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Awarding Expert Witness Fees in Civil Rights Actions

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AWARDING EXPERT WITNESS FEES IN CIVIL RIGHTS ACTIONS

Expert witness testimony is commonly used in civil rights actions. Experts testify, for example, to medical damage and the quality of medical care in prisoners' rights cases,[1] and to statistical occurrences of unequal treatment of minorities in employment discrimination cases.[2] In school desegregation cases, experts are called not only to prove statistical racial inequities, but sometimes to participate, as well, in the long and complex process of proposing and evaluating redistricting plans.[3] Such testimony is often crucial for litigants to prove their cases,[4] and is frequently quite expensive.[5]

Federal courts may ease a prevailing party's financial burden by ordering the losing litigant to pay a portion of the winner's costs, in-

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[1] See, e.g., Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987), cert. denied, 485 U.S. 991 (1988); Newman v. Alabama, 503 F.2d 1320, 1328 n.11 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975).

[2] Expert testimony plays several important roles in employment discrimination cases. The discrimination itself must often be proved by statistical analyses of wage and promotion discrepancies between minorities and non-minorities. See, e.g., Denny v. Westfield State College, 880 F.2d 1465, 1466-67 (1st Cir. 1989) (plaintiffs' experts in a sex discrimination action applied a multiple regression analysis to show wage differentials between equally situated male and female faculty members); Rios v. Enterprise Ass'n Steamfitters Local 638, 400 F. Supp. 993, 997 (S.D.N.Y. 1975), aff'd in part and rev'd in part sub nom. EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579 (5th Cir. 1976), cert. denied, 430 U.S. 911 (1977); cf. EEOC v. Datapoint Corp., 412 F. Supp. 406, 410 (W.D. Tex. 1976) (defendants used experts to prove statiscally a lack of discrimination). Due to the complexity of back pay and other standard employment discrimination awards, experts also calculate damages. See, e.g., Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987). Finally, since these actions often result in injunctive relief in addition to damages, experts evaluate plans for correction of discrimination. See, e.g., *Rios*, 400 F. Supp. at 997 (experts determined a percentage goal for a labor union's racial integration); NAACP v. Allen, 340 F. Supp. 703, 705-06 (M.D. Ala. 1972) (experts estimated the time and cost of implementing new testing and hiring procedures of state troopers to rectify racial discrimination), aff'd and remanded, 493 F.2d 614 (5th Cir. 1974).

[3] See, e.g., Bradley v. School Bd. of Richmond, 317 F. Supp. 555, 568 (E.D. Va. 1970).

[4] See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 446 (1987) (Marshall, J., dissenting); *Denny*, 880 F.2d at 1467; Paschall v. Kansas City Star Co., 695 F.2d 322, 338-39 (8th Cir. 1982), rev'd on other grounds, 727 F.2d 692 (8th Cir.), cert. denied, 469 U.S. 872 (1984); Roberts v. S. S. Kyriakoula D. Lemos, 651 F.2d 201, 206 (3d Cir. 1981); see also Note, Contingent Fees for Expert Witnesses in Civil Litigation, 86 Yale L.J. 1680, 1680 & n.1 (1977) (claiming that expert evidence controlled case outcome in 65% of all litigation) (citing D. Doud, Scientific Evidence 1 (Wis. Law Seminars 1959)).

[5] See, e.g., *Paschall*, 695 F.2d at 338 (involving expert fees of over $300,000); Gilbert v. City of Little Rock, 709 F. Supp. 856, 861-62 (E.D. Ark. 1987) (litigant had to absorb over $93,000 in expert fees), aff'd by split decision, 867 F.2d 1062 (8th Cir.), cert. denied, 110 S. Ct. 57, modified on other grounds, 867 F.2d 1063 (8th Cir. 1989); see also Note, supra note 4, at 1680-81 nn.2 & 4 (expert witness fees "represent[] a litigation expense second only to the attorney's fee").

cluding expert witness fees.[6] Though expert witness fee reimbursements are generally limited by statute to thirty dollars per day, "fee-shifting" statutes create exceptions to this general limit.[7] In civil rights cases, the applicable fee-shifting statute is the Civil Rights Attorney's Fees Awards Act of 1976 ("Section 1988").[8]

In 1987, the Supreme Court capped judicial cost-shifting authority in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,[9] which concluded that absent explicit statutory direction, federal courts may not award more than the statutory expert witness fee limit.[10] Though *Crawford* did not involve a Section 1988 motion,[11] some courts have used the breadth of its holding to apply its limit to civil rights actions.[12] Other courts have read *Crawford* narrowly and awarded expert witness fees exceeding the thirty-dollar ceiling.[13] Thus, *Crawford* created as much confusion as it attempted to quiet. Federal courts have no clear direction as to whether they may award expert witness fees that exceed the statutory ceiling in Section 1988 actions.

This Note argues that the *Crawford* limit should not apply to Section 1988 actions. Part I summarizes the American system of fee awards, its exceptions for expert witness fees, and the development of Section 1988. Part II details the judicial confusion preceding *Crawford* and the decision itself, and is followed by Part III's discussion of the disparity in decisions since *Crawford*. Part IV examines interpretive and policy reasons for determining whether the *Crawford* limit applies in Section 1988 cases and concludes that imposing the statutory ceiling on expert witness fee awards is repugnant to Section 1988. Finally, this Note urges amendment to Section 1988 to resolve the morass of case law emerging from *Crawford*.

I. THE AMERICAN RULE AND EXPERT WITNESS FEE EXCEPTIONS

A. *The American Rule*

American federal courts generally require each party to bear her

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6 See infra notes 21-23 and accompanying text.

7 See infra notes 25-27 and accompanying text.

8 Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1982)) [hereinafter Section 1988].

9 482 U.S. 437 (1987).

10 Id. at 439.

11 The § 1988 motion, defeated in the district court, was not reintroduced on appeal. 482 U.S. at 446 n.1 (Marshall, J., dissenting); see Denny v. Westfield State College, 880 F.2d 1465, 1468 (1st Cir. 1989); infra notes 69-70 and accompanying text.

12 See infra notes 77-78 and accompanying text.

13 See infra notes 79-83 and accompanying text.

own litigation expenses, including attorney fees, witness fees, and miscellaneous costs such as transcripts and duplication.[14] This system is known as the "American Rule" because it began as an intentional rejection of the English practice of customarily awarding all litigation expenses to the prevailing party.[15]

Three general policies support the American Rule: protection of impecunious potential defendants, judicial expediency, and fairness.[16] American Rule proponents speculate that fear of incurring their adversary's costs would discourage people of modest means from defending themselves in court.[17] Proponents are also reluctant to implement the potentially burdensome judicial procedure necessary to evaluate cost awards.[18] Moreover, if cost awards are considered pen-

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[14] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Although the American Rule is most commonly characterized in terms of attorneys' fees, it applies as well to other costs of litigation, including expert witness fees. See International Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174, 1176-77 (5th Cir. 1986), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619, 621-22 (1931); Comment, Expert Witness Fees as Taxable Costs in Federal Courts—The Exceptions and the Rule, 55 U. Cin. L. Rev. 1207, 1211 (1987).

[15] *Alyeska*, 421 U.S. at 247 & n.18; Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216, 1220 (1967); see Kaplan, An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure, 69 Mich. L. Rev. 821, 836 (1971). English courts derive their authority to award costs from both statutes and their inherent discretionary power. Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202, 204 (1966). In England, the prevailing party serves a cost bill on the losing party. If the parties cannot arrive at an agreement, they submit the bill to a taxing master who reviews each expense to evaluate its amount and appropriateness. Id. at 205. The masters are to award only "necessary and proper" expenses. Kaplan, supra, at 836 (quoting Rules of the Supreme Court Order 62, rule 28(2)).

[16] Besides policies, several commentators have suggested historical factors contributing to the adoption of the American system. As attorneys' fees awards were originally thought to benefit the lawyers more than the litigants, distrust and dislike of lawyers may have influenced the rejection of England's system. See Sands, Attorneys' Fees as Recoverable Costs, 63 A.B.A. J. 510, 513 (1977) (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)). But see Starr, The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court, 28 S. Tex. L. Rev. 189, 190 (1986) (discrediting this theory, stating: "[f]ortunately, the underlying premise of this wretched theory presumably has been long since rejected"). The early American frontier spirit is also cited. The United States in its infancy was characterized by individualistic ideals that each person was responsible for and capable of defending herself. Note, supra note 15, at 1220-21.

[17] See, e.g., *Fleischmann*, 386 U.S. at 718; Sands, supra note 16, at 513; Starr, supra note 16, at 191; see also McCormick, supra note 14, at 639-41 (Although McCormick ultimately rejects the American Rule, he concedes that under an automatic fee-shifting system parties will hesitate before asserting doubtful defenses and will be more likely to compromise, arbitrate, or "surrender."). But cf. Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75, 80 (1963) (*rejecting* the American Rule, in part for the same reasons).

[18] See *Fleischmann*, 386 U.S. at 718; see also F. D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974) (the difficulty in determining reasonableness of fee awards "has given us pause," although courts are already required to do this in statutory fee-

alties, the uncertainty associated with most litigation would make it unfair to penalize the losing party merely for asserting a claim about which reasonable people could differ.[19] Finally, automatic fee shifting would threaten the overall American policy of minimizing litigation expenses and preventing the inflation of legal fees.[20]

B. *Exceptions for Expert Witness Fees*

Despite the American Rule, both Congress and the courts have created exceptions to discourage obdurate behavior, equitably distribute the expense of publicly beneficial litigation, and encourage private enforcement of important congressional policies. These statutory exceptions and common-law doctrines allow, and sometimes compel, a federal judge to award litigation costs to the prevailing party.

1. Statutory Exceptions

Congress has enacted statutes which grant federal courts general power to "tax," as an attachment of costs is termed, in any action at least a portion of expert witness fees onto the losing party's damage

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shifting situations). Determining the reasonableness of fees is complicated, and the process may turn into a second trial. McCormick, supra note 14, at 639 & n.100 (quoting Oelrichs v. Spain, 82 U.S (15 Wall.) 211 (1872)).

[19] See *F. D. Rich*, 417 U.S. at 129 (quoting *Fleischmann*, 386 U.S. at 718); McCormick, supra note 14, at 639; Sands, supra note 16, at 513 (merely bringing or defending suit, even on a doubtful claim, is not a wrongful action).

[20] See Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 234 & n.5 (1964) (citing, as evidence of this judicial policy, Rule 1 of the Federal Rules of Civil Procedure which compels the court " 'to secure the just, speedy, and *inexpensive* determination of every action.' ") (emphasis added in *Farmer*); Dowdell v. City of Apopka, 698 F.2d 1181, 1189 n.12 (11th Cir. 1983).

Several other American Rule policies have been suggested, but much less frequently. The *F. D. Rich* Court expressed a reluctance to make attorneys dependent upon judges for their earnings, calling this a threat to independent advocacy. 417 U.S. at 129. The American Rule has also been supported by some legalistic, tortious arguments rather than policy. For example, it has been suggested that litigation expenses should not be attached to recovery for an action because they "accrue" later. Sands, supra note 16, at 513. A tort-based argument characterized legal fees as too unforeseeable and remote to be the losing party's responsibility, as they are not the natural or proximate result of the underlying harm. Id.; McCormick, supra note 14, at 639 & n.99 (citing St. Peter's Church v. Beach, 26 Conn. 355, 366 (1857)).

In contrast, federal courts' reliance on the American Rule has been characterized as "blind adherence to a questionable precedent." Sands, supra, at 513. Some cases reluctantly sustaining the American Rule contain language disclaiming its dubious merits. As early as 1796, the Court in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) denied attorneys' fees because "[t]he general practice of the *United States* is in opofition to it; and even if that practice were not ftrictly correct in principle, it is entitled to the refpect of the court, till it is changed, or modified, by ftatute." Id. at 306 (old English spellings in original). More recently, even in *Alyeska Pipeline Service Co. v. Wilderness Society*, a seminal Supreme Court affirmance of the American Rule, the Court refused to argue its merits. The Court was satisfied that "[i]t is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs." 421 U.S. 240, 270-71 (1975).

payment. This power is granted in two places. First, Rule 54(d) of the Federal Rules of Civil Procedure ("Rule 54(d)") vests general discretion in the district court to award litigation costs, leaving the types of costs that can be taxed unspecified.[21] Second, a federal cost statute indicates that witness fees are among those costs a court may award.[22] Another cost statute limits witness fee reimbursements to thirty dollars per day.[23] After years of confusion, the Supreme Court rejected the proposition that Rule 54(d) vests a court with discretion to exceed the thirty-dollar limit.[24]

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21 Rule 54(d) provides:

> Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

Fed. R. Civ. P. 54(d).

22 Taxable costs are enumerated and defined in § 1920 of Title 28 of the United States Code. This section provides, in pertinent part:

> Taxation of costs
>
> A judge or clerk of any court of the United States may tax as costs the following:
>
> . . . .
>
> (3) Fees and disbursements for printing and witnesses;
>
> . . . .
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (1982) [hereinafter Section 1920].

23 Section 1821 of title 28 of the United States Code states, in pertinent part:

> Per diem and mileage generally; subsistence
>
> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> . . . .
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance.

28 U.S.C. § 1821 (1982) [hereinafter Section 1821].

Although neither § 1821 nor § 1920 so specifies, most courts interpret them to apply to both lay and expert witnesses. Over 50 years ago, the Supreme Court declared the statutory witness fee limit applicable to expert witness fee awards, saying that in the fee act which was predecessor to § 1821, "The Congress has dealt with the subject [of witnesses] comprehensively and has made no exception of the fees of expert witnesses." Henkel v. Chicago, St. P., M. & O. Ry., 284 U.S. 444, 446-47 (1932).

Lay witnesses testify only to their personal perceptions of facts in issue, while experts are called to testify to inferences which the jury is not as qualified to draw. McCormick on Evidence § 13 (E. Cleary 3d ed. 1984). Under the Federal Rules of Evidence, expert testimony may be used only when it would assist the jury to decide a fact in issue. Fed. R. Evid. 702 advisory committee's notes. For discussions of the definition of and qualifications for expert witnesses, see 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶¶ 702[01]-[04] (1988 & Supp. 1989); 7 J. Wigmore, Evidence §§ 1923, 1925 (Chadbourne rev. 1978).

24 Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); see infra text accompanying notes 69-74. The *Crawford* Court explained its interpretation of the interplay among Rule 54(d) and §§ 1821 and 1920 as follows:

> The logical conclusion from the language and interrelation of these provisions is

Congress has also enacted a group of less precise statutes which compel or allow a federal judge to award larger portions of litigation expenses, including attorneys' fees, in specific types of actions.[25] Some of these statutes explicitly direct or allow district courts to award "reasonable expert witnesses' fees."[26] Courts construe "reasonable" to permit a judge to exceed the thirty-dollar statutory limit on expert witness fee awards.[27]

These fee-shifting statutes provide incentive for private parties to initiate lawsuits that help to enforce congressional policies.[28] For this reason, most fee-shifting statutes pertain to public interest areas including environmental protection, trade and labor regulation, and civil rights,[29] all of which depend upon private enforcement.[30] These

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that § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs. *Crawford*, 482 U.S. at 441.

25 See infra notes 26 & 29 and accompanying text for reference to specific statutes.

26 Consumer Product Safety Act, 15 U.S.C. § 2060(c) (1988). Some other fee-shifting statutes which expressly authorize federal courts to award expert witness fees are: Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C) (1988); Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(3) (1988); National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4 (1988); Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (1988); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a)(1) (1988); Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 7430(a), (c)(1)(A)(ii) (1982 & Supp. V 1987); Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1982 & Supp. V 1987); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (1982); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (1982); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4) (1982); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d) (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (1982 & Supp. V 1987); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (1982); Deepwater Port Act of 1974, 33 U.S.C. § 1515(d) (1982); Act to Prevent Pollution From Ships, 33 U.S.C. § 1910(d) (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (1982); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (1982); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2) (1982); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (1982); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e) (1982 & Supp. V 1987); Clean Air Act, 42 U.S.C. §§ 7413(b), 7604(d), 7607(f) (1982); Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7622(b)(2)(B), (e)(2) (1982); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d) (1982); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d) (1982); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5) (1982); Natural Gas Pipeline Safety Act Amendments of 1976, 49 U.S.C. app. § 1686(e) (1982); Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. app. § 2014(e) (1982).

27 Dowdell v. City of Apopka, 698 F.2d 1181, 1188-89 (11th Cir. 1983).

28 See Awarding of Attorneys' Fees: Hearings on H. 521 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 2 (1975) (statement of Rep. Seiberling); see also Comment, supra note 14, at 1217 (fee-shifting statutes are also designed to deter frivolous conduct).

29 See Comment, supra note 14, at 1217 n.63. Other policy areas in which fee-shifting statutes abound are intellectual property, consumer protection, and energy conservation. Id. For other lists of fee-shifting statutes, see Starr, supra note 16, at 196 n.41; Note, The Civil

public interest areas rely heavily on private enforcement because they primarily involve private conduct—which the federal government lacks the resources to continually monitor. Private enforcement, in turn, depends heavily upon fee reimbursement because those likely to initiate public interest litigation often lack the financial capability to initiate a lawsuit against large, commercial offenders.[31] Fee-shifting statutes have proven to be effective tools for encouraging private enforcement.[32]

2. The Private Attorney General Exception

Before most fee-shifting statutes were enacted, courts created equitable exceptions to the American Rule under which they awarded counsel and expert witness fees in excess of the statutory maximum. Three of these, the bad faith,[33] common fund,[34] and common benefit[35]

Rights Attorney's Fees Awards Act of 1976, 52 St. John's L. Rev. 562, 563 n.4 (1978) [hereinafter Civil Rights].

30 The critical need for private enforcement of civil rights laws is discussed in S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) [hereinafter Senate Report], reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910, and infra note 114 and accompanying text.

31 See infra notes 117-23 and accompanying text.

32 Senate Report, supra note 30, at 4, reprinted in 1976 U.S. Code Cong. & Admin. News at 5911 ("These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy."); see Dowdell v. City of Apopka, 698 F.2d 1181, 1189 n.12 (11th Cir. 1983).

33 Either party can recoup attorneys' fees and expert witness fees if his opponent has acted " 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " Newman v. Piggie Park Enters., 390 U.S. 400, 402 n.4 (1968); see Green, From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts, 69 Cornell L. Rev. 207, 278-80 (1984) (citing F. D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974)). The bad faith exception has been used to award expert witness fees in addition to attorneys' fees. See, e.g., Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 441 F.2d 631 (5th Cir.), cert. denied, 404 U.S. 941 (1971). The policies behind an award of fees under the bad faith exception are protection of the honest litigant and deterrence of obstinate conduct. Note, Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L.J. 733, 735 (1973).

34 The common fund exception is policy-based rather than punitive. If a prevailing litigant secures a benefit for an ascertainable class which shares a fund with the litigant, the court may reimburse the litigant's attorneys' fees from this fund. Trustees v. Greenough, 105 U.S. 527, 532 (1881); Green, supra note 33, at 282. In addition to encouraging beneficial litigation, the common fund exception rectifies the unjust enrichment which occurs when the common fund members benefit at the prevailing litigant's expense. *Trustees*, 105 U.S. at 532; Note, supra note 33, at 736. An example of this would occur if a member of a trust successfully sues its trustees for wasting the trust's assets, thereby obtaining judgment for the benefit of the trust. As a result, the litigant has won money for the other members of the trust who were "free-riders" in the benefit of the litigation. La Raza Unida v. Volpe, 57 F.R.D. 94, 96-97 (N.D. Cal. 1972), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 U.S. 968 (1974); Green, supra note 33, at 282.

35 The third exception is a slight expansion of the common fund exception. This "common benefit" exception applies when a prevailing litigant secures a benefit for an ascertainable class,

exceptions, have been affirmed by the Supreme Court.[36] The fourth, the "private attorney general" exception, subsequently eliminated by the Court,[37] allowed a court to award counsel and expert witness fees when a prevailing party helped vindicate a strong congressional policy benefiting a large class of people, especially when private enforcement offered little or no financial reward.[38] Reimbursement was a necessary financial incentive to encourage private enforcement of congressional policies which public agencies alone could not efficiently

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but there is no common fund from which to draw counsel fees. The court instead assesses the cost of counsel fees onto the losing party who will then distribute the cost of the prevailing party's judgment among its other beneficiaries. Hall v. Cole, 412 U.S. 1, 7 (1973); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166-67 (1939); *Trustees*, 105 U.S. at 533; Green, supra note 33, at 297-301. Like the common fund exception, the common benefit exception attempts to redistribute an unjust enrichment and to encourage initiation of litigation for the benefit of others. To invoke the common benefit exception, there must be a reasonably direct connection between the litigant's success and the benefit conferred on the third parties (mere stare decisis is insufficient) and between the losing party and the beneficiaries' assets. Id. at 297-99.

36 See, e.g., Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (expanding common fund exception into common benefit exception); *Piggie Park*, 390 U.S. 400 (recognizing bad faith exception); *Trustees*, 105 U.S. 527 (recognizing common fund exception); see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-59 (1975) (sustaining all three exceptions while rejecting private attorney general exception).

37 See infra notes 42-44 and accompanying text.

38 See, e.g, Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974) (reapportionment of county governing body); Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1333 (1st Cir. 1973) (air pollution); Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972) (racial discrimination in housing); Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir.) (employment discrimination), cert. dismissed, 404 U.S. 1006 (1971); Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177, 1194-95 (D. Minn. 1974) (discrimination against Native Americans in federal education funding); Wallace v. House, 377 F. Supp. 1192, 1206 (W.D. La. 1974) (voting rights), aff'd in part and rev'd in part, 515 F.2d 619, 636-37 (5th Cir. 1975) (the Fifth Circuit affirmed the attorney's fee award on bad faith, not private attorney general grounds, due to the intervening *Alyeska* decision), vacated and remanded, 425 U.S. 947 (1976); Sims v. Amos, 340 F. Supp. 691, 694 (M.D. Ala.) (reapportionment of legislature), aff'd, 409 U.S. 942 (1972); NAACP v. Allen, 340 F. Supp. 703, 708-09 (M.D. Ala. 1972) (racial discrimination in police hiring), aff'd and remanded, 493 F.2d 614 (5th Cir. 1974); *La Raza Unida*, 57 F.R.D. at 98, 101-02 (environmental protection and housing relocation); Bradley v. School Bd. of Richmond, 53 F.R.D. 28, 42-43 (E.D. Va. 1971) (school desegregation), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974). This doctrine was born in *Newman v. Piggie Park Enterprises*, a racial discrimination case brought under a fee-shifting statute, in which the Supreme Court awarded attorneys' fees in the absence of bad faith, stating "[w]hen a plaintiff brings an action under [Title II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Piggie Park*, 390 U.S. at 402. Seizing this language and the ideas behind the common fund and common benefit exceptions, courts awarded counsel fees in the absence of a common fund and with at best a tenuous connection between the losing party and the other beneficiaries of the judgment. See, e.g., *Red School House*, 386 F. Supp. 1177. For an account of the private attorney general exception's creation from expansions of the common fund, common benefit, and bad faith exceptions, see Note, supra note 33, at 737-48.

enforce.[39] In addition, awarding fees rectified the unjust expense the litigant shouldered to benefit others.[40] These same reasons became the rationale for the enactment of Section 1988.[41]

C. *Section 1988*

In 1975, the Supreme Court abolished the private attorney general exception because it was such a drastic exception to the American Rule.[42] This decision severely curtailed fee reimbursements. The Court reasoned that explicit congressional approval was required before such a far-reaching exception could be judicially recognized.[43] The private attorney general exception afforded courts too much "roving" authority to determine which policies warranted an award of fees with no legislative guidance.[44]

Congress immediately reacted by codifying the private attorney general doctrine into the Civil Rights Attorney's Fees Awards Act of 1976.[45] Section 1988 directly overturned the Supreme Court's nullifi-

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39 Note, supra note 33, at 733. Limited funds, heavy bureaucracy, and conflicts of interest in public enforcement provoke the need for private enforcement of these policies. Id. See *Natural Resources Defense Council*, 484 F.2d at 1334 (demonstrating why private enforcement is necessary to the Clean Air Act).

40 See *Natural Resources Defense Council*, 484 F.2d at 1333; Note, supra note 33, at 756.

41 See infra notes 45-48 and accompanying text.

42 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

43 Id. at 269.

44 Id. at 262-63. Congress demonstrated an intent to reserve fee-shifting decisions for itself by enacting fee-shifting statutes which provide for various amounts of discretion under different policies. Id. at 262. Further, courts would have a difficult time deciding which statutes warrant attorneys' fees awards without more specific congressional direction. See id. at 263-64.

Although only attorneys' fees were at issue in *Alyeska*, its reasoning and conclusion would logically extend to expert witness fees as well. In reaching its conclusion, the Court reviewed the history of cost statutes which govern expert witness fees and decided that although Congress has established statutory exceptions and has implicitly approved some common-law exceptions, it has not "retracted, repealed, or modified the limitations on taxable fees contained in the [cost] statute and its successors." Id. at 260. Therefore, except in those congressionally approved situations, Congress intended the cost statutes to limit awards.

45 Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1982)). Section 1988 provides, in pertinent part:

> Proceedings in vindication of civil rights; attorney's fees
>
> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], 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 [of litigation].

42 U.S.C. § 1988 (1982).

For discussions of the legislative history of § 1988, see Malson, In Response to Alyeska—The Civil Rights Attorney's Fees Awards Act of 1976, 21 St. Louis U.L.J. 430 (1977); Civil Rights, supra note 29. Section 1988 responded directly to *Alyeska* and proposed to fill *Alyeska*-created gaps in judicial power to award attorneys' fees under various civil rights laws.

cation, and thus reinstated the financial incentive vital to private enforcement of many civil rights laws.[46] Section 1988 grants federal judges discretion in civil rights cases to award the prevailing party "a reasonable attorney's fee as part of the costs" of litigation.[47] Like the private attorney general doctrine, Section 1988's fee-shifting provision was intended to encourage civil rights litigants to judicially enforce their claims without fear of prohibitive expense.[48]

II. EXPERT WITNESS FEES UNDER SECTION 1988

Before *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,[49] federal courts awarded expert witness fees using widely divergent standards. In *Crawford*, the Supreme Court attempted to standardize this chaos by eliminating most sources of judicial discretion to exceed the statutory limit. *Crawford* did not settle the issue, however, as lower courts continue to disagree on whether civil rights cases remain an exception to the statutory limit.

A. *Pre-*Crawford *Confusion*

Before *Crawford*, federal courts awarded expert witness fees in divergent and confusing ways. Circuits could not agree on whether they had any discretion to award excess expert witness fees, and if so, the source and extent of such discretion.

Within Section 1988, some pre-*Crawford* courts found no discre-

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Senate Report, supra note 30, at 4, reprinted in 1976 U.S. Code Cong. & Admin. News at 5912; see Dowdell v. City of Apopka, 698 F.2d 1181, 1191 (11th Cir. 1983). Congress wanted to provide judges with explicit statutory authority to award counsel fees under those civil rights laws which had no provision for counsel fees. Senate Report, supra note 30, at 4, reprinted in 1976 U.S. Code Cong. & Admin. News at 5911.

46 See infra notes 117-23 and accompanying text.

47 42 U.S.C. § 1988 (1982).

48 Senate Report, supra note 30, at 2, reprinted in 1976 U.S. Code Cong. & Admin. News at 5909-10. Congressional goals behind § 1988 included private enforcement of congressional policies, assuring access to courts, and assigning the burden of civil wrongs onto the wrongful party.

> [The] civil rights laws depend heavily upon 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.
>
> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Id. at 5910. See infra notes 112-16 and accompanying text for further discussion of § 1988's policies.

49 482 U.S. 437 (1987).

tion to exceed statutory fee limits.[50] Most of these courts interpreted Section 1988's silence as to expert witness fees as congressional intent not to use the statute to override cost statute limits.[51]

Other circuits rejected this strict interpretation of Section 1988 and found that it creates discretion to award expert witness fees above the statutory per diem.[52] These courts agreed on the existence of discretion, but they differed as to its sources and limits. Several argued from the statute's text, claiming that expert fees are definitionally included in Section 1988's "reasonable attorney's fee."[53] Other courts declined to reconcile expert fee awards with the text of Section 1988, justifying their awards instead on the legislative intent or policies behind the statute.[54] One circuit also required that the expert testimony be "reasonably necessary."[55]

Several circuits also found discretion in Rule 54(d) to exceed cost statute limits without the benefit of a fee-shifting statute.[56] Most of these courts also relied on a previous Supreme Court statement which had acknowledged the existence of limited discretion to exceed statu-

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50 The Fourth, Fifth, and Sixth Circuits held this view. See, e.g., International Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174, 1181 (5th Cir. 1986), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); Northcross v. Board of Educ., 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Wheeler v. Durham City Bd. of Educ., 585 F.2d 618, 623-24 (4th Cir. 1978).

51 See, e.g., *Woodworkers*, 790 F.2d at 1179-80; *Wheeler*, 585 F.2d at 624. Ironically, one of these courts denying excess expert witness fees purported to apply a broad interpretation of § 1988's "reasonable attorney's fee." See *Northcross*, 611 F.2d at 633, 639-40.

52 The Seventh, Tenth, and Eleventh Circuits supported this view. See, e.g, Chicago College of Osteopathic Medicine v. George A. Fuller Co., 801 F.2d 908, 911 (7th Cir. 1986) (dictum); Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983); Dowdell v. City of Apopka, 698 F.2d 1181, 1187 (11th Cir. 1983); cf. Heiar v. Crawford County, 746 F.2d 1190, 1203-04 (7th Cir. 1984) (in a civil rights case brought under an analogous fee-shifting statute, the court based its award on the history and purposes of § 1988), cert. denied, 472 U.S. 1027 (1985). Although it is not clear, the D.C. Circuit probably shared this view as well. See, e.g., Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984) (this court used such broad reasoning and language that, although only expenses other than expert fees were at issue, the court probably would not have distinguished expert fees), cert. denied, 472 U.S. 1021 (1985), overruled on other grounds, Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988).

53 See *Heiar*, 746 F.2d at 1203-04; *Ramos*, 713 F.2d at 559; *Dowdell*, 698 F.2d at 1190-91.

54 See, e.g., *Chicago College*, 801 F.2d at 912.

55 *Ramos*, 713 F.2d at 559.

56 See, e.g., *Chicago College*, 801 F.2d at 911; Murphy v. International Union of Operating Eng'rs, 774 F.2d 114, 132-34 (6th Cir. 1985) (dictum), cert. denied, 475 U.S. 1017 (1986); Hiegel v. Hill, 771 F.2d 358, 359-60 (8th Cir. 1985), cert. denied, 474 U.S. 1058 (1986); Templeman v. Chris Craft Corp., 770 F.2d 245, 248-50 (1st Cir.), cert. denied, 474 U.S. 1021 (1985); Quy v. Air Am., Inc., 667 F.2d 1059, 1067-68 (D.C. Cir. 1981); Roberts v. S. S. Kyriakoula D. Lemos, 651 F.2d 201, 206 (3d Cir. 1981). See supra note 21 and accompanying text for discussion of Rule 54(d).

tory maximums.[57] In that statement, the Court had cautioned, in dictum, that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute."[58] Many circuits limited the discretion under Rule 54(d) by requiring some degree of necessity for expert testimony, but those circuits conflicted over the requisite degree.[59] Other circuits denied any discretion in Rule 54(d) to tax excess expert fees.[60]

Thus, expert witness fee awards were characterized by confusion and discord. Under both fee-shifting statutes and Rule 54(d), courts were unsure of the nature and limits of their discretion to exceed statutory cost ceilings.

B. Crawford's *Putative Solution*

Crawford presented the Supreme Court with an opportunity to standardize the treatment of expert witness fee taxing. In *Crawford*, the Court consolidated two somewhat complicated awards actions. The first[61] was an antitrust action in which the prevailing defendant petitioned for attorneys' fees and costs under Rule 54(d).[62] The sec-

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[57] See *Hiegel*, 771 F.2d at 359-60; *Templeman*, 770 F.2d at 248, 250; *Roberts*, 651 F.2d at 206.

[58] Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964).

[59] The Third, Sixth, and Eighth Circuits would only award excess expert witness fees if the testimony was "crucial" or "indispensable" to the resolution of issues, while the First Circuit required the costs to be "extraordinary" and pre-approved by the court. See, e.g., *Murphy*, 774 F.2d at 134; *Hiegel*, 771 F.2d at 360; *Templeman*, 770 F.2d at 250; *Roberts*, 651 F.2d at 206. The Seventh and D.C. Circuits would only exceed cost statutes in "exceptional circumstances," but they defined this phrase differently. See, e.g., *Chicago College*, 801 F.2d at 911; *Quy*, 667 F.2d at 1066. The D.C. Circuit required prior court approval or that the testimony be "information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the resolution of the case." Id. at 1066 & n.11. The Seventh Circuit rendered the exception a virtual nullity, dismissing it as merely judicial "hesitat[ion] to state hard-and-fast rules which foreclose any future appeal to circumstances not foreseen at present." *Chicago College*, 801 F.2d at 911.

[60] See, e.g., International Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174, 1180 (5th Cir. 1986), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); cf. CleveRock Energy Corp. v. Trepel, 609 F.2d 1358, 1363 (10th Cir. 1979) (impliedly rejecting discretion under Rule 54(d) by holding that "[i]n the absence of specific agreement between the parties, . . . expert witnesses are entitled only to the regular statutory witness fees as part of taxed costs," although Rule 54(d) itself was not discussed), cert. denied, 446 U.S. 909 (1980).

[61] J.T. Gibbons, Inc. v. Crawford Fitting Co., 102 F.R.D. 73 (E.D. La. 1984), rev'd, 790 F.2d 1193 (5th Cir. 1986), aff'd and remanded, 482 U.S. 437 (1987).

[62] It is not clear whether petitioners also moved for expert witness fees under the fee-shifting provision in the Clayton Act, 15 U.S.C. § 15 (1988). On certiorari to the Supreme Court, petitioners stated "[t]he [district] court's award of expert witness fees as costs was based upon the exercise of its discretion under Rule 54(d) of the Federal Rules of Civil Procedure." Brief for the Petitioners at 3, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) (No. 86-322). Indeed, the district court opinion analyzes expert witness fees under Rule 54(d)

ond[63] was an employment discrimination action in which the prevailing defendant filed for costs, including expert witness fees, under Rule 54(d), and filed separately for attorneys' fees under Section 1988.[64]

The en banc Fifth Circuit denied excess expert witness fees in both actions. According to the court, Rule 54(d) does not provide discretion to supersede cost statute limits because Rule 54(d) explicitly disavows discretionary taxing "where express provision therefor is made . . . in a statute of the United States."[65] The court considered cost statutes to be such express provisions.[66] Further, although neither petitioner had motioned for expert witness fees under Section 1988,[67] the court deemed fee-shifting statutes to apply in both cases and found that neither Section 1988 nor the Clayton Act (an antitrust fee-shifting statute) provides explicit fee-shifting authority to tax expert witness fees in excess of the thirty-dollar cap.[68]

Upon consolidation, petitioners only appealed the Fifth Circuit's denials of excess expert witness fees under Rule 54(d).[69] They did not challenge the denials of expert witness fees under the Clayton Act and Section 1988.[70] The Supreme Court affirmed the Fifth Circuit's refusal to exceed the statutory limit, agreeing that Rule 54(d) grants no discretion to do so. Rule 54(d) only grants discretion to refrain from awarding costs.[71] The Court proceeded even further and held that without explicit statutory or contractual authority to exceed the statu-

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only and makes no mention of the Clayton Act's fee-shifting provision. See *Gibbons*, 102 F.R.D. 73. On appeal, however, the Fifth Circuit also discussed, and ultimately denied, expert witness fee awards under the Clayton Act. See J.T. Gibbons, Inc. v. Crawford Fitting Co., 790 F.2d 1193, 1194-95 (5th Cir. 1986), aff'd and remanded, 482 U.S. 437 (1987).

63 International Woodworkers of Am. v. Champion Int'l Corp., 43 Fair Empl. Prac. Cas. (BNA) 381 (N.D. Miss. 1983), aff'd, 790 F.2d 1174 (5th Cir. 1986), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987).

64 See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 446 n.1 (1987) (Marshall, J., dissenting).

65 International Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174, 1178 (5th Cir. 1986) (quoting Rule 54(d)), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); accord J.T. Gibbons, Inc. v. Crawford Fitting Co., 790 F.2d 1193, 1194 (5th Cir. 1986), aff'd and remanded, 482 U.S. 437 (1987).

66 *Woodworkers*, 790 F.2d at 1177-78; accord *Gibbons*, 790 F.2d at 1194.

67 *Crawford*, 482 U.S. at 446 n.1 (Marshall, J., dissenting). It is also possible that neither petitioner had motioned or appealed for expert fees under the Clayton Act. See supra note 62.

68 See *Woodworkers*, 790 F.2d at 1181 (§ 1988); *Gibbons*, 790 F.2d at 1194-95 (Clayton Act).

69 See Brief for the Petitioners at *i*, *Crawford*, 482 U.S. 437 (No. 86-322); *Crawford*, 482 U.S. at 446 n.1 (Marshall, J., dissenting) (citing the trial court record in the employment discrimination action).

70 See Brief for the Petitioners at *i*, *Crawford*, 482 U.S. 437 (No. 86-322); *Crawford*, 482 U.S. at 446 n.1 (Marshall, J., dissenting).

71 *Crawford*, 482 U.S. at 442.

tory limit, courts must adhere to it in expert fee awards.[72] To unify precedent, the Court expressly dismissed, as simply dictum,[73] its previous statement that had admitted judicial discretion to overstep cost statutes.[74]

The majority couched its denial of excess expert fees in very broad terms, yet never mentioned the Clayton Act, Section 1988, or any other fee-shifting statute. Justice Blackmun concurred in the result, stipulating that the holding did not reach cases brought under Section 1988.[75] Justices Marshall and Brennan, in their dissent, agreed with Blackmun's condition, pointing out that "the issue [of expert witness fees under Section 1988 was] not properly before the Court."[76] Since the *Crawford* majority opinion did not address or discuss expert fee awards under Section 1988, the issue remains unresolved.

III. POST-*CRAWFORD* DIVERGENCE

Post-*Crawford* decisions have disagreed on whether the *Crawford* expert witness fee limit governs Section 1988 actions. Several courts have applied the limit in Section 1988 actions because of the breadth of *Crawford*'s holding.[77] The *Crawford* Court, although faced with

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72 Id. at 439.

73 Id. at 443.

74 Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964); see supra notes 57-58 and accompanying text.

75 *Crawford*, 482 U.S. at 445 (Blackmun, J., concurring).

76 Id. at 446 n.1 (Marshall, J., dissenting).

According to legal theory, the Supreme Court has not ruled on the issue of awarding expert witness fees under Section 1988 because only treatment under Rule 54(d) was at issue. Appellate court holdings have precedential value only for those issues, theories, and factual situations brought before it. "[I]nsofar as the court's statement of the holding covers a type of facts not before the court, the statement is mere dictum." S. Mermin, Law and the Legal System: An Introduction 290 & n.14 (2d ed. 1982); see E. Levi, An Introduction to Legal Reasoning 2-3 (1948). This prevents courts from deciding hypothetical questions and issues on which they have heard no arguments. H. Jones, J. Kernochan & A. Murphy, Legal Method: Cases and Text Materials 114 (2d ed. 1980). But see S. Mermin, supra, at 290 & n.13 (Some accept whatever breadth a court uses as its holding, regardless of specific facts in issue.).

77 See Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987), cert. denied, 108 S. Ct. 1735 (1988); Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987), cert. denied, 108 S. Ct. 1298 (1988); Gilbert v. City of Little Rock, 709 F. Supp. 856, 862 (E.D. Ark. 1987) ("The Court is not unmindful of the burden that this finding places on civil rights plaintiffs, not only in the instant case, but in others as well. However, this Court is constrained to follow the pronouncements of the United States Supreme Court."), aff'd by split decision, 867 F.2d 1062 (8th Cir.), cert. denied, 110 S. Ct. 57, modified on other grounds, 867 F.2d 1063 (8th Cir. 1989); Alberti v. Sheriff of Harris County, 688 F. Supp. 1176, 1203 (S.D. Tex.), modified on other grounds sub nom. Alberti v. Klevenhagen, 688 F. Supp. 1210 (S.D. Tex. 1987); cf. Denny v. Westfield State College, 880 F.2d 1465, 1468 (1st Cir. 1989) (the court applied *Crawford*'s limit to Title VII, a fee shifter identical in relevant language to § 1988, stating "*Crawford* cuts too wide a swath. Its sweep does not permit experts' expenses to be awarded . . .

only interpretation of Rule 54(d), established with broad strokes a rule which could be held to encompass all cost awards, including those under fee-shifting statutes.[78] Post-*Crawford* courts that have deemed Section 1988 not to be express authority to overstep statutory limits have thus felt constrained to apply its limit in civil rights cases.

Other courts have found *Crawford* inapposite to civil rights actions and therefore have exceeded the statutory per diem.[79] Most have merely agreed with *Crawford*'s concurrence and dissent that Section 1988 was not at issue,[80] with some also suggesting that applying a strict *Crawford* limit on expert witness fees would undermine the policy behind Section 1988.[81] One court, refusing to enforce *Crawford* "beyond the contours of Rule 54,"[82] concluded that Section 1988 is just the explicit statutory authority prescribed by *Crawford* to overcome statutory limits, despite Section 1988's lack of specific refer-

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simply because a plaintiff prevails under a law which contains a general fee-shifting provision."); Glenn v. General Motors Corp., 841 F.2d 1567, 1573-74 (11th Cir.) (applying *Crawford*'s limit to an action for expert witness fees under the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1982), which, similar to § 1988, has no explicit expert witness provision), cert. denied, 109 S. Ct. 378 (1988). But cf. Sevigny v. Dicksey, 846 F.2d 953, 959 (4th Cir. 1988) (citing *Crawford* as authority for the elimination of Rule 54(d) discretion, but denying expert witness fees under § 1988 because of other Fourth Circuit precedent).

78 See *Denny*, 880 F.2d at 1468; *Glenn*, 841 F.2d at 1573-74; *Sevigny*, 846 F.2d at 959; *Boring*, 833 F.2d at 474; *Leroy*, 831 F.2d at 584; *Gilbert*, 709 F. Supp. at 862.

79 See, e.g., Freeman v. Package Machinery Co., 865 F.2d 1331, 1345-47 (1st Cir. 1988); SapaNajin v. Gunter, 857 F.2d 463, 465 (8th Cir. 1988); Johns v. Whirlpool Corp., No. 86-2003 (D. Kan. Feb. 4, 1988) (WESTLAW, Allfeds database); Black Grievance Comm. v. Philadelphia Elec. Co., 690 F. Supp. 1393, 1403-04 (E.D. Pa. 1988); Hillburn v. Commissioner, 683 F. Supp. 23, 27 (D. Conn. 1987), aff'd mem., 847 F.2d 835 (2d Cir. 1988); United States v. Yonkers Bd. of Educ., 118 F.R.D. 326, 330 (S.D.N.Y. 1987), cert. denied, 108 S. Ct. 2821 (1988); cf. Mathis v. Spears, 857 F.2d 749, 758-59 (Fed. Cir. 1988) (In a patent case with a fee-shifting statute which, like § 1988, specifies only "a reasonable attorney's fee," the court stated that *Crawford* "did not reach the question of whether awards of attorney fees under statutes specifically providing for such awards may include witness fees beyond the limits of Sections 1920 and 1821."); Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987) (the court, in dictum, distinguished *Crawford* from "appropriate case[s], [in which] expert witness fees may be reimbursed as part of an attorney's fees award," citing Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983), a civil rights case under § 1988).

80 See *Crawford*, 482 U.S. at 445, 446 n.1 (Blackmun, J., concurring; Marshall, J., dissenting); see, e.g., *Hillburn*, 683 F. Supp. at 27. Some of these cases eventually denied excess expert witness fees, but conceded that *Crawford* did not force them to do so. See, e.g., *Sevigny*, 846 F.2d at 960.

81 *Freeman*, 865 F.2d at 1346 & n.11; *Johns*, No. 86-2003; *Black Grievance*, 690 F. Supp. at 1403; *Yonkers*, 118 F.R.D. at 330.

82 *Freeman*, 865 F.2d at 1346. "[B]ecause a federal 'civil rights' type of statute containing a separate cost-shifting provision is at issue in this case, *Crawford*, without some further extrapolation, would not be directly controlling." Id. at 1347 (analogizing the statute at issue, the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1982), to § 1988). The *Freeman* court went to great lengths to comment on *Crawford*, but ultimately awarded expert fees under state, not federal law. Id. at 1349-50.

ence to expert witness fees.[83]

Despite the Court's intention, therefore, *Crawford* has failed to quiet dissension on expert witness awards in civil rights cases. Although courts generally have followed *Crawford*'s clear elimination of Rule 54(d) as a source of judicial discretion to exceed statutory limits,[84] they have disagreed as to whether Section 1988 is a source of such discretion. As the following section demonstrates, this disagreement is the natural result of the conflict between *Crawford*'s broad language and Section 1988's broad policies.[85]

IV. SHOULD *CRAWFORD* APPLY IN CIVIL RIGHTS ACTIONS?

Two analyses have been used to determine whether the *Crawford* expert witness fee limit should apply in Section 1988 actions: an examination of the statute's text in light of its legislative history, and a policy approach. Textual interpretations of Section 1988 can dictate opposite conclusions. Narrow readings of the text and legislative history lead to limiting awards,[86] while liberal readings allow expert witness fee awards to be implied.[87] Courts also use different policy arguments to support their positions. Those applying the *Crawford* limit cite the American Rule as policy;[88] their opponents cite Section 1988's policy of enforcing civil rights laws.[89]

A. *Interpretations of Section 1988*

Neither the text nor the legislative history of Section 1988 con-

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[83] Id. at 1346-47. But see Denny v. Westfield State College, 880 F.2d 1465, 1471 (1st Cir. 1989) (rejecting expert witness fee reimbursement under Title VII, the court also denied that § 1988 would trump statutory limits).

In an interesting interpretation of *Crawford*, the *Black Grievance* court read the *majority* opinion as specifically denying its application to § 1988 actions. That court stated:

> The Court in *Crawford* noted that Congress had broadened attorney's fee awards through its enactment of 42 U.S.C. § 1988, but had "not otherwise 'retracted, repealed, or modified the limitations on taxable fees contained in [Sections 1821 and 1920].' " . . . I interpret this to mean that, as to § 1988, the limitations of § 1821 were repealed.

Black Grievance, 690 F. Supp. at 1403.

[84] See, e.g., *Sevigny*, 846 F.2d at 960; Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (3d Cir. 1988).

[85] Consequently, those courts that limit expert witness fees under § 1988 do so based on a broad reading of *Crawford*, while those that exceed fee limits emphasize the policy behind § 1988. Compare Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987) (relying on *Crawford* language), cert. denied, 486 U.S. 1008 (1988) with *Yonkers*, 118 F.R.D. at 330 (citing policy reasons for disallowing the *Crawford* limit in civil rights actions).

[86] See infra notes 91-96 and accompanying text.

[87] See infra notes 97-107 and accompanying text.

[88] See infra notes 108-11 and accompanying text.

[89] See infra notes 112-27 and accompanying text.

tains explicit authorization to award expert witness fees.[90] Both before and since *Crawford*, some courts have narrowly read this omission to mean that Congress did not intend to award expert witness fees in civil rights actions. However, such a narrow reading ignores important elements of the legislative history which support a liberal reading of Section 1988. Other courts have followed a liberal interpretation and implied expert witness fee awards as a necessary part of the reasonable attorney's fee award which Section 1988 explicitly provides. This implication is further supported by overall congressional intent to codify the private attorney general exception into Section 1988.

1. Strict Readings

Advocates of limiting expert witness fee awards in civil rights actions read Section 1988 narrowly.[91] They claim that since Congress did not explicitly provide for expert witness fees in Section 1988, it did not intend to reimburse them under that statute.[92] They reason that the exclusion was intentional because Congress explicitly provided for expert witness fee reimbursements in other fee-shifting statutes.[93]

These courts also argue that Section 1988's legislative history is devoid of congressional intent to reimburse expert witness fees. Expert witness fees are not mentioned anywhere in the Senate Report,[94] the House Report,[95] or any of the floor debates in the enactment of section 1988.[96]

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[90] See supra note 45 for the text of § 1988; Senate Report, supra note 30, reprinted in 1976 U.S. Code Cong. & Admin. News 5908; H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) [hereinafter House Report].

[91] One recent case advocated that *Crawford* dictates strict readings of the text and legislative history of fee-shifting statutes when determining expert fee awards. Denny v. Westfield State College, 880 F.2d 1465, 1471 (1st Cir. 1989) ("[I]n the albedo of *Crawford*, courts must subject proffered statutory language and legislative history to fairly rigorous scrutiny.").

[92] See supra note 51 and accompanying text.

[93] See, e.g, *Denny*, 880 F.2d at 1471. Under the maxim of statutory interpretation *expressio unius est exclusio alterius*, the mention of expert witness fees in other fee-shifting statutes, supra note 26, shows that Congress was aware of expert witness fees and therefore did not omit them from § 1988 inadvertently. See 2A N. Singer, Sutherland Statutory Construction § 47.23 (4th ed. 1984).

[94] Senate Report, supra note 30, reprinted in 1976 U.S. Code Cong. & Admin. News 5908.

[95] House Report, supra note 90.

[96] There are a few passing remarks in the House of Representatives subcommittee testimony urging a specific reference to expert witness fees. Awarding of Attorneys' Fees, 1975: Hearings on H. 521 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 67 (1975) (statement of Charles A. Hobbs, Esq.); id. at 136 (statement of John M. Ferren). Attorneys in civil rights cases "face an additional problem: because of the limited resources available to them in public

2. Liberal Readings

Despite Section 1988's lack of reference to expert witness fees, several courts have interpreted it liberally to include expert witness fees under its award. Under this construction, expert witness fees are part of the definition of "a reasonable attorney's fee."[97] A broad reading of the statute was advocated by Congress[98] and is necessary because of the difficulty of distinguishing between actual attorney time and other expenses which are included in an attorney's hourly billing rate.[99]

In addition, those who claim the absence of any explicit recognition of expert witness fees in the legislative history have overlooked an important part of that history. Although expert witness fees were not discussed in any of the congressional debates, the Senate Report contains a reference which can be construed as demonstrating congressional intent to award such fees. The Senate Report provides three examples of cases in which "[t]he appropriate standards [for awarding fees were] correctly applied."[100] Two of those cases involved an

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interest cases, they are rarely able to afford the technical assistance of expert witnesses," while their opponents frequently have vast resources to draw from. Therefore, for equal access to the courts, attorneys' fees must be awarded. Id. at 89 (letter from Mary Frances Derfner, Lawyers' Committee for Civil Rights, Attorneys' Fees Project, to Rep. John F. Seiberling) (implying that expert witness fees should be compensated for in the attorneys' fees). No other discussion, aside from a brief discussion of preclearance for expert costs, occurred in subcommittee.

A related argument is that the legislative history evinces no desire to change the generally accepted federal expert witness fee policy. Congress did not explicitly overrule the early Supreme Court enforcement of statutory limits to expert witness fees in *Henkel v. Chicago, St. P., M. & O. Ry.*, 284 U.S. 444 (1932), nor did it repeal or modify witness fees provisions in §§ 1821 and 1920 to reflect an exception.

97 See supra note 53 and accompanying text.

98 "[T]he phrase 'attorney's fee' would include the values of the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation." 122 Cong. Rec. 35,123 (1976) (statement of Rep. Drinan).

99 Fees for expenses such as paralegals and expert witnesses are part of the meaning of "reasonable attorney's fee." Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985). Section 1988 should be read broadly to include expert witness fees and all out-of-pocket expenses which a lawyer normally does not include in overhead costs. Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983); see Dowdell v. City of Apopka, 698 F.2d 1181, 1190-91 (11th Cir. 1983).

100 The appropriate standards . . . are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) and *Swann v. Charlotte-Mecklenberg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

Senate Report, supra note 30, at 6, reprinted in 1976 U.S. Code Cong. & Admin. News at 5913 (citations omitted).

award of expert witness fees in excess of the statutory limit.[101] This reference, plus the absence of any negative references to expert witness fee awards, arguably show that Congress understood that cost statutes should not limit expert witness fee awards in civil rights actions.

Congressional omission of a specific expert witness fee provision in Section 1988 can be attributed to inadvertence rather than intention.[102] Although Congress has specifically provided for expert witness fee shifting in other statutes, these statutes, for the most part, are more recent than Section 1988 and reflect an increased awareness that expert testimony is "so substantial and common-place as to warrant express reference."[103] Those statutes more contemporary to Section 1988 concern areas such as environmental protection and economic policy,[104] which are patently scientific and mathematical in nature and are therefore more obviously dependent on expert testimony than is civil rights.[105]

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101 In *Davis*, 8 Empl. Prac. Dec. (CCH) at ¶ 9444, an employment discrimination case under Title VII of the Civil Rights Act of 1964, and in *Swann*, 66 F.R.D. 483, a school desegregation case, fees beyond the statutory limit were awarded to non-court appointed experts. See Brief for the NAACP Legal Defense and Educational Fund, Inc., the Lawyer's Committee for Civil Rights Under Law, the American Civil Liberties Union Foundation, and the Mexican American Legal and Educational Fund as Amici Curiae in Support of Respondents at 46 & n.22, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) (No. 86-328) (explaining that excess expert witness fees were awarded in *Swann*). Therefore, Congress implicitly recognized this practice as a correct application of § 1988's principles. But see Denny v. Westfield State College, 880 F.2d 1465, 1470-71 (1st Cir. 1979) (disavowing this Senate Report cite for expert witness fee purposes because these cases were cited in the Senate Report only to show appropriate attorney's fee awards).

102 International Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174, 1184 (5th Cir. 1986) (Rubin, J., concurring), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987).

103 Id.

104 See supra note 26 and accompanying text.

105 Furthermore, congressional failure to repeal or modify either of the cost statutes, §§ 1821 and 1920, does not necessarily evidence an intention to have them govern expert witness fee awards in civil rights actions. Instead, it may show that Congress considered cost statutes irrelevant in fee-shifting situations because § 1821 provides that it governs "[e]xcept as otherwise provided by law." § 1821(a)(1). Congress may have presumed modification of cost statutes unnecessary because the exemption provision removes fee-shifting statutes from § 1821 bounds.

Similar reasoning refutes the allegation that Congress would have mentioned that it was rejecting previous Supreme Court imposition of cost statute limits on expert witness fee awards in *Henkel v. Chicago, St. P., M. & O. Ry.*, 284 U.S. 444 (1932), discussed at supra note 96. Congress probably did not intend to overrule that precedent; rather, Congress probably thought it inapplicable to statutory fee-shifting situations, and therefore unnecessary to distinguish. *Henkel* did not concern a fee-shifting statute, and it was decided in a court of law before the merger of law and equity. At that time, courts of law possessed no authority to exceed statutory cost maximums, while courts of equity were allowed discretion. The merger of law and equity in 1938, which gave courts of law discretion to tax costs through Rule 54(d),

The legislative history of Section 1988 also favors a broad reading of the statute. The history shows that Section 1988 was intended to codify the private attorney general exception.[106] Before it was invalidated by the Supreme Court, lower courts commonly awarded excess expert witness fees under this exception.[107] Since Congress enthusiastically approved the exception and made no reference in the legislative history to departing from any aspect of it, Congress intended to adopt the doctrine's expert witness fee award standards.

B. *The Policy Approach*

1. Limiting Expert Witness Fees

Advocates of expert witness fee limits claim that awarding excess expert witness fees under Section 1988 conflicts with and threatens to overturn the American Rule. Although Congress has implicitly en-

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may have nullified the Supreme Court precedent. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 448 (1987) (Marshall, J., dissenting); *Woodworkers*, 790 F.2d at 1189-90 (Rubin, J., concurring). If so, Congress would have seen no need to reject Supreme Court precedent in its enactment of § 1988. But see *Crawford*, 482 U.S. at 444 (*Henkel* is a case of statutory construction of the Fee Act (§ 1821's predecessor). "Whatever the effect of the merger of law and equity in federal courts, it did not repeal any part of the Fee Act."); Chicago College of Osteopathic Medicine v. George A. Fuller Co., 801 F.2d 908, 910 (7th Cir. 1986) (*Henkel* was not overturned by the merger of law and equity because the Advisory Committee notes to Rule 54(d) state that it was not to affect § 1920).

[106] The purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent Alyeska decision has required specific statutory authorization if Federal courts are to continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply . . . . restores to the Federal courts authority which they had exercised for years until a little over 2 months ago.

121 Cong. Rec. 26,806 (1975) (statement of Sen. Tunney). At least one court recognized the significance of this statement. In Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983), the court stated that § 1988 grants authority to award costs "*identical* to that which existed under the equitable power in *Fairley*," citing Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974), a civil rights suit in which expert fees in excess of the statutory limit were awarded. *Dowdell*, 698 F.2d at 1191 (emphasis in original).

[107] See, e.g., Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974); Barth v. Bayou Candy Co., 379 F. Supp. 1201 (E.D. La. 1974) (photographer's fees awarded in employment discrimination case); Wallace v. House, 377 F. Supp. 1192, 1206 (W.D. La. 1974) (when attorneys' fees are appropriate, so are expert witness fees), aff'd in part and rev'd in part, 515 F.2d 619 (5th Cir. 1976) (in light of *Alyeska*, this court struck down the private attorney general exception application but did not distinguish between attorneys' and experts' fees under that exception), vacated and remanded, 425 U.S. 947 (1976); Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974); La Raza Unida v. Volpe, 57 F.R.D. 94, 102 (N.D. Cal. 1972), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 U.S. 968 (1974); Sims v. Amos, 340 F. Supp. 691, 695 (M.D. Ala.), aff'd, 409 U.S. 942 (1972); NAACP v. Allen, 340 F. Supp. 703, 708 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974).

dorsed some common-law attorney's fee exceptions[108] by not modifying or enacting contrary statutes, and has even statutorily increased exceptions,[109] Congress has not explicitly overturned the American Rule's general policy that each litigant bears her own expenses.[110] Allowing judges to imply a new expert witness fee exception into Section 1988 would contradict this general policy and would permit judges to invade the area of discretionary fee shifting, a legislative function.[111]

2. Exceeding Expert Witness Fee Limits

On the other hand, courts have also cited policy reasons for exceeding expert witness fee limits under Section 1988.[112] The primary policy behind Section 1988 is the encouragement of private enforcement of civil rights laws.[113] Private enforcement is necessary because public enforcement tends to be largely ineffective and inefficient, requiring onerous bureaucracy.[114]

Section 1988 was also designed to assure potential civil rights

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108 See supra notes 33-36 and accompanying text.

109 See supra notes 25-27 and accompanying text.

110 See supra notes 14-20 and accompanying text for discussion of the American Rule and its policies.

111 See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262 (1975). But cf. Chicago College of Osteopathic Medicine v. George A. Fuller Co., 801 F.2d 908, 910-11 (7th Cir. 1986) (In a tort and contract action, this court refused to imply an exception to the § 1821 limit which would effectively swallow the American Rule and overturn the spirit of *Henkel*'s expert witness fee limit, supra note 96. The court, however, expressly distinguished its facts from statutory fee-shifting situations.).

112 Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Johns v. Whirlpool Corp., No. 86-2003 (D. Kan. Feb. 4, 1988) (WESTLAW, Allfeds database); Hillburn v. Commissioner, 683 F. Supp. 23 (D. Conn. 1987), aff'd mem., 847 F.2d 835 (2d Cir. 1988); United States v. Yonkers Bd. of Educ., 118 F.R.D. 326 (S.D.N.Y. 1987), cert. denied, 108 S. Ct. 2821 (1988).

113 See Senate Report, supra note 30, at 2, reprinted in 1976 U.S. Code Cong. & Admin. News at 5909-10; 122 Cong. Rec. 33,313 (1976) (statement of Sen. Kennedy); Malson, supra note 45, at 432-34; Civil Rights, supra note 29, at 563.

Another policy underlying § 1988 is the equitable imposition of the burdens of civil wrongs. It is unjust for a victim to have to pay to obtain his constitutionally guaranteed rights while the violator does not. This policy was suggested by Johnson v. Georgia Highway Express, 488 F.2d 714, 719 (5th Cir. 1974). Although decided before the enactment of § 1988, *Johnson* was brought under the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) (1982), which contains a fee-shifting provision virtually identical to that of § 1988. *Johnson* stated that the policy behind Title VII fee-shifting was, in addition to attracting counsel and assuring court access to potential plaintiffs, "to fairly place the economical burden of Title VII litigation." Id. at 719. The legislative history of § 1988 reflects this additional policy. "If private citizens are to be able to assert their civil rights, and *if those who violate the Nation's fundamental laws are not to proceed with impunity*, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." Senate Report, supra note 30, at 2, reprinted in 1976 U.S. Code Cong. & Admin. News at 5910 (emphasis added). If this policy holds for awards of attorneys' fees, there is no reason to distinguish expert witness fees.

114 Dowdell v. City of Apopka, 698 F.2d 1181, 1189 n.12 (11th Cir. 1983).

plaintiffs legal access.[115] After the Supreme Court abolished the private attorney general exception, Congress created Section 1988 out of a concern that failure to reimburse would reduce civil rights victims' access to the courts.[116] In a democratic society, increased public access to federal courts is reason in itself to enact a fee-shifting statute, but assuring access also furthers Section 1988's other purpose, encouraging private enforcement of civil rights laws.

To achieve increased access and private enforcement, Section 1988 makes civil rights litigation financially feasible by reimbursing the prevailing party's litigation expenses.[117] But feasibility requires that compensation reflect the economic realities of civil rights litigations. First, expert witness testimony is often as essential to civil rights cases as competent representation.[118] Second, civil rights plaintiffs are frequently indigent and have insufficient resources for up-front outlays for legal expenses, including expert witness fees.[119] Finally, civil rights actions tend to be prohibitively costly to initiate, and usually offer only declaratory or injunctive relief,[120] leaving the prevailing party financially worse off for having to pay legal fees.[121]

One attorney, testifying before the Senate, explained the critical

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115 International Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174, 1183 (5th Cir. 1986) (Rubin, J., concurring), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); *Dowdell*, 698 F.2d at 1189; House Report, supra note 90, at 1; 122 Cong. Rec. 35,126 (1976) (statement of Rep. Kastenmeier); id. at 53,127 (statement of Rep. Holtzman).

116 City of Riverside v. Rivera, 477 U.S. 561, 576 (1986); *Woodworkers*, 790 F.2d at 1183 (Rubin, J., concurring); see Note, supra note 4, at 1699-1700 & n.96 ("Access to civil litigation is limited by the prospective litigant's willingness to risk a net financial loss . . . . If a prospective plaintiff has limited financial resources and is unable to finance litigation through borrowing, she faces a 'budget constraint' that may deny her access to the courts.").

117 *Dowdell* held that § 1988 should not be interpreted according to any predetermined list of expenses but should be construed in a way which would make civil rights litigation feasible. 698 F.2d at 1189.

118 *Woodworkers*, 790 F.2d at 1184 (Rubin, J., concurring); *Dowdell*, 698 F.2d at 1190; Bradley v. School Bd. of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974); Note, supra note 4, at 1680 & n.1.

119 122 Cong. Rec. 35,127 (1976) (statement of Rep. Holtzman). Further, experts must be an up-front expense because unlike attorneys' fees, expert witnesses' fees cannot be contingent upon the outcome of the case. To make them contingent is a violation of the Code of Professional Responsibility. But see Note, supra note 4, at 1681 & n.7 (urging the repeal of this prohibition).

120 *Riverside*, 477 U.S. at 577-78; Jones v. Wittenberg, 330 F. Supp. 707, 721 (N.D. Ohio 1971) ("It is clear that civil rights actions are basically equitable."), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

121 Even a court that followed, albeit reluctantly, *Crawford*'s broad holding acknowledged "the burden that this finding places on civil rights plaintiffs, not only in the instant case, but in others as well." Gilbert v. City of Little Rock, 709 F. Supp. 856, 862 (E.D. Ark. 1987), aff'd by split decision, 867 F.2d 1062 (8th Cir.), cert. denied, 110 S. Ct. 57, modified on other grounds, 867 F.2d 1063 (8th Cir. 1989).

need for fee reimbursements in public interest litigation through his own experience in such a case:

> [T]here is very little money for such essential things as, for example, expert witnesses. . . . I did not have any money at all to pay any expert anything. And so basically what we had to do was to write or telephone around the country with our hat in our hands asking, [sic] university people to give us assistance and to take some time off from their heavy class workload . . . . But at no time could we actually say to an expert, for example, give us three weeks, we want you down here in Washington, . . . we want you to be prepared to be a witness at trial . . . . This was precisely what the other side was doing. But, we could not do that.
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> . . . .
>
> As a result, the public interest lawyer must pare off very important issues . . . simply because they are either too technical or too big, or require too much expenditure of money.[122]

A policy awarding expert witness fees alleviates some of these obstacles to the initiation of civil rights lawsuits, thus benefiting the civil rights justice system.[123] More importantly, if the victims of civil rights violations do not possess the means to bring suit and cannot expect reimbursement for substantial, yet indispensable, expenses like expert witness fees, they will be unable to vindicate their civil rights, rendering Section 1988 largely ineffective. Without compensation of *all* of the reasonable costs of litigation, civil rights laws will be impossible to enforce.[124]

In addition, categorically denying expert witness fees may result in inefficient and thus ineffective use of legal counsel.[125] Lawyers will be forced to perform tasks better suited for experts, and to charge that work as attorneys' fees, compromising the effectiveness of representa-

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122 The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93rd Cong., 1st Sess. 833-34 (1973) (statement of Dennis Flannery, Esq., Attorney, Washington, D.C.).

123 Derfner, One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976, 21 St. Louis U.L.J. 441, 444-45 (1977). According to Derfner, the doctrine enabled public interest lawyers to bring actions that they had been unable to bring without the possibility of fee reimbursement. Id. Non-public interest lawyers and law firms began to build their civil rights practices. Id. at 445. This decentralization of public interest law resulted in better enforcement of constitutional rights because litigants no longer had to search far and wide for lawyers willing to take their cases. Id.

124 Chicago College of Osteopathic Medicine v. George A. Fuller Co., 801 F.2d 908, 911-12 (7th Cir. 1986); see also United States v. Yonkers, 118 F.R.D. 326, 330 (S.D.N.Y. 1987) (citing the "crippling effect such a limitation would have on civil rights suits in which the defendant generally has far greater resources in litigation in which expert testimony is often a critical factor"), cert. denied, 108 S. Ct. 2821 (1988).

125 *Chicago College*, 801 F.2d at 911-12 (dictum).

tion.[126] An even more likely result is that, without compensation for expert witness fees, civil rights litigators ultimately will revert to more remunerative actions, still further decreasing victims' already limited access to the courts.[127]

The inevitable decline in private enforcement of civil rights laws will in turn shift the burden of enforcement to the public. As private litigators are discouraged from accepting civil rights cases, victims will become increasingly dependent on already overworked public agencies and lawyers to defend their civil rights.

V. CONCLUSION

The best interpretation of Section 1988 is the one which is most true to the liberal congressional intent and policies behind it.[128] Congress approved of awarding excess expert witness fees in the Senate Report and made clear its intent to unconditionally adopt the private attorney general exception in Section 1988's legislative history. Any interpretation denying expert witness fees in Section 1988 actions thus misinterprets its legislative intent.

More critically, an interpretation that denies adequate compensation for expert witness fees, a substantial and vital litigation expense, threatens to stultify Section 1988's overall policy—the encouragement, privatization, and streamlining of civil rights enforcement—and unfairly burdens civil rights victims. For these reasons, courts should award reasonable expert witness fees as part of the "reasonable attorney's fee" under Section 1988.

Unfortunately, some courts have justified narrow fee reimbursement in civil rights actions by misconstruing *Crawford*'s sweeping language. Thus, Congress must amend Section 1988 to provide courts with more explicit notice of its intention to reimburse expert witness fees above the statutory limit. The final sentence of Section 1988 should be amended to read "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee *and the reasonable fees of expert witnesses* as part of the costs of litigation." This simple amendment will provide courts with the explicit authority they need

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126 Id.

127 International Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174, 1184 (5th Cir. 1986) (Rubin, J., concurring), aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); Dowdell v. City of Apopka, 698 F.2d at 1181, 1190 (11th Cir. 1983).

128 In the words of Learned Hand:

> [I]t is one of the surest indexes of a mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404 (1945).

to render *Crawford* inapplicable to Section 1988 actions and to compensate prevailing civil rights litigants for the expenses they incur in securing constitutional rights for themselves and others.

Bebe Novich