1974). After the police department promised not to violate the judgment, the newspaper's motion for preliminary injunction was denied. Stanford Daily v. Zurcher, 64 F.R.D. at 684.

38. In Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974), plaintiffs won an important decision requiring an affirmative action program for the County Fire Department. Here the court held that since the plaintiffs achieved excellent results, they were entitled to an award for all the time reasonably expended in pursuit of this result. *Id.* at ¶ 9444, p. 5049.

Similarly, the district court in Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483, 484 (W.D.N.C. 1975) based its determination of a fee award on the fact that the results obtained were excellent despite the plaintiff's losses on "certain minor contentions." In *Swann*, the plaintiffs brought suit on the grounds that active segregation was being practiced in the local schools. *Id.* at 485. The plaintiffs succeeded in their aim of complete desegration of the local schools. *Id.* at 484. The "minor contentions" involved adequacy of physical plants and equipment and teacher qualifications. *Id.*

39. Hensley v. Eckerhart, 103 S. Ct. at 1939.

40. *Id.*

41. *See, e.g.*, Bayside Enter., Inc. v. Carson, 470 F. Supp. 1140 (D.C. Fla. 1979) (where only one of the plaintiff's claims challenging the constitutionality of a municipal ordinance governing adult entertainment was sustained); Dawson v. Pastrick, 441 F. Supp. 331 (D.C. Ind. 1977) (plaintiff established his case with respect to racial discrimination in hiring for city fire department).

42. Hensley v. Eckerhart, 103 S. Ct. at 1939.

43. *Id.* at 1937 (citing No. 75-CV-87-C, at 7 (W.D. Mo. Jan. 23, 1981)).

44. *Id.* The district court reached this conclusion based on the fact that the plaintiffs prevailed on five of their six claims. *Id.*

45. *Id.* the district court awarded a fee of $133,000. *Id.* This award differed from the actual amount asked for by the respondents. *Id.* The lower court, because of inadequate documentation of hours, reduced the number of hours claimed by one attorney by 30%. The court also declined to adopt an enhancement factor to increase the award. *Id.* Hours which are not reasonably expended also include hours that are excessive, redundant, or unnecessary. *Id.* at 1940.

In viewing the lower court's decision, it is important to reiterate that the phrase "prevailing parties," contained within section 1988, was considered by the *Hensley* and *Nadeau* courts to be a minimum qualification to be overcome before proceeding further on the question of a fees award.[46] With this in mind, while still respecting the discretion of the lower court, the Supreme Court in *Hensley* set out to fashion guidelines as to what constitutes a "reasonable" fee award in those situations where a plaintiff is not completely successful on all his claims.[47]

The *Hensley* Court found that the most logical place to begin when determining a reasonable fee award is the number of hours reasonably expended on the litigation by the attorneys multiplied by a reasonable hourly rate.[48] According to the Supreme Court, this calculation represents an objective foundation on which to at least make an *initial* estimate of the value of the "prevailing party's" legal services.[49] Like the lower court, the Supreme Court also noted that the inadequate documentation of the hours worked, as well as those hours not "reasonably expended" by the plaintiff's counsel, would present grounds for the district court to reduce the award accordingly.[50]

According to the *Hensley* Court, this principal statutory element of "reasonable attorney's fees" must be determined upon the unique facts of each case.[51] The lower courts have enumerated a number of factors, however, to aid in determining the reasonableness of awards under similarly worded attorney's fee provisions, as embodied in the case of *Johnson v. Georgia Highway Express, Inc.*[52]

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46. Hensley v. Eckerhart, 103 S. Ct. at 1939. *See also* Nadeau v. Helgemoe, 581 F.2d at 279, where it was held that one of the plaintiff's contentions, library access for prisoners, was significant enough to overcome the initial qualification of "prevailing parties" but this issue could, by no means, be said to have dominated the litigation. *Id.* This issue was merely one of many alleged violations of the prisoner's constitutional rights regarding inhumane prison conditions. Nadeau v. Helgemoe, 423 F. Supp. 1250, 1256-60 (D.N.H. 1976). Therefore, the factor of proportionality should be kept in mind in arriving at a fee award. Nadeau v. Helgemoe, 581 F.2d at 279.

47. Hensley v. Eckerhart, 103 S. Ct. at 1941.

48. *Id.* at 1939.

49. *Id.*

50. *Id. See supra* note 41 and accompanying text.

51. Hensley v. Eckerhart, 103 S. Ct. at 1937.

52. 488 F.2d 714 (5th Cir. 1974). The twelve factors endorsed by the Fifth Circuit and the *Hensley* Court were: (1) the amount of time and labor required; (2) the difficulty of the questions; (3) the skill needed to provide adequate legal service; (4) other opportunities foregone by the attorney due to acceptance of the case; "(5) the customary fee"; "(6) whether the fee is fixed or contingent"; (7) time limitations; "(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 attorney-client relationship; and "(12) awards in similar cases." *Id.* at 717-19. These factors were taken from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106. *See* Hensley v. Eckerhart, 103 S. Ct. at 1937 n.3.

The Senate Report cited in *Hensley* refers to *Johnson* and to a number of lower court decisions that "correctly applied the twelve factors" listed therein.[53] These cases have resulted in fees which attracted competent counsel but which do not produce windfalls to the attorneys.[54] Although this sheds some light on what is considered "reasonable" in awarding fees, the value of these decisions is marred somewhat by the fact that in each case the plaintiffs were thoroughly successful on their claims and obtained essentially complete relief.[55] The *Hensley* case presented a different issue: whether a *partially* successful plaintiff can recover attorneys' fees even for those claims on which he is unsuccessful.[56] Therefore, the legislative history cited in the Senate Report did not provide a definite resolution as to the appropriate standard in those cases where the prevailing party has achieved less than excellent results or only limited success.[57]

Realizing a disparity in fact situations, the Court next concentrated on one of the factors found in *Johnson*, in the hopes of fashioning an appropriate test.[58] The *Hensley* Court determined that including the factor "the amount involved and the results obtained" indicated that the level of a plaintiff 's success must be extremely important in determining the proper fee award.[59] The importance of this relationship was confirmed, in the Court's opinion, in varying degrees by cases cited approvingly in the Senate Report on attorneys' fees awards in civil rights actions.[60]

"Consistent with the legislative history, courts of appeals generally have recognized the relevance of the results obtained to the amount of a fee award."[61] These courts are not in agreement, however, as to the course that should be taken in applying this principle in cases where the "prevailing party" was only partially successful on his claims.[62] As often happens when

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53. Hensley v. Eckerhart, 103 S. Ct. at 1937. *See supra* notes 37-38 & 52 and accompanying text.

54. Senate Report, *supra* note 28, at 6.

55. Hensley v. Eckerhart, 103 S. Ct. at 1938. Where a plaintiff has obtained excellent results, his attorneys should receive their full fee and in these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every issue raised in the litigation. Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444 at 5049. Results are considered "excellent" when they constitute the total accomplishment of the aims of the suit. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483, 484 (W.D.N.C. 1975) (plaintiffs achieved their aim of total desegregation of the local public schools).

56. Hensley v. Eckerhart, 103 S. Ct. at 1935.

57. *Id.* at 1938.

58. *Id.* at 1940 n.9 (citing Johnson v. Georgia Highway Express, Inc., 488 F.2d at 718).

59. Hensley v. Eckerhart, 103 S. Ct. at 1938.

60. Senate Report, *supra* note 28, at 5. Such awards are especially appropriate where a party has prevailed on an important issue in the case even when he ultimately does not prevail on all the issues. *Id. See* Bradley v. School Bd., 416 U.S. 696 (1974); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (pendent lite awards).

61. Hensley v. Eckerhart, 103 S. Ct. at 1938.

62. Some courts of appeals have stated flatly that plaintiffs should not recover for any work on unsuccessful claims. *See, e.g.*, Bartholomew v. Watson, 665 F.2d 910, 914 (9th Cir.

the circuits are in conflict on similar issues, it was left to the Supreme Court in *Hensley* to clarify this relationship.[63]

In *Hensley* both petitioners and respondents agreed that a plaintiff's success is relevant, but there was disagreement as to the weight a plaintiff's success should be given.[64] In response, the Supreme Court in *Hensley* stated that this "results obtained" factor is particularly crucial where a plaintiff is deemed to be the prevailing party, even though this party was successful on only some of his contentions.[65] As such, the Court then developed a quasi-test[66] for measuring the extent of a prevailing party's success in which two questions must be addressed.[67] First, did the prevailing party fail to succeed on those claims that were not *related* to the claims on which he succeeded?[68] Second, did the plaintiff succeed to such an extent that awarding attorneys' fees on the basis of hours reasonably expended becomes a satisfactory basis for maintaining a fee award?[69]

In addressing the first of these questions, the majority in *Hensley* agreed that in a single lawsuit it is possible to have distinctly different claims for relief that are based on dissimilar facts and theories of recovery.[70] Accordingly, the Court stated that all effort expended on an unsuccessful claim cannot be held to have been expended in pursuit of the ultimate result

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1982); Muscare v. Quinn, 614 F.2d 577, 579-81 (7th Cir. 1980). Other courts of appeals have suggested that prevailing plaintiffs should receive a fee based on hours spent on all nonfrivolous claims. *See, e.g.*, Sherkow v. Wisconsin, 630 F.2d 498, 504-05 (7th Cir. 1980); Brown v. Bathke, 588 F.2d 634, 636-37 (8th Cir. 1978). Still other appellate courts have held that recovery for hours spent on unsuccessful claims depends upon the relationship of those hours expended to the success achieved. *See, e.g.*, Copeland v. Marshall, 641 F.2d 880, 891-92 n.18 (D.C. Cir. 1980) (en banc); Gurule v. Wilson, 635 F.2d 782, 794 (10th Cir. 1980) (opinion on rehearing); Lamphere v. Brown University, 610 F.2d 46, 47 (1st Cir. 1979).

63. Hensley v. Eckerhart, 103 S. Ct. at 1939.

64. *Id.* at 1939.

65. *Id.* at 1940.

66. *Id.* at 1941. The Court in *Hensley* emphasized there is no precise rule or formula for determining the actual extent of success or whether issues are related, etc. *Id.* Rather, the Court was merely prescribing some sort of framework in order to provide a clearer and easier method of determining fee awards. In reality, this determination will have to be made on a case-by-case basis by the federal district courts after an independent examination of the facts.

67. *Id.* at 1940.

68. *Id.* One major reason why there is no precise method of determining when claims are related or unrelated is because each side's attorney is not required by law to record in explicit detail whether or not each minute of his time was spent on a certain claim. *Id.* at 1941 n.12. Counsel should be required to at least identify, however, the general subject matter of his time expenditures. *Id.*

69. *Id.* at 1940. As mentioned above, the extent of success by a plaintiff does not have to be complete. *See, e.g.*, Busche v. Burkee, 649 F.2d 509, 521 (7th Cir. 1981). A plaintiff need not prevail on every issue to be awarded attorney's fees under section 1988. *See supra* notes 34-38 and accompanying text.

70. *See generally supra* note 60. The Court in *Hensley* was well aware of the difficulty in dividing the hours worked by an attorney on an issue by issue basis. Hensley v. Eckerhart, 103 S. Ct. at 1941.

achieved.[71] In precise terms, work done on unrelated claims which the prevailing party did not carry in the litigation are not entitled to be considered in awarding an attorney's fee.[72] It is not such a clear cut question, however, when the unsuccessful claims are related to those issues the plaintiff prevailed upon.[73]

Realizing the difficulty in separating hours worked by an attorney into successful and unsuccessful claims, the *Hensley* Court fell back on the basic premise that the overall result is what matters.[74] Similarly, the district court should consider the overall success obtained by the prevailing party in relation to the hours reasonably expended by the attorneys on the litigation.[75] To support this contention, the Court in *Hensley* relied on *Davis v. County of Los Angeles*[76] where the court held that in a lawsuit consisting of related claims, where a plaintiff achieved excellent results, his award should not be reduced simply because he was not successful on every issue that was raised in the suit.[77] In support of its view that the extent of the success is critical to an award, the *Hensley* majority stated that there may be cases where the prevailing party is only limited in his or her success, and therefore, allowing an award based on the number of hours reasonably expended multiplied by a reasonable rate would result in inequity.[78] The *Hensley* Court believed that in these situations the district court should award only that amount of fees which is reasonable in relation to the results obtained.[79]

In applying the above holdings, the majority in *Hensley* found that although the district court made a "commendable effort"[80] in attempting to promulgate a fee award, the lower court nevertheless erred by failing to properly consider the relationship between the extent of the plaintiff's success and the amount of the fee award itself.[81] The district court had relied on the case of *Brown v. Bathke*[82] in reaching its decision. The Supreme

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71. Hensley v. Eckerhart, 103 S. Ct. at 1940. *See also* Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5049.

72. Hensley v. Eckerhart, 103 S. Ct. at 1940. *But see* Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d 34, 37 (2d Cir. 1978) (because the unsuccessful claim made by the plaintiff was frivolous, vexatious, etc., the defendant may be entitled to recover reasonable attorneys' fees in responding to that claim).

73. *See supra* note 64 and accompanying text.

74. Hensley v. Eckerhart, 103 S. Ct. at 1940.

75. *Id.*

76. 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5049.

77. *Id. See supra* note 55 (explaining excellent results).

78. Hensley v. Eckerhart, 103 S. Ct. at 1941.

79. *Id.* at 1943.

80. *Id.* at 1942. *See supra* note 68 and accompanying text.

81. *Id.* at 1942. By a "commendable effort," the *Hensley* Court meant that given the interrelated nature of the facts and the legal theories presented, the district court did not err in rejecting a "mathematical approach" of basing a fee award on a comparison of the total number of issues in the case with those upon which a party actually prevailed. *Id.* at 1940-41 n.11.

82. 588 F.2d 634 (8th Cir. 1978). In *Brown*, a fired school teacher sought reinstatement

Court, however, believed that reliance on *Brown* was erroneous because that case did not give enough emphasis to the "results obtained" factor.[83] The Eighth Circuit in *Brown* believed that the results obtained may be considered, but that this factor should not "be given such weight that it reduces the fee awarded to a prevailing party below the 'reasonable attorney's fee' authorized by section 1988."[84] The *Brown* court further held that even though the appellant was unsuccessful on the majority of the issues presented, these issues were not to be considered frivolous, and hence, remanded the case for reconsideration of the fee award.[85]

Justice Powell, on behalf of the *Hensley* majority, distinguished *Brown* on the basis of its holding that the extent of a party's success is a crucial factor that the district court should consider carefully when determining the amount of attorney's fees to be awarded.[86] The *Hensley* Court believed that the Eighth Circuit, in remanding the *Brown* case, was insinuating that the district court should not withhold fees on unsuccessful claims unless those claims were frivolous.[87] Justice Powell and the majority in *Hensley* found this to run contrary to their holding which directed the district court in its discretion to consider awarding a lesser amount in light of the limited success achieved by the prevailing party.[88] It should be noted that in his dissent, Justice Brennan felt that *Brown* was perfectly consistent with the majority's holding.[89]

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and attorney's fees. *Id.* at 635. The teacher was fired when school officials learned she was pregnant. *Id.*

83. Hensley v. Eckerhart, 103 S. Ct. at 1942 n.14. In *Brown*, the district court held that since the plaintiff failed on all issues but one, thus obtaining only a minor part of the relief sought, she should be awarded attorney's fees only for the time spent on the issue upon which she ultimately prevailed. Brown v. Bathke, 588 F.2d at 636. The plaintiff in *Brown* had alleged violations of her constitutional rights to privacy, equal protection, and due process. *Id.* The plaintiff teacher requested reinstatement, lost wages, and damages. *Id.* at 635. She prevailed only on the issue of whether there was a fair hearing before the board of education. *Id.* at 636.

84. Brown v. Bathke, 588 F.2d at 637.

85. *Id.* at 638.

86. Hensley v. Eckerhart, 103 S. Ct. at 1943.

87. *Id.*

88. Hensley v. Eckerhart, 103 S. Ct. at 1941-42. The district court has the discretion to adjust fee on the basis of either the exceptional or limited nature of the relief obtained by the "prevailing party," providing that the court has considered the relationship between the amount of the fee awarded and the results obtained. *Id.*

89. *Id.* at 1949 (Brennan, J., dissenting). The dissenting justices felt that what the majority found suspicious in *Brown* was the implication that a district court *must* award attorney's fees for all work reasonably calculated to advance a plaintiff's nonfrivolous claims including unsuccessful ones, whenever the client *hurdles* the "prevailing party" obstacle. *Id.* (emphasis added). *See* Brown v. Bathke, 588 F.2d at 637-38. The dissent pointed out, however, that the district court did not refer to the actual language in *Brown* that was criticized by the majority. Hensley v. Eckerhart, 103 S. Ct. at 1949. Rather, the lower court only cited to a footnote in *Brown* for the proposition that "mechanical division of claimed hours . . . ignores the interrelated nature of many prevailing and non-prevailing claims." *Id.* (citing Brown v. Bathke, 588 F.2d at 637 n.5). The dissent stated that this indicated that the *Brown* court was interested

The district court in *Hensley* had held that the respondents as prevailing parties were the "parties who had obtained relief of significant import" and therefore the extent of this relief clearly justified the award of a reasonable attorney's fee.[90] The Supreme Court in *Hensley*, however, indicated that the mere finding of "relief of significant import" failed to answer the question of what is reasonable in light of that level of success.[91] In other words, the inquiry into attorneys' fees should not end merely upon the finding that the prevailing party obtained significant relief.[92] The *Hensley* Court did admit, however, that with respect to the level of the respondent's success, the lower court award may be consistent with its holding but did not go as far as to affirm the trial court's decision.[93]

Overall, it appears that the Supreme Court reached a just decision. The dissent in *Hensley* agreed with the majority's carefully worded holding to the extent that a plaintiff's success is a critical factor in awarding attorneys' fees.[94] The four dissenting justices were also of the opinion that the Court's holding in *Hensley* was consistent with the purpose of section 1988 as well as with the interpretation of the statute by the various circuits.[95] Despite this endorsement, the dissent disagreed with the majority because the former recognized a potential flaw in the majority's analysis.[96]

The majority in *Hensley* constantly emphasized that the district court had the discretion to determine the amount of an attorney's fee award.[97] It is this very point which the dissent seized upon, arguing that the district

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only in related legal theories. Hensley v. Eckerhart, 103 S. Ct. at 1949.

Finally, the dissent argued that the Eighth Circuit never applied the holding in *Brown* in the manner asserted by the *Hensley* majority. *Id.* Rather, subsequent opinions by the Eighth Circuit make it clear that a district court should consider the degree of a "prevailing party" success in setting a fee award. *See, e.g.*, Oldham v. Ehnlich, 617 F.2d 163, 168 n.9 (8th Cir. 1980). The degree of a plaintiff's success is appropriate to consider when gauging the amount of an attorney's fee award. *Id.*; United Handicapped Fed'n v. Andre, 622 F.2d 342, 348 (9th Cir. 1980) (rejecting claim for over $200,000 in fees and setting $10,000 limit on award because of limited success in the case).

90. Hensley v. Eckerhart, 103 S. Ct. at 1942 (citing the district court Record 231).

91. *Id.* at 1942. The dissent suggested that if the district court's statement, "the extent of this relief clearly justifies the award of a reasonable fee," is altered by changing the word "a" to "this," the additional finding which the majority in *Hensley* demands would be satisfied. *Id.* at 1949 (Brennan, J., dissenting). In response, the majority stated that this view was erroneous because the district court's failure to consider this issue would not be alleviated by a mere conclusory statement that this fee was reasonable in light of the success obtained. *Id.* at 1942 n.15.

92. *Id.* at 1943.

93. *Id.* at 1942.

94. *Id.* at 1944 (Brennan, Marshall, Blackmun, Stevens, JJ., dissenting).

95. *Id.* at 1943-44. The dissenting justices also agreed that plaintiffs should recover attorney's fees when they succeed on any significant issue of the proceeding. *Id.* at 1944 (citing Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).

96. Hensley v. Eckerhart, 103 S. Ct. at 1944.

97. *Id.* at 1941.

court did in fact award a fee that was well within that court's "zone of discretion" under section 1988.[98] Furthermore, the majority in *Hensley* appeared to admit as much by its statements upholding the discretionary power of the district court[99] and by its acquiescence in stating that the district court's findings represented a "commendable effort" to explain the fee award.[100] The *Hensley* Court's response to the dissent's criticism was that although the lower court had discretion in making this equitable judgment, such equitable judgment must be exercised in light of the considerations set out by the Court in its opinion.[101]

This statement did not sway the dissenting justices. Their view was that any award which falls between the rough poles of the district court's "zone of discretion" accomplishes the congressional objectives of section 1988.[102] The dissenting justices also felt that the lower court had adequately addressed each of the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*[103] The dissent urged that the only discrepancy committed by the district court was lumping all of these factors, including the amount involved/results obtained factor, under the general heading "Reasonableness of the Fee."[104]

The significance of this position taken by the dissent is that if the district court is not allowed this "zone of discretion,"[105] the resulting situation would lead to one of the "least socially productive types of litigation imaginable; appeals from awards of attorney's fees."[106] In effect, that would result in two trials, one on the merits of the case and then another trial to deter-

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98. *Id.* at 1944. A district court's "zone of discretion" is any award determination which falls within two boundaries: one boundary being an award so low that it is clearly inadequate compensation to the prevailing party's attorney, and the other boundary being an award so high as to constitute an unmistakable windfall. *Id.* at 1950-51. *See, e.g.*, Gurrule v. Wilson, 635 F.2d 782, 793 (10th Cir. 1981) (award that does not fully compensate an attorney for his time does not meet standard of reasonable fees required by section 1988); Furtado v. Bishop, 635 F.2d 915, 923 n.16 (1st Cir. 1980) (court reduced fee award from $23,000 to $15,000 where the prevailing party's recovery was only $27,500). An appellate court should not reverse the award unless it falls outside these "rough poles." Hensley v. Eckerhart, 103 S. Ct. at 1950. Any award that falls within these "rough poles" substantially accomplishes Congress's objectives. *Id.* at 1951. A more exacting review, for which there is no clear mandate in the statute or its legislative history, frustrates rather than advances the policies of section 1988. *Id.*

99. *Id.* at 1941.

100. *Id.* at 1942.

101. *Id.* at 1941.

102. *Id.* at 1951. It was the intent of Congress to delegate to the federal district court the responsibility for setting a "reasonable fee." *Id.* at 1951 n.11. Appellate courts, as a matter of good judicial policy, should not disturb any lower court fee award unless it falls outside this rough "zone of discretion." *Id.*

103. 488 F.2d 714, 715-17 (5th Cir. 1974).

104. Hensley v. Eckerhart, 103 S. Ct. at 1948.

105. *See supra* note 95 and accompanying text.

106. Hensley v. Eckerhart, 103 S. Ct. at 1944.

mine the attorneys' fee award.[107] Such a result greatly increases the price a plaintiff must pay to vindicate his civil rights.[108] Therefore, without district court discretion, one of the major legislative purposes of section 1988 would be frustrated.[109] The only purpose these attorneys' fee award appeals might serve would be to spawn litigation and to take up valuable lawyers' and judges' time which could be more profitably devoted to other cases, including civil rights cases which section 1988 was meant to facilitate.[110] Furthermore, defendants in a civil rights action generally have "deeper pockets," and as such, have much to gain by dragging out the litigation in hopes that the plaintiff compromises his attorney's fees claim.[111]

Finally, the dissent in *Hensley* pointed out a direct correlation between the obstacles that are placed in a prevailing party's path in seeking reasonable attorney's fees, and the decreased likelihood lawyers will undertake civil rights litigation.[112] In other words, the greater the risk in obtaining a civil rights attorney's fee, the greater the likelihood that more attorneys will choose to undertake other civil litigation where collecting their fees is not so hazardous.[113] The result would undermine the very basic, yet important, congressional purpose of ensuring "effective access to the judicial process for persons with civil rights grievances."[114]

Hensley v. Eckerhart is important because the case represents the Supreme Court's attempt to reconcile varying circuit court decisions by clarifying attorneys' fees in the very common type of civil rights action where the plaintiff, although successful overall, did not succeed on all of the claims asserted. After *Hensley*, it becomes obvious that work done on distinct, unsuccessful claims will not merit inclusion into the fee award.[115] Furthermore, the Court's holding that the extent of a plaintiff's success is crucial to a fees award will aid future decisions where the case involves interrelated claims and the party is limited in its success.[116]

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107. *Id.*

108. *Id.*

109. *See, e.g.*, House Report, *supra* note 28, at 8. A key feature of the Civil Rights Attorney's Fee Act of 1976 is its mandate that fees are to be allowed in the discretion of the trial court, subject to case law interpreting similar attorney's fee provisions. 42 U.S.C. § 1988 (Supp. IV 1980).

110. Hensley v. Eckerhart, 103 S. Ct. at 1951.

111. *Id.*

112. *Id.*

113. *Id.*

114. House Report, *supra* note 28, at 1.

115. Hensley v. Eckerhart, 103 S. Ct. at 1943.

116. *Cf.* Blum v. Stenson, 52 U.S.L.W. 4377 (1984). In *Blum*, the plaintiff filed a civil rights action in federal district court on behalf of a statewide class of Medicaid recipients challenging certain procedures utilized for termination of Medicaid benefits. *Id.* at 4378. The district court entered summary judgment granting the requested relief. *Id.* After the Second Circuit Court of Appeals affirmed the lower court, the plaintiff filed for attorneys' fees in the district court. *Id.* Within this request, the plaintiff asked for and was granted by the district

As a final note, a caveat about the *Hensley* decision is in order. As is evident by the legislative intent behind section 1988 and subsequent case law interpreting this statute, courts must recognize and give deference to the district court's discretionary power of an attorney's fee award. Here the *Hensley* Court may have paid only lip service to this legislative mandate. The decision reached in *Hensley* is still important if viewed in a limited light because the decision breaks new ground in the area of attorney's fee awards where the prevailing party is not completely successful. The danger occurs when the *Hensley* decision is viewed on such a broad basis as to imply that a new precedent is being fashioned by the Court. This view would be erroneous and detrimental because it would undercut district court discretion, increase unjustified litigation, and could result in potential harmful effects as to the future of civil rights litigation. To remain faithful to the legislative objectives of section 1988, appellate courts, including the Supreme Court, should exercise judicial restraint in prolonging litigation over attorneys' fees after the merits of a case have been concluded.

Thomas Robert Hennen

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court a fifty percent bonus to compensate for the "complexity of the case," the novelty of the issues presented, and the "great benefit achieved." *Id.* The court of appeals upheld this award. *Id.*

The United States Supreme Court found that the lower court abused its discretion in awarding the fifty percent upward adjustment in the attorney's fee. *Id.* at 4381. This did not close the door, however, on any possible upward scaling of fee awards in civil rights cases. Relying on *Hensley*, the Supreme Court noted that 42 U.S.C. § 1988 and its legislative history provides for an award of reasonable attorney's fees for the prevailing party, but in some cases of "exceptional success" an enhanced award may be justified. *Id.* at 4380 (citing Hensley v. Eckerhart, 103 S. Ct. at 1940). In *Blum*, the Court found that the plaintiff failed to convincingly show that he had in fact undertaken a "complex case" containing "novel issues" or that the decision was of "great benefit" to a large class of people. *Id.* at 4381.

Finally, unrelated to the scope of *Hensley*, yet nevertheless important to the area of civil rights attorney's fees, the *Blum* Court held that section 1988 mandates that reasonable attorney's fees "are to be calculated according to prevailing market rates in the relevant community" and not according to the cost of providing the legal services, regardless of whether the prevailing party is being represented by a private attorney or a legal aid organization. *Id.* at 4379.