CHOOSING THE INSIDIOUS PATH: *WEST VIRGINIA UNIVERSITY HOSPITALS, INC. V. CASEY* AND THE IMPORTANCE OF EXPERTS IN CIVIL RIGHTS LITIGATION

EILEEN R. KAUFMAN*

> At issue here is much more than the simple question of how much [plaintiff's] attorneys should receive as attorney fees. At issue is . . . continued full and vigorous commitment to this Nation's lofty, but as yet unfulfilled, agenda to make the promises of this land available to all citizens, without regard to race or sex or other impermissible characteristic. There are at least two ways to undermine this commitment. The first is open and direct: a repeal of this Nation's anti-discrimination laws. The second is more indirect and, for this reason, somewhat insidious: to deny victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their cases to court.[1]

* Professor of Law, Touro College of Law. B.A., 1970, Skidmore College; J.D., 1975, L.L.M., 1991, New York University School of Law.

1. Hidle v. Geneva County Bd. of Educ., 681 F. Supp. 752, 758-759 (M.D. Ala. 1988), *quoted in* West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1149 (1991) (Marshall, J., dissenting).

INTRODUCTION

The United States Supreme Court recently held in *West Virginia University Hospitals v. Casey*[2] that neither the testimonial nor the nontestimonial expenses of experts may be shifted to the losing party pursuant to the Civil Rights Attorney's Fees Awards Act of 1976.[3] Though not heralded by the widespread critical publicity that greeted the Court's 1989 restrictive civil rights rulings,[4] *West Virginia University Hospitals* significantly blocks access to the courts to those without sufficient economic resources to finance litigation necessary to vindicate their civil rights. By holding that expert expenses are neither part of the attorney's fee pursuant to 42 U.S.C. § 1988, nor included in costs pursuant to 28 U.S.C. § 1920,[5] the Court has substantially limited the litigation of those civil rights claims which require the hiring of experts to serve as consultants or witnesses.

Prior to *West Virginia University Hospitals*, the federal courts divided sharply on whether a prevailing party could recover reasonable fees incurred for the services of expert witnesses within the meaning of a variety of fee shifting statutes,[6] including the Civil Rights Attorney's Fees Awards Act[7] and Title VII.[8] The courts' confusion stemmed from *Crawford Fitting Co. v. J.T.*

---

2. West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138 (1991).

3. 42 U.S.C. § 1988 (1988) provides:

> 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, or title VI of the Civil Rights Act of 1964, 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.

4. Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

5. 28 U.S.C. § 1920 (1988) provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> . . .
>
> (3) Fees and disbursements for . . . witnesses . . . .

6. *Compare, e.g.*, Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989) (excess expert fees are not recoverable under Title VII) *and* West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989), *aff'd*, 111 S. Ct. 1138 (1991) *with* Friedrich v. Chicago, 888 F.2d 511 (7th Cir. 1989) (section 1988 encompasses expert fees), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991); *see infra* notes 150-221.

7. 42 U.S.C. § 1988 (1988).

8. 42 U.S.C. § 2000e-5(k) (1988) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This statute was recently amended by passage of the Civil Rights Act of 1991, which was signed by President Bush on November 21, 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). Section 2000e-5(k) was amended by inserting "including expert fees" after "attorney's fee." Pub. L. No. 102-166, § 113(b), 105 Stat. 1071, 1079 (1991). Also included in the Civil Rights Act of 1991 is an amendment to 42 U.S.C. § 1988 authorizing an award of expert fees in cases brought pursuant to 42 U.S.C. § 1981, which, *inter alia*, prohibits racial discrimination in the making of contracts. Pub. L. No. 102-166, § 113(a), 105 Stat. 1071, 1079 (1991). Thus the issues addressed in this Article have been resolved for purposes of Title VII and for purposes of 42 U.S.C. § 1981 by passage of the Civil Rights Act of 1991. Unfortunately, the Civil Rights Act of 1991 stopped short of amending section 1988 so as

Gibbons, Inc.,[9] which held that federal courts generally do not have the authority, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, to award expert witness fees in excess of the then thirty-dollars-per-day limit contained in 28 U.S.C. § 1821(b).[10] The Court in *Crawford Fitting* left two significant questions unresolved: first, whether the thirty-dollar-per-day limit was applicable to fee requests made pursuant to the Civil Rights Attorney's Fees Awards Act[11] and, second, whether the holding in *Crawford Fitting* would be limited to testimonial expenses or expanded to restrict reimbursement for nontestimonial expert expenses. These issues are extremely significant because in this "age of sophisticated litigation . . . expert witnesses play an increasingly important role" in civil rights litigation.[12]

The Supreme Court definitively resolved these issues in *West Virginia University Hospitals, Inc. v. Casey*.[13] The Court squarely held that the monetary cap on expert witness fees contained in 29 U.S.C. § 1821(b) was applicable to fee requests made pursuant to the Civil Rights Attorney's Fees Awards Act and that the nontestimonial services of experts were not compensable as a part of the attorney's fee or as a part of the costs.[14]

Congress has responded to the harshness of this ruling, at least in the context of employment discrimination cases, by including a provision in the recently enacted Civil Rights Act of 1991 which explicitly authorizes an award of expert fees to prevailing parties in suits brought under Title VII and

---

to legislatively overrule *West Virginia University Hospitals*. Thus, in cases brought pursuant to 42 U.S.C. § 1983, expert fees remain nonrecoverable.

The issues addressed in this Article have also arisen in connection with the fee shifting provisions of the Equal Pay Act, 29 U.S.C. § 216(b) (1988), *see* Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988); the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (1988); *see* Freeman v. Package Machinery Co., 865 F.2d 1331, 1345-47 (1st Cir. 1988); Furr v. A.T.&T. Technologies, 824 F.2d 1537, 1550 (10th Cir. 1987); and the Voting Rights Act, 42 U.S.C. § 1971(e) (1988), *see* Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988). The Supreme Court has indicated that the standards that it has expressed governing section 1988 fee petitions "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983); *see* Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989). Thus, the points made in this Article are equally applicable to cases involving fee applications made pursuant to Title II of the Civil Rights Act of 1964 and pursuant to section 402 of the Voting Rights Act Amendments of 1975.

9. 482 U.S. 437 (1987).

10. 28 U.S.C. 1821(b) (1988) provides:

> A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

The $30-per-day cap contained in section 1821(b) has since been increased to $40 per day. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 314, 104 Stat. 5089 (1990).

11. 42 U.S.C. § 1988 (1988).

12. West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11, 34 (3d Cir. 1989), *aff'd*, 111 S. Ct. 1138 (1991).

13. 111 S. Ct. 1138 (1991).

14. *Id.*

42 U.S.C. § 1981.[15] Unfortunately, Congress did not authorize expert fees in cases brought pursuant to 42 U.S.C. § § 1982, 1983, or 1985. Thus, despite the adoption of the Civil Rights Act of 1991, *West Virginia University Hospitals* continues to preclude an award of expert fees to the prevailing party in the vast majority of civil rights actions.[16]

This Article explores the significance of *West Virginia University Hospitals*. It begins by examining the extent to which experts play a vital role in civil rights litigation. Among the civil rights cases where experts have assumed a particularly significant function, both as witnesses and consultants, are school desegregation cases,[17] prisoners' rights cases,[18] police misconduct cases,[19] and employment discrimination cases.[20] Additionally, regardless of the substantive context, medical experts are always important in assisting the jury in assessing damages whenever the plaintiff has suffered personal injury.[21]

The Article next analyzes the circumstances in which costs and fees, including expert fees, were awarded in public interest litigation before and after passage of the Civil Rights Attorney's Fees Awards Act of 1976. Until 1975, when the Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*,[22] fee shifting was permitted in civil rights cases as an exception to the American rule on the basis of a private attorney general rationale.[23] However, in *Alyeska*, the Court held that, absent congressional authorization, fees may not be shifted to vindicate significant public policies.[24] In an explicit effort to legislatively overrule *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, which authorizes the court to award a reasonable attorney's fee to prevailing parties in civil rights actions.[25] An exploration of the legislative history of this fee shifting statute shows a congressional intent to restore the public policy objectives of civil rights fee shifting which existed prior to *Alyeska*.[26]

The Article then analyzes how the courts' treatment of testimonial and nontestimonial expert expenses was affected by *Crawford Fitting Co. v J.T.*

15. Civil Rights Act of 1991, 102 P.L. 166 § 113, 105 Stat. 1071, 1079 (1991). Section 1981, which is derived from the Civil Rights Act of 1866, prohibits intentional racial discrimination in the making and enforcing of contracts. It has been used, along with Title VII, to combat racial discrimination in employment. *See* Eileen R. Kaufman & Martin A. Schwartz, *Civil Rights in Transition: Sections 1981 and 1982 Cover Discrimination on the Basis of Ancestry and Ethnicity*, 4 TOURO L. REV. 183 (1988).

16. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES, § 1.1, at 4-8 (1991).

17. *See infra* text accompanying notes 59-68,

18. *See infra* text accompanying notes 69-84.

19. *See infra* text accompanying notes 85-90.

20. *See infra* text accompanying notes 91-115.

21. *See infra* text accompanying notes 54-58.

22. 421 U.S. 240 (1975).

23. *See id.* at 284 n.7 (Marshall, J., dissenting) (citing cases).

24. *Id.* at 269.

25. *See infra* text accompanying notes 127-28.

26. See *infra* text accompanying notes 129-37.

Gibbons, Inc.,[27] a non-civil rights case limiting reimbursement for expert witnesses to the monetary cap contained in 18 U.S.C. § 1821(b). Prior to *Crawford Fitting*, most — but not all — federal courts interpreted the Civil Rights Attorney's Fees Awards Act to authorize a fully compensatory award of expert expenses.[28] The decision in *Crawford Fitting* ended this near consensus and produced a split in the circuits on whether the federal courts had the power to award expert fees to the prevailing party in civil rights cases.[29]

Finally, the Article critically evaluates the Supreme Court's decision in *West Virginia University Hospitals* in light of the central role that experts play in civil rights litigation. The author suggests that the opinion reflects a fundamental hostility on the part of a majority of the Court to the underlying goals of civil rights fee shifting statutes to encourage private litigation in vindication of important public policies. The Article concludes with two recommendations. First, litigants should make increased use of Rule 706 of the Federal Rules of Evidence,[30] which authorizes court appointment of expert witnesses. Rule 706 has been underutilized in general, and has played virtually no role in civil rights cases.[31] In the wake of *West Virginia University Hospitals*, Rule 706 offers a stopgap solution by providing a means of obtaining and compensating experts. Second, and more importantly, the Article calls for prompt congressional action to overrule *West Virginia University Hospitals*. Congress should make clear that the reasonable cost of experts as consultants and as witnesses is reimbursable as part of the attorney's fee within the meaning of the Civil Rights Attorney's Fees Awards Act.

I.
THE IMPORTANCE OF EXPERTS IN CIVIL RIGHTS LITIGATION

There is no serious dispute that experts are an essential expense when litigating civil rights cases.[32] In order to effectively prepare and litigate their case, civil rights attorneys may require the services of corrections experts,[33] law enforcement experts,[34] voter registration experts,[35] demographers,[36] urban

27. 482 U.S. 437 (1987).

28. *See infra* text accompanying notes 151-53.

29. *See infra* text accompanying notes 164-221.

30. *See infra* note 333.

31. *See infra* text accompanying notes 349-60.

32. *See, e.g.*, Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc), *cert. dismissed*, 453 U.S. 950 (1981); *see also Contingent Fees for Expert Witnesses in Civil Litigation*, 86 YALE L.J. 1680, 1680 n.1 (1977).

33. *See, e.g.*, Parker v. Williams, 855 F.2d 763 (11th Cir. 1988) (expert in field of correctional facilities), *opinion withdrawn*, 862 F.2d 1471 (11th Cir. 1989); Ruiz v. Estelle, 503 F. Supp. 1265, 1287 (S.D. Tex. 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115, *order amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Mieth v. Dothard, 418 F. Supp. 1169 (M.D. Ala. 1976), *aff'd in part, rev'd in part sub nom.* Dothard v. Rawlinson, 433 U.S. 321 (1977).

34. *See, e.g.*, Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991) (police expert in excessive force case); Samples v. City of Atlanta, 916 F.2d 1548 (11th Cir. 1990) ("use of force" experts in Fourth Amendment excessive force case); Friedrich v. City of Chicago, 888 F.2d 511

geographers,[37] urban planners,[38] urban government experts,[39] historians,[40] education experts,[41] educational psychologists and sociologists,[42] labor econo-

(7th Cir. 1989) (police commissioner as expert in first amendment challenge to ordinance restricting street performances), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991); Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988) (law enforcement expert in false arrest claim); Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987) (expert on constitutional law of search and seizure and on criminal procedure in illegal search and seizure claim); Kladis v. Brezek, 823 F.2d 1014 (7th Cir. 1987) (police expert testified regarding proper levels of force using a "force chart").

35. *See, e.g.*, Mississippi State Chapter, Operation PUSH v. Mabus, 932 F.2d 400 (5th Cir. 1991) (expert used in challenge to Mississippi vote registration proceedings); Major v. Treen, 700 F. Supp. 1422 (E.D. La. 1988) (expert used in section 1983 action for reapportionment of congressional district).

36. *See, e.g.*, Butts v. City of New York, 614 F. Supp. 1527 (S.D.N.Y. 1985) (voting rights case utilizing specialist in demography research methodology, social psychology and urban psychology), *rev'd*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 584 F. Supp. 328 (E.D. Ark. 1984) (school desegregation case utilizing, *inter alia*, expert on population demography); Vaughns v. Bd. of Educ. of Prince George's County, 574 F. Supp. 1280 (D. Md. 1983) (expert used in school desegregation case), *aff'd in part, rev'd in part*, 758 F.2d 983 (4th Cir. 1985); Liddell v. Board of Educ. of St. Louis, 469 F. Supp. 1304 (E.D. Mo. 1979) (expert used in school desegregation case), *rev'd*, 620 F.2d 1277 (8th Cir. 1980); Armstrong v. O'Connell, 463 F. Supp. 1295 (E.D. Wis. 1979) (expert used in school desegregation case); NAACP v. Wilmington Medical Center, 453 F. Supp. 280 (D. Del. 1978) (challenge to relocation of hospital utilizing experts in demography, health, transportation, and economics), *remanded*, 599 F.2d 1247 (3d Cir. 1979); Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973) (expert used in school desegregation case), *appeal dismissed*, 495 F.2d 1095 (3d Cir. 1974), *cert. denied*, 419 U.S. 884 (1974).

37. *See, e.g.*, Armstrong v. O'Connell, 463 F. Supp. 1295 (E.D. is. 1979) (school desegregation case).

38. *See, e.g.*, United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985) (claim of racial segregation in housing and education requiring experts in urban planning and urban economics), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); Ammons v. Dade City, 594 F. Supp. 1274 (M.D. La. 1984) (claim of racial discrimination in provision of municipal services), *aff'd*, 783 F.2d 982 (11th Cir. 1986).

39. *See, e.g.*, Bradley v. School Bd. of Richmond, 338 F. Supp. 67 (E.D. Va. 1972) (school desegregation case).

40. *See, e.g.*, Ammons v. Dade City, 594 F. Supp. 1274 (M.D. Fla. 1984) (claim of racial discrimination in provision of municipal services), *aff'd*, 783 F.2d 982 (11th Cir. 1986); Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984) (school desegregation case utilizing expert historian and expert on the determinants of residential location).

41. *See, e.g.*, Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (experts used in First Amendment claim concerning religion in public schools), *cert. denied*, 484 U.S. 1066 (1988); Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) (experts used in bilingual education case); Hadix v. Johnson, 694 F. Supp. 259 (E.D. Mich. 1988) (experts in reading ability and on delivery systems for incarcerated persons); United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985) (claim of racial segregation in housing and education), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); United States v. Bd. of Educ. of Chicago, 588 F. Supp. 132 (N.D. Ill. 1984) (school desegregation case utilizing education experts and experts on desegregation plans and the effects of racial segregation on minority children); Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 584 F. Supp. 328 (E.D. Ark. 1984) (school desegregation case utilizing professors of urban sociology and education, expert on school desegregation); Vaughns v. Bd. of Educ. of Prince George's County, 574 F. Supp. 1280 (D. Md. 1983) (expert used in school desegregation case), *aff'd in part, rev'd in part*, 758 F.2d 983 (4th Cir. 1985); Stevenson v. Reed, 391 F. Supp. 1375 (N.D. Miss. 1975) (prisoners rights case utilizing experts in readability analysis), *aff'd*, 530 F.2d 1207 (5th Cir. 1976), *cert. denied*, 429 U.S. 944 (1976); Hoots v. Pennsylvania, 359 F. Supp. 807

mists,[43] statisticians,[44] computer specialists,[45] mathematicians,[46] industrial psychologists[47], certified public accountants,[48] test analysts,[49] sociologists,[50] nutritionists,[51] physicians,[52] and psychiatrists.[53]

(W.D. Pa. 1973) (school desegregation case), *appeal dismissed*, 495 F.2d 1095 (3d Cir. 1974), *cert. denied*, 419 U.S. 884 (1974); Bradley v. School Bd. of City of Richmond, Va., 338 F. Supp. 67 (E.D.Va. 1972) (school desegregation case utilizing education experts and experts who testified regarding the effects of segregation).

42. *See, e.g.*, Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989) (First Amendment challenge to ordinance restricting street performances), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991); Trachtmen v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 584 F. Supp. 328 (E.D. Ark. 1984) (school desegregation case utilizing, *inter alia*, experts in urban sociology and education, educational sociology, education planning, education administration, and race relations); Armstrong v. O'Connell, 463 F. Supp. 1295 (E.D. Wis. 1979) (school desegregation case utilizing educational psychologist and sociologist testifying on the psychological attitudinal effects of segregation).

43. *See, e.g.*, Johnson v. Garrett, No. 73-702-CIV-J-12, 1991 WL 96434 (M.D. Fla. Mar. 6, 1991).

44. *See, e.g.*, Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989) (Title VII claim); Griffin v. Board of Regents of Regency Univs., 795 F.2d 1281 (7th Cir. 1986) (expert testimony on multiple regression analysis); Shipes v. Trinity Indus., Inc., 685 F. Supp. 612 (E.D. Tex. 1987) (Title VII claim), *appeal dismissed*, 883 F.2d 339 (5th Cir. 1989); Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986) (claim involving provision of child care services), *aff'd*, 848 F.2d 1338 (2d Cir. 1988); United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985) (claim of racial segregation in housing and education requiring, *inter alia*, testimony of sociologists with expertise in statistical analysis), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); Butts v. City of New York, 614 F. Supp. 1527 (S.D.N.Y. 1985) (voting rights case utilizing correlation and regression statistical analysis), *rev'd*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); Pennsylvania v. Local Union 542, 469 F. Supp. 329 (E.D. Pa. 1978) (plaintiff's case dependent on statistical probability analysis); Johnson v. Garrett, No. 73-702-CIV-J-12, 1991 WL 96434 (M.D. Fla. Mr. 6, 1991) (expert testimony on "chi-square" and "z-value").

45. *See, e.g.*, Shipes v. Trinity Indus., Inc., 685 F. Supp. 612 (E.D. Tex. 1987) (Title VII claim), *appeal dismissed*, 883 F.2d 339 (5th Cir. 1989); Johnson v. Garrett, No. 73-702-CIV-J-12, 1991 WL 96434 (M.D. Fla. Mar. 6, 1991).

46. *See, e.g.*, Vulcan Society of New York City Fire Dept, Inc. v. Civil Service Comm'n, 360 F. Supp. 1265 (S.D.N.Y.), *aff'd in part, remanded in part*, 490 F.2d 387 (2d Cir. 1973); Johnson v. Garrett, No. 73-702-CIV-J-12, 1991 WL 96434 (M.D. Fla. Mar. 6, 1991).

47. *See, e.g.*, Black Grievance Comm. v. Philadelphia Electric Co., 690 F. Supp. 1393 (E.D. Pa. 1988); Johnson v. Garrett, No. 73-702-CIV-J-12, 1991 WL 96434 (M.D. Fla. Mar. 6, 1991).

48. *See, e.g.*, Black Grievance Comm. v. Philadelphia Elec. Co., 690 F. Supp. 1393 (E.D. Pa. 1988); Ammons v. Dade City, 594 F. Supp. 1274 (M.D.Fla. 1984) (claim of racial discrimination in provision of municipal services), *aff'd*, 783 F.2d 982 (11th Cir. 1986).

49. *See, e.g.*, Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); Vulcan Society of New York City Fire Dep't, Inc. v. Civil Service Comm'n, 360 F. Supp. 1265 (S.D.N.Y.), *aff'd in part, remanded in part*, 490 F.2d 387 (2d Cir. 1973).

50. *See, e.g.*, Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991); United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985) (claim of racial segregation in housing and education), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

51. Ruiz v. Estelle, 503 F. Supp. 1265, 1287 (S.D. Tex. 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115, *order amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

52. *See, e.g.*, Shahid v. City of Detroit, 889 F.2d 1543 (6th Cir. 1989) (neurologist and

Any civil rights case involving personal injuries potentially requires expert medical testimony to establish plaintiff's right to damages. Thus, in *Busby v. City of Orlando*,[54] the Eleventh Circuit concluded that it was reversible error to exclude the testimony of a psychological counselor who would have explained the psychological impact of racial discrimination, an issue which was "directly relevant to the issue of damages."[55] The court noted that "[w]ithout this testimony it would not be possible for the jury to assess the damages to which [plaintiff] may have been entitled as a result of the injuries she allegedly suffered under the section 1983 claim."[56] Similarly, in *Dang Vang v. Vang Xiong X. Toyed*,[57] the Ninth Circuit affirmed the use of mental health experts whose testimony aided in the assessment of damages in a case involving the rape of plaintiffs, who were Hmong refugees, by an employee of a state employment agency.[58]

Experts have played a particularly vital role in school desegregation cases.[59] For example, in *United States v. Yonkers Board of Education*,[60] plaintiffs relied on a battery of experts, including educational and sociological experts, as well as experts in urban planning, housing and school desegregation, urban economics, and statistical analysis.[61] School desegregation cases have utilized experts to testify regarding population demography,[62] urban sociol-

physician testified in case concerning inmate's claim of inadequate medical care); Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983) (prisoners' Eighth Amendment claim), *cert. denied*, 468 U.S. 1217 (1984); Rivera v. Dyett, 762 F. Supp. 1109 (S.D.N.Y. 1991); Renaud v. Martin Marietta Corp., 749 F. Supp. 1545 (D. Colo. 1990) (experts in industrial hygiene, chemistry and environmental sciences, environmental engineering, hydrology and pollution, genetic toxicology, and environmental medicine); King v. Board of Regents of Univ. of Wis. System, 748 F. Supp. 686 (E.D. Wis. 1990); Ruiz v. Estelle, 503 F. Supp. 1265, 1287 (S.D. Tex. 1980) (prisoners' Eighth Amendment claim), *aff'd in part, rev'd in part*, 679 F.2d 1115, *order amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). Physicians played a critical role in *West Virginia University Hospitals*, explaining the intricacies of Medicaid reimbursement and providing detailed and highly specialized information regarding hospital staffing and medical delivery systems. West Virginia University Hospitals, Inc. v. Casey, No. 86-0955 (M.D. Pa. Jan. 30, 1989) (attached as Appendix C to Petition for Writ of Certiorari).

53. *See, e.g.*, Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990) (prisoner's Eighth Amendment claim of inadequate psychiatric care); Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988); Williams v. City of New York, 728 F. Supp. 1067 (S.D.N.Y. 1990) (psychiatric testimony regarding prisoner's pain and suffering); Langley v. Coughlin, 709 F. Supp. 482 (S.D.N.Y. 1989) (challenging adequacy of psychiatric care to prisoners), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977) (prisoners' Eighth Amendment claim).

54. 931 F.2d 764 (11th Cir. 1991).

55. *Id.* at 784.

56. *Id.*

57. 944 F.2d 476 (9th Cir. 1991).

58. *Id.* at 480-83.

59. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954).

60. 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

61. *Id.*

62. Little Rock School Dist. v. Pulaski County Special School District No. 1, 584 F. Supp. 328 (E.D. Ark. 1984); Liddell v. Bd. of Educ. of St. Louis, 469 F. Supp. 1304 (E.D. Mo. 1979),

ogy,[63] the determinants of residential location,[64] special education,[65] educational planning and administration,[66] race relations,[67] and the effects of racial segregation on minority children.[68]

Experts have also played a critical role in cases brought by prisoners alleging Eighth Amendment violations. In *Jones v. Diamond*,[69] the court observed that "[c]ounsel must have the assistance of experts to furnish effective and competent representation. In most civil rights litigation, and in prison cases in particular, expert testimony is a vital ingredient in the proper presentation and decision of a case."[70]

In prison cases involving a denial of medical care, expert testimony will almost always be necessary in order to make the showing of deliberate indifference required under the Eighth Amendment.[71] Thus, for example, in *Boring v. Kozakiewicz*,[72] the court dismissed a section 1983 claim brought by indigent pretrial detainees alleging a failure to provide medical treatment because of plaintiffs' failure to provide expert testimony to demonstrate the severity of their medical needs.[73] The court acknowledged "plaintiffs' dilemma in being unable to proceed . . . because of the inability to pay for an expert witness" yet declined to appoint an expert, concluding it lacked authority to do so.[74] This result prompted a dissent by Chief Judge Gibbons, who described the court's decision as a "Catch 22"[75] for indigent pretrial detainees:

There is no provision for furnishing pretrial detainees expert wit-

---

rev'd, 620 F.2d 1277 (8th Cir. 1980); Armstrong v. O'Connell, 463 F. Supp. 1295 (E.D. Wis. 1979); Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Pa.), *appeal dismissed*, 495 F.2d 1095 (3d Cir. 1973), *cert. denied*, 419 U.S. 884 (1974).

63. Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 584 F. Supp. 328 (E.D. Ark. 1984).

64. Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984).

65. Vaughns v. Bd. of Educ. of Prince George's County, 574 F. Supp. 1280 (D. Md. 1983), *aff'd in part, rev'd in part*, 758 F.2d 983 (4th Cir. 1985).

66. Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 584 F. Supp. 328 (E.D. Ark. 1984).

67. *Id.*

68. United States v. Bd. of Ed. of Chicago, 588 F. Supp. 132 (N.D. Ill. 1984); Bradley v. School Bd. of Richmond, 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (1972).

69. 636 F.2d 1364 (5th Cir.) (en banc), *cert. dismissed*, 453 U.S. 950 (1981).

70. *Id.* at 1382.

71. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

72. 833 F.2d 468, 474 (3d Cir. 1987), *cert. denied*, 485 U.S. 991 (1988).

73. *Id.* at 473. This claim was governed by the Due Process Clause rather than the Eighth Amendment because the plaintiffs were pretrial detainees. *See* Bell v. Wolfish, 441 U.S. 520 (1979). The standard, however, is essentially the same for measuring the constitutional adequacy of the medical treatment. *See Boring*, 833 F.2d at 471-72.

74. *Boring*, 833 F.2d at 474. The Court failed to mention Rule 706 of the Federal Rules of Evidence. *See infra* text accompanying notes 332-60 (arguing for use of Rule 706 for civil rights cases involving experts until Congress enacts legislation overturning *West Virginia University Hospitals*).

75. *Boring*, 833 F.2d at 474 (Gibbons, J., dissenting); *see also* Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.) (en banc) ("Without the ability to recover experts' fees, plaintiffs, particularly prison inmates who are almost always indigent will be unable to bring these cases."), *cert. dismissed*, 453 U.S. 950 (1981).

> nesses at governmental expense; but, without expert testimony, pretrial detainees' complaints that their jailers neglected to provide them with prescribed medical treatment cannot reach the jury. Thus indigent pretrial detainees can never recover for pain and suffering, suffered as a result of neglected medical treatment unless they are released, obtain funds, and can hire an expert. The inhumanity of this paradoxical rule of law alone suggests a serious flaw.[76]

Other inmates, alleging deliberate indifference to serious medical needs, have been caught in the same predicament. In *Hampton v. Holmesburg Prison Officials*,[77] the Third Circuit dismissed a section 1983 claim because plaintiff failed to meet his burden of "produc[ing] medical testimony that his complaints were capable of remedy by treatment that he did not receive."[78] Similarly, in *Hamm v. DeKalb County*,[79] the court dismissed a prisoner's Eighth Amendment claim for failure to introduce expert testimony.

In sharp contrast are Eighth Amendment cases where prisoners were able to introduce expert testimony in order to meet their burden of demonstrating deliberate indifference to serious medical needs.[80] Thus, in *Langley v. Coughlin*,[81] expert testimony was critical in defeating a motion for summary judgment by documenting an Eighth Amendment claim that severely mentally ill prisoners were placed in a special housing unit where they were systemically denied psychiatric care.[82] Similarly, in *Todaro v. Ward*,[83] the trial court relied extensively on plaintiffs' experts in concluding that the adequacy of the medical care provided at a women's correctional facility constituted cruel and unusual punishment under the Eighth Amendment.[84]

Experts have also played a vital role in civil rights cases challenging po-

---

76. *Boring*, 833 F.2d at 474 (Gibbons, J., dissenting).

77. 546 F.2d 1077 (3d Cir. 1976).

78. *Id.* at 1081.

79. 774 F.2d 1567, 1575 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).

80. *See, e.g.*, Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990) (expert psychiatric testimony offered on behalf of plaintiff in case involving Eighth Amendment claim of deliberate indifference to psychiatric needs); Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983) (psychiatric and medical experts), *cert. denied*, 468 U.S. 1217 (1984); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979) (expert testimony on adequacy of psychiatric care); Rivera v. Dyett, 762 F. Supp. 1109 (S.D.N.Y. 1991); Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y.), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); Ruiz v. Estelle, 503 F. Supp. 1265, 1287 (S.D. Tex. 1980) (testimony "from a large number of extremely well qualified experts, the like and number of which have never been assembled in any other prison case of which this court is aware"), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir.), *order amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Todaro v. Ward, 431 F. Supp. 1129 (S.D.N.Y.), *aff'd*, 565 F.2d 48 (2d Cir. 1977); Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977) (expert testimony on the inadequacy of medical screening).

81. 715 F. Supp. 522 (S.D.N.Y.), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989).

82. *Id.* at 531-40.

83. 431 F. Supp. 1129 (S.D.N.Y.), *aff'd*, 565 F.2d 48 (2d Cir. 1977).

84. *Id.* at 1136-40. Plaintiffs' experts testified to the inadequacy of the sickwing, *id.* at 1140; the dangerousness of an outdated x-ray machine, *id.* at 1139; and the effectiveness of physician staffing, *id.* at 1136.

lice misconduct. Experts are frequently used in excessive force,[85] false arrest,[86] and search and seizure cases,[87] all of which rely on standards derived from a Fourth Amendment objective reasonableness test.[88] Litigants also use experts in section 1983 cases claiming municipal liability due to inadequate training[89] in an attempt to meet the standard of "deliberate indifference to the rights of persons with whom the police come into contact."[90]

The importance of expert witnesses to civil rights litigation was recently recognized by Congress in the context of employment discrimination law. In the Civil Rights Act of 1991,[91] Congress explicity provided for the shifting of expert's fees in cases brought under Title VII and section 1981.[92] This legislation reflects an understanding of the increasing complexity of employment discrimination litigation and of the concomitant need to utilize experts as consultants and as witnesses.

Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[93] Of the various federal employment discrimination statutes, Title VII has been most useful in cases where plaintiffs are unable to prove purposeful discrimination. Sections 1981 and 1983 require proof of intentional discrimination,[94] whereas Title VII liability may be premised on disparate impact.[95] Disparate impact claims challenge employment

85. *See, e.g.*, Davis v. Mason County, 927 F.2d 1473, 1483 (9th Cir.) (police expert testified as to the inadequacy of field training), *cert. denied*, 112 S. Ct. 275 (1991); Samples v. City of Atlanta, 916 F.2d 1548 (11th Cir. 1990) ("use of force" expert); Kladis v. Brezek, 823 F.2d 1014 (7th Cir. 1987) (police expert testified about proper levels of force by using a "force chart"); Berry v. McLemore, 670 F.2d 30, 34 (5th Cir. 1982) (expert medical witness testified regarding the position of the parties when defendant police officer pulled the trigger and fired the shot).

86. *See, e.g.*, Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988).

87. *See, e.g.*, Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987), *vacated on reh'g en banc*, 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989).

88. *See* Graham v. Connor, 490 U.S. 386 (1989) (excessive force); Brower v. County of Inyo, 489 U.S. 593 (1989) (unreasonable seizure using excessive force); Monroe v. Pape, 365 U.S. 167 (1961) (false arrest).

89. *See, e.g.*, Davis v. Mason County, 927 F.2d 1473 (9th Cir.), *cert. denied*, 112 S. Ct. 275 (1991).

90. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

91. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

92. *See supra* note 8. It should be noted that employment discrimination claims are also litigated under section 1983, which does not permit shifting of expert's fees. In Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991), the Eleventh Circuit concluded that it was reversible error to exclude expert testimony which would have explained statistics tending to establish racial discrimination in the Orlando Police Department. The court concluded that the statistical information was "highly relevant to showing a custom or policy of discrimination on the part of the department as required to establish [plaintiff's] racial discrimination claims against the City of Orlando." *Id.* at 783.

93. 42 U.S.C. § 2000e-2(a)(1) (1988).

94. General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

95. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

practices which are nondiscriminatory on their face, but operate to have a disproportionately negative effect on a protected group.[96]

Statistical evidence has come to play a vital part in proving a Title VII violation based on disparate impact.[97] *Denny v. Westfield State College*[98] is a case in point. Denny's success in proving her sex discrimination claim was attributed, in large part, to the use of statisticians.[99] The testimony of a statistician formed the "linchpin" of plaintiff's case by establishing through multiple regression analysis that "statistically significant wage differentials existed at the school, with female faculty members receiving lower salaries than male faculty members of equivalent experience, rank, and departmental affiliation."[100]

Disparate impact litigation was radically altered as a result of the Court's ruling in *Wards Cove Packing Co. v Atonio*,[101] which resulted in seriously devaluing the difference between Title VII and sections 1981 and 1983 while heightening the necessity of experts in order to make out a disparate impact claim.[102] In *Wards Cove*, unskilled, nonwhite workers claimed discrimination in two Alaskan salmon canneries as a result of various hiring and promotion policies which included nepotism, a rehire preference, separate hiring channels for cannery and noncannery jobs, lack of objective hiring criteria, and a practice of not hiring from within.[103] Plaintiffs relied on statistics that showed that a high percentage of nonwhite workers were concentrated in the nonskilled and lower paying cannery jobs whereas very few held the better paying noncannery jobs.[104] This disproportion resulted in what Justice Blackmun described in his dissenting opinion as a "plantation economy," replete with racially segregated housing and dining facilities.[105]

The formula for evaluating this type of disparate impact claim was originally articulated in *Griggs v Duke Power Co.*[106] Pursuant to the *Griggs* formula, plaintiffs have the initial burden to show that the employer's job practices disproportionately affected members of a protected group.[107] At that point, the burden shifts to the employer to show that the practice is required by business necessity.[108]

---

96. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

97. *See, e.g.*, Shipes v. Trinity Indus., Inc., 685 F. Supp. 612, 613 (E.D. Tex. 1987) ("As is frequently the situation in Title VII actions, the presentation of the merits of plaintiffs' case depended heavily on a statistical description of the defendant's employment practices.").

98. 880 F.2d 1465 (1st Cir. 1989).

99. *Id.* at 1467.

100. *Id.*

101. 490 U.S. 642 (1989).

102. *See* Gail Wright-Sirmans, *Employment Discrimination*, 6 TOURO L. REV. 88, 97 (1989).

103. *Wards Cove*, 490 U.S. at 647.

104. *Id.* at 647.

105. *Id.* at 662 (Blackmun, J., dissenting).

106. 401 U.S. 424 (1971).

107. *Id.* at 429-30.

108. *Id.* at 431.

Wards Cove substantially rewrote the rules in disparate impact cases in three ways. First, with respect to statistical disparity, plaintiffs may no longer compare the minority population in two parts of the workplace but must use the relevant labor market as the relevant yardstick.[109] This is so even in a case like *Wards Cove*, which involved a unique industry, situated in a remote area, where the practice of recruiting workers from far away made it difficult if not impossible to identify the relevant labor market. Secondly, with respect to causation, plaintiffs must isolate the particular employment practice that has produced the disparate impact rather than point to a variety of practices that are responsible, in combination, for the disparate impact.[110] Thirdly, the *Griggs* framework was fundamentally changed by placing the burden of proof on the plaintiff throughout the entire litigation and by diluting the business justification needed to defeat plaintiff's claim. Under *Wards Cove*, to rebut plaintiff's prima facie case, the employer need not show business necessity, defined as a practice essential or indispensable to the employer's business. Rather, the employer need only provide a *reasonable* business purpose.[111] Having done that, the burden then falls upon the plaintiff to demonstrate that other means would serve the employer's purpose as well without the racial effect, taking into account costs and other burdens.[112]

The first two changes mandated by *Wards Cove* underscore the necessity of experts in disparate impact cases. Plaintiffs will be unable to make the requisite statistical showing without economists and statisticians, nor will they be able to demonstrate the particularized causation required by *Wards Cove* unassisted by expert witnesses and consultants.[113]

With the passage of the Civil Rights Act of 1991, Congress has, in effect, legislatively overruled *Wards Cove* and restored the analysis to be used in disparate impact cases to its pre-*Wards Cove* status.[114] However, even before *Wards Cove*, industrial psychologists, labor economists, and statisticians were

---

109. 490 U.S. at 650-51.

110. *Id.* at 656-58. This aspect of *Wards Cove* is addressed in the recently enacted Civil Rights Act of 1991, which at section 105 provides, *inter alia*:

> With respect to demonstrating that a particular employment practice causes a disparate impact . . . , the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (1991).

111. 490 U.S. at 659-60.

112. *Id.* at 660.

113.[D]isparate impact cases have become more expensive and time-consuming because additional experts are needed to 'pick apart personnel actions' to find the specific practice causing the discrimination" quoting Joseph Sellers of the Lawyers Committee for Civil Rights Under Law. Mr. Sellers also stated that "Wards Cove, along with the fact that you can't recover expert witness fees, has made it virtually unaffordable to bring these claims.

Marcia Coyle, *Undoing Another's Handiwork*, NAT'L L.J., Apr. 2, 1990, at 1.

114. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

routinely employed in Title VII disparate impact cases.[115]

While the hiring of experts in employment discrimination cases may now be compensable under the Civil Rights Act of 1991,[116] there remains a tremendous need for experts in order to litigate other kinds of civil rights cases. A recent review of the caseload of the NAACP Legal Defense Fund reveals that experts are required in 100% of its education, health care, land use, and prison cases, and in approximately seventy-five percent of its housing discrimination cases.[117] Moreover, the expenses associated with hiring experts essential to civil rights litigation typically comprise a significant percentage of the attorney's fee,[118] often ranging between a quarter and a third of the overall fee award.[119] The effective enforcement of this nation's civil rights laws is closely tied to the power of the courts to shift fees for experts for prevailing plaintiffs.

II.
EXPERT EXPENSES AND FEE SHIFTING PRIOR TO *CRAWFORD FITTING*

Under the well entrenched American rule, prevailing parties are required to pay their own attorney's fees absent statutory or contractual authority to the contrary.[120] Exceptions to this rule include cases involving a wilful violation of a court order,[121] parties exhibiting bad faith or exercising oppressive litigation practices,[122] and lawsuits generating a common fund.[123] Until the Supreme Court's 1975 decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[124] the lower federal courts formulated an exception to the American rule for cases advancing a private attorney general purpose, whereby fees were shifted to vindicate a significant public policy.[125]

In *Alyeska*, the Supreme Court held that, absent congressional authorization, federal courts do not have the power to shift fees in order to effectuate a private attorney general rationale.[126] Congress promptly responded to *Alyeska* by enacting the Civil Rights Attorney's Fees Awards Act of 1976.[127]

115. *See supra* notes 43, 44, and 47.

116. *See supra* note 8.

117. Letter from Charles Stephen Ralston, Deputy Director-Counsel to the NAACP Legal Defense Fund, to Eileen Kaufman, Professor, Touro College of Law 1-2 (Oct. 4, 1990) (on file with author).

118. *See* Thomas Woodroof, *Contingent Fees for Witnesses*, 8 J. LEGAL PROF. 237, 238 (1983).

119. *See, e.g.*, Friedrich v. Chicago, 888 F.2d 511, 519 (7th Cir. 1989) ("almost one-fourth of the total award of fees"), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991).

120. *See* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 247-63 (1975) (discussing historical background and development of the American rule).

121. *See, e.g.*, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923).

122. Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962).

123. Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

124. 421 U.S. 240 (1975).

125. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975).

126. *Id.* at 269.

127. 42 U.S.C. § 1988 (1988).

This Act authorizes the court to award a reasonable attorney's fee to the prevailing party in specifically enumerated civil rights actions.[128] Congress' purpose was clear and explicit — to legislatively overrule *Alyeska* and thereby restore fee shifting in order to remove the economic barriers that prevented low income individuals from vindicating federal constitutional and statutory rights.[129]

The Act's legislative history clearly announced Congress' determination to restore the federal courts' authority to award fees in cases in which an individual aggrieved plaintiff vindicates not just her own interest but also "a policy that Congress considered of the highest priority."[130] The Senate report stated:

> If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.[131]

Reflecting this "private attorney general" rationale, the Senate report concluded that "fee awards are essential if the Federal statutes to which [section 1988] applies are to be fully enforced."[132]

While neither section 1988 nor the legislative history speaks explicitly about expert fees, there are numerous references to shifting the costs of litigation to the losing party. For example, the Senate report states: "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."[133] Similarly, the report provides, "[i]n computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' "[134] The legislative history also includes a statement by Congressman Drinan, one of the bill's sponsors, that "the 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."[135] The Senate committee report cited with approval several pre-*Alyeska* cases in which courts had awarded expert witness fees as a part of the attorney's fee, noting that these courts had "follow[ed] Congressional recognition in newer statutes of the 'private attorney general' concept [and] ex-

128. *Id.*

129. S. REP. No. 1011, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908 [hereinafter S. REP. No. 1011].

130. *Id.* at 3 (quoting Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968)).

131. *Id.* at 5.

132. *Id.* at 6.

133. *Id.* at 2.

134. *Id.* at 6 (citations omitted).

135. 122 CONG. REC. H35,123 (daily ed. Oct. 1, 1976).

ercis[ed] their traditional equity powers to award attorneys' fees."[136] Another passage from the Senate report stated that "this bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision [in *Alyeska*]."[137] Since courts had routinely awarded expert expenses as a part of the attorney's fee pre-*Alyeska*, and since section 1988 was an explicit effort to restore pre-*Alyeska* decisional law, the legislative history supports the view that the Civil Rights Attorney's Fees Awards Act was meant to include authorization for an award of expert expenses.

Section 1988 has been expansively interpreted to authorize a broad range of litigation expenses as part of the attorney's fee.[138] Thus, courts have included in their award of attorney's fees those litigation expenses typically billed separately by private attorneys, which are not included as overhead and thus already built into the attorney's hourly rate.[139] Such expenses include postage,[140] long distance telephone calls,[141] photocopying,[142] transporta-

136. S. REP. NO. 1011, *supra* note 129, at 4.

137. *Id.* at 6.

138. SCHWARTZ & KIRKLIN, *supra* note 16, § 24.8, at 337. As one commentator writes:

> Courts that have examined the issue more closely, however, have almost uniformly agreed that those statutory provisions permitting an award of a reasonable attorney's fee 'as part of the costs' or in addition to 'other litigation costs' embrace a concept of a reasonable attorney's fee which includes all 'incidental and necessary expenses incurred in furnishing effective and competent representation' and that such out-of-pocket expenses may be awarded in addition to statutory costs and the hours-times-billing-rate (as adjusted) fee figure.

Laura B. Bartell, *Taxation of Costs and Awards of Expenses in Federal Court*, 101 F.R.D. 553, 592.

139. *See* Chalmers v. City of Los Angeles, 796 F.2d 1205, 1216 n. 7 (9th Cir. 1986); Dowdell v. City of Apopka, 698 F.2d 1181, 1189 (11th Cir. 1983) (section 1988 intended "to ensure the effective enforcement of the civil rights laws, by making it financially feasible to litigate civil rights violations"); Martin v. Mabus, 734 F. Supp. 1216 (S.D. Miss. 1990); Pacific West Cable Co. v. City of Sacramento, 693 F. Supp. 865 (E.D. Cal. 1988); ECOS, Inc. v. Brinegar, 671 F. Supp. 382, 403 (M.D.N.C. 1987) ("As a general rule, statutory provisions permitting an award of a reasonable attorney's fee 'as part of the costs' embrace a concept of a fee which includes all 'incidental and necessary expenses incurred in furnishing effective and competent representation.' A court may award such out-of-pocket expenses in addition to statutory costs."); *see also* SCHWARTZ & KIRKLIN, *supra* note 16, at § 24.8.

140. *See, e.g.*, Heiar v. Crawford County, 746 F.2d 1190, 1203-04 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Carrero v. New York City Housing Authority, 685 F. Supp. 904 (S.D.N.Y. 1988); Jordan v. Allain, 619 F. Supp. 98 (N.D. Miss. 1985); Spell v. McDaniel, 616 F. Supp. 1069 (E.D.N.C. 1985); Palmer v. Shultz, 594 F. Supp. 433 (D.D.C. 1984), *modified*, 598 F. Supp. 382 (D.D.C. 1984), *vacated & remanded on other grounds*, 478 U.S. 1015 (1986). *But see* Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983).

141. *See, e.g.*, Henry v. Webermeier, 738 F.2d 188 (7th Cir. 1984); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Palmigiano v. Garrahy, 707 F.2d 636 (1st Cir. 1983); Miller v. Carson, 628 F.2d 346 (5th Cir. 1980); Wheeler v. Durham City Bd. of Educ., 585 F.2d 618 (4th Cir. 1978); Palmer v. Shultz, 594 F. Supp. 433 (D.D.C.), *modified on reconsideration*, 598 F. Supp. 382 (D.D.C. 1984), *vacated and remanded on other grounds*, 478 U.S. 1015 (1986); Population Services Int'l v. Carey, 476 F. Supp. 4 (S.D.N.Y. 1979).

142. *See, e.g.*, Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472

tion,[143] deliveries and messengers,[144] depositions,[145] transcripts,[146] lodging,[147] food,[148] and parking.[149]

Until the Supreme Court's decision in *Crawford Fitting v. J.T. Gibbons, Inc.*,[150] most courts agreed that for purposes of section 1988, the cost of experts was a litigation expense, reimbursable to the prevailing party as part of the attorney's fee.[151] Thus, so long as the expert was reasonably necessary to the litigation,[152] or, in some circuits, "indispensable to the determination of the case,"[153] reasonable expenses incurred in connection with the expert's tes-

---

U.S. 1027 (1985); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Wheeler v. Durham City Bd. of Educ., 585 F.2d 618 (4th Cir. 1978); Alberti v. Sheriff of Harris County, 688 F. Supp. 1176 (S.D. Tex. 1987); Cool v. Police Dep't of Yonkers, 620 F. Supp. 954 (S.D.N.Y. 1985); Jordan v. Allain, 619 F. Supp. 98 (N.D. Miss. 1985); Rank v. Balshy, 590 F. Supp. 787 (M.D. Pa. 1984); Thompson v. Sawyer, 586 F. Supp. 635 (D.D.C. 1984); Wuori v. Concannon, 551 F. Supp. 185 (D. Me. 1982). *But see* Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983).

143. *See, e.g.*, Chalmers v. City of Los Angeles, 796 F.2d 1205 (9th Cir. 1986); Grendel's Den, Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1984); Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Wheeler v. Durham City Bd. of Educ., 585 F.2d 618 (4th Cir. 1978); Alberti v. Sheriff of Harris County, 688 F. Supp. 1176 (S.D. Tex. 1987); Rank v. Balshy, 590 F. Supp. 787 (M.D. Pa. 1984); Society for Good Will to Retarded Children v. Cuomo, 574 F. Supp. 994 (E.D.N.Y. 1983), *vacated on other grounds*, 737 F.2d 1253 (2d Cir. 1984); Thompson v. Sawyer, 586 F. Supp. 635 (D.D.C. 1984); Connor v. Winter, 519 F. Supp. 1337 (S.D. Miss. 1981).

144. *See, e.g.*, Alberti v. Sheriff of Harris County, 688 F. Supp. 1176, 1202 (S.D. Tex. 1987); Vaughns v. Bd. of Educ. 627 F. Supp. 837 (D. Md. 1985); Cool v. Police Dep't of Yonkers, 620 F. Supp. 954 (S.D.N.Y. 1985); Rank v. Balshy, 590 F. Supp. 787 (M.D. Pa. 1984); Thompson v. Sawyer, 586 F. Supp. 635 (D.D.C. 1984).

145. *See, e.g.*, Alberti v. Sheriff of Harris County, 688 F. Supp. 1176 (S.D. Tex. 1987); Carrero v. New York City Housing Authority, 685 F. Supp. 904 (S.D.N.Y. 1988); Rank v. Balshy, 590 F. Supp. 787 (M.D. Pa. 1984).

146. *See, e.g.*, Carrero v. New York City Housing Auth., 685 F. Supp. 904 (S.D.N.Y. 1988).

147. *See, e.g.*, Palmigiano v. Garrahy, 707 F.2d 636 (1st Cir. 1983); Ryan v. Raytheon Data Systems Co., 601 F. Supp. 243 (D. Mass. 1985); Population Services Int'l v. Carey, 476 F. Supp. 4 (S.D.N.Y. 1985).

148. *See, e.g.*, Palmigiano v. Garrahy, 707 F.2d 636 (1st Cir. 1983); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Ryan v. Raytheon Data Systems Co., 601 F. Supp. 243 (D. Mass. 1985); Jordan v. Allain, 619 F. Supp. 98 (N.D. Miss. 1985); Rank v. Balshy, 590 F. Supp. 787 (M.D. Pa. 1984).

149. *See, e.g.*, Palmigiano v. Garrahy, 707 F.2d 636 (1st Cir. 1983); Keith v. Volpe, 644 F. Supp. 1317 (C.D. Cal. 1986); Rank v. Balshy, 590 F. Supp. 787 (M.D. Pa. 1984).

150. 482 U.S. 437 (1987).

151. *See, e.g.*, Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985); Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); Palmigiano v. Garrahy, 707 F.2d at 637; Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983); Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240, 1245 (9th Cir. 1982) (Title VII case), *vacated on other grounds*, 461 U.S. 952 (1983); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.) (en banc), *cert. dismissed*, 453 U.S. 950 (1981); Lenihan v. City of New York, 640 F. Supp. 822 (S.D.N.Y. 1986). *But see* Davis v. R.R., Fredericksburg & Potomac Railroad, 803 F.2d 1322, 1328 (4th Cir. 1986); Wheeler v. Durham City Bd. of Educ., 585 F.2d 618, 624 (4th Cir. 1978) (fees of expert witnesses not a part of attorney's fee no matter how essential to the successful preparation and trial of case).

152. *See, e.g.*, Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983).

153. *See* United States v. City of San Francisco, 748 F. Supp. 1416, 1441 (N.D. Cal. 1990)

timonial and nontestimonial services were awarded to the prevailing party.

III.
CRAWFORD FITTING CO. V. J.T. GIBBONS, INC.

This near consensus among the circuits vanished with the Supreme Court's decision in *Crawford Fitting*.[154] Reviewing two consolidated cases, the Court did not directly address the issue of fee shifting in the context of section 1988. The first case was an antitrust litigation. The second was a civil rights dispute in which the prevailing defendant moved for attorney's fees pursuant to section 1988 and filed a bill of costs under Rule 54(d). The district court denied both motions, and the defendant appealed only the order denying expert witness fees under Rule 54(d).

The Court held that federal courts do not have the authority under Rule 54 of the Federal Rules of Civil Procedure to award expert witness fees in excess of the then thirty-dollar-per-day limit set forth in 28 U.S.C. § 1821(b). Rule 54(d) authorizes the federal courts to award costs to the prevailing party.[155] The costs that may be taxed are listed at 28 U.S.C. § 1920, which, at subsection (3), specifically includes witness fees.[156] Section 1920(3) must be read in conjunction with 28 U.S.C. § 1821(b), which sets the witness fee at thirty dollars per day.[157] The Court in *Crawford Fitting* stated that "[t]he logical conclusion from the language and interrelation of these provisions is 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."[158] After reviewing the history of the 1853 Fee Act,[159] which sets forth the nature and amount of taxable items of cost, the Court concluded that the Act represented a comprehensive set of considered and particularized Congressional choices on the costs that may be imposed on the losing party. Such choices are binding on the federal courts absent authorization to the contrary.[160] In *Crawford Fitting*, the Court stated:

We will not lightly infer that Congress has repealed § § 1821 and

---

(citing United States v. City of Twin Falls, 806 F.2d 862, 878 (9th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987)); Black Grievance Comm. v. Philadelphia Elec. Co., 690 F. Supp. 1393 (E.D. Pa. 1988).

154. 482 U.S. 437 (1981).

155. Rule 54(d) provides:

> 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).

156. *See supra* note 5.

157. *See supra note* 10.

158. 482 U.S. at 441.

159. Prior to the 1853 Fee Act, federal courts referred to state rules governing triable costs. In response to the various approaches, Congress enacted the 1853 Fee Act. Section 1920 embodies these choices. 28 U.S.C. § 1920 (1988).

160. 482 U.S. at 440-42.

> 1920, either through Rule 54(d) or any other provision not referring explicitly to witness fees. . . . We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.[161]

Justice Blackmun, concurring, wrote separately to express his understanding that the Court was not deciding the question of whether a federal court may award fees for an expert witness under the Civil Rights Attorney's Fees Awards Act.[162] Justices Marshall and Brennan, dissenting, also stated their belief that the majority's holding did not decide the question under section 1988.[163]

IV.
EXPERT FEES AND FEE SHIFTING STATUTES AFTER *CRAWFORD FITTING*

A. Applying the Crawford Fitting *Rule to Civil Rights Cases*

During the period between *Crawford Fitting* and *West Virginia University Hospitals, Inc. v. Casey*,[164] the lower federal courts divided sharply on the applicability of *Crawford Fitting* to civil rights cases. Most courts concluded, with unusually explicit reluctance, that they were constrained by the language of *Crawford Fitting* to apply its result to cases involving fee shifting statutes that do not explicitly authorize excess expert witness fees.[165]

Thus, when the Third Circuit decided *West Virginia University Hospitals*, the court concluded that it too was "constrained by the language of *Crawford Fitting* to abandon [their] previous rule and to limit expert witness fees to thirty dollars a day."[166] The court acknowledged that until *Crawford Fitting*,

---

161. *Id.* at 445.

162. *Id.* (Blackmun, J., concurring).

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

164. 111 S. Ct. 1138 (1991).

165. *See* West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989), *aff'd*, 111 S. Ct. 1138 (1991); Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989); Gilbert v. City of Little Rock, 867 F.2d 1062 (8th Cir.) (en banc), *cert. denied*, 110 S. Ct. 57 (1989); Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988); Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988); Knop v. Johnson, 712 F. Supp. 571 (W.D. Mich. 1989); Shipes v. Trinity Indus., Inc., 685 F. Supp. 612 (E.D. Tex. 1987); Beamon v. City of Ridgeland, Mississippi, 666 F. Supp. 937 (S.D. Miss. 1987).

166. West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11, 34 (3d Cir. 1989), *aff'd*, 111 S. Ct. 1138 (1991); *see also* Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987) (stating in dicta that "a prevailing party in a civil rights case is not entitled to tax such [expert witnesses] fees as costs"), *cert. denied*, 485 U.S. 991 (1988); Central Delaware Branch, NAACP v. City of Dover, 123 F.R.D. 85, 94 (D. Del. 1988) (applying *Crawford Fitting* to section 1988). *But see* Fritz v. White, 711 F. Supp. 1350 (E.D. Pa. 1989) (refusing to apply *Crawford Fitting* to a request for fees under section 1988); Black Grievance Comm. v. Philadelphia Elec. Co., 690 F. Supp. 1393 (E.D. Pa. 1988) (refusing to apply *Crawford Fitting* to fees sought under section 1988).

the rule in the Third Circuit had permitted district courts to order expert witness expenses in excess of the thirty-dollar-per-day cap whenever the expert's testimony was "indispensable to determination of the case."[167] In *West Virginia University Hospitals*, the parties stipulated to the fact that the hospital's experts were indispensable to the case, and the district court expressed its heavy reliance upon the experts' testimony.[168] The court recognized that "the policy underlying section 1988, that of making the prevailing party whole, would suggest that the rule of cost taxation embodied in *Crawford Fitting* should not apply in the context of attorneys fee shifting in civil rights actions."[169] But despite the "forceful argument that based on the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, Congress intended to treat expert witness fees like all other litigation expenses and include them as part of the attorney's fee awardable under section 1988,"[170] the court concluded that section 1988 does not contain the explicit authorization for excess expert witness fees required by *Crawford Fitting*.[171]

The Fourth Circuit, unsurprisingly in light of its pre-*Crawford Fitting* rule,[172] applied *Crawford Fitting* to cases involving fee applications under section 1988.[173] In *Herold v. Hajoca Corp.*,[174] the court noted that the *Crawford Fitting* rule is not a new one in the Fourth Circuit, which had uniformly declined to treat expert witness expenses as a litigation expense recoverable as part of the attorney's fee within the meaning of fee shifting statutes.[175]

The First Circuit, while leaving the question open under section 1988, held in *Denny v. Westfield State College*[176] that expert witness fees are not recoverable as a part of the attorney's fee under Title VII.[177] The court reached this conclusion despite its acknowledgement that expert statistical testimony played a "critical role in plaintiffs' success at trial"[178] and that "[e]xperts' costs, if not shifted, can operate as a significant disincentive to would-be enforcers."[179] The court in *Denny* stated:

---

167. *West Virginia University Hospitals*, 885 F.2d at 33 (citing Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201, 206 (3d Cir. 1981); Rank v. Balshy, 590 F. Supp. 787, 801 (M.D. Pa. 1984)).

168. *Id.*

169. *Id.*

170. *Id.* at 34.

171. *Id.* at 35. *But see* Fritz v. White, 711 F. Supp. 1350 (E.D. Pa. 1989) (declining to apply *Crawford Fitting* to section 1988); Black Grievance Comm. v. Philadelphia Elec. Co., 690 F. Supp. 1393 (E.D. Pa. 1988) (same).

172. *See supra* note 151.

173. Sevigny v. Dicksey, 846 F.2d 953, 959 (4th Cir. 1988); *see also* ECOS, Inc. v. Brinegar, 671 F. Supp. 381 (M.D.N.C. 1987).

174. 864 F.2d 317 (4th Cir. 1988)

175. *Id.* at 323.

176. 880 F.2d 1465 (1st Cir. 1989).

177. *Id.*; *see also* Freeman v. Package Machinery Co., 865 F.2d 1331, 1345-47, nn.9-11 (1st Cir. 1988) (leaving open the question under the Age Discrimination in Employment Act).

178. 880 F.2d at 1467.

179. *Id.* at 1472.

> Surely, Title VII will be a less effective ameliorative if victims of proven discrimination are compelled to swallow the often sizable fees of testifying experts. Where statutes shift counsel fees there is, as the Seventh Circuit has said, "an element of paradox in allowing the winner to recover his attorney's fee but not expert-witness fees." *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908, 912 (7th Cir. 1986). Given the financial commitment involved in, say, sophisticated statistical analysis, a $30-per-day limit would likely have a depressant effect on discrimination suits in which, as is often the case, the defendant has the deeper pocket.[180]

Despite the court's recognition of the strength of plaintiffs' policy arguments, it considered itself constrained by the holding in *Crawford Fitting*, which "cabins a court's ability to guess at Congress' meaning where fee enactments are concerned."[181] According to the court, *Crawford Fitting* requires that courts "subject proferred statutory language and legislative history to fairly rigorous scrutiny."[182] Unless the court is able to discover "some tangible, reasonably explicit indication of congressional intent that witness fees be shifted without regard to the thirty-dollar-per-day cap, the *Crawford* rule must prevail."[183]

The First Circuit in *Denny* did not address the issue of whether expert fees reflecting time spent on investigation or consultation might be recoverable as a part of the attorney's work product since the argument had not been raised by the plaintiff.[184] *Denny* resolved only the shifting of testimonial expert fees under Title VII. It did not decide whether the fee shifting statute of Title VII is limited by the thirty-dollar-per-day cap of 28 U.S.C. § 1821(b) when the plaintiff is seeking nontestimonial expenses related to out-of-court preparation, consultation, or briefing of counsel. In addition, *Denny* did not resolve whether expert fees, either testimonial or nontestimonial, are recoverable as a part of the attorneys fee under section 1988. As to that question, the court stated: "We acknowledge that section 1988's legislative history, as described in this, and other, circuits, lends some support to plaintiff's interpretation."[185]

Finally, the Fifth Circuit also refused to award excess expert witness expenses pursuant to the fee shifting provisions of Title VII,[186] the Voting Rights

180. *Id.*
181. *Id.* at 1470.
182. *Id.* at 1471
183. *Id.*.
184. *Id.* at 1472.
185. *Id.* at 1469.
186. Int'l Woodworkers of America 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); *But see* Mennor v. Fort Hood Nat'l Bank, 829 F.2d 553, 557 (5th Cir. 1987) (Title VII authorizes court "to award reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services").

Act,[187] and the Clayton Act.[188] In *Leroy v. City of Houston*, the court concluded that *Crawford Fitting* "leaves us no room to construe the Voting Rights Act provision" as authorizing expert witness fees.[189] The court noted that the fee shifting provision of the Voting Rights Act is substantially similar to section 1988 and has been construed consistently with section 1988.[190]

One district court, while constrained to follow the Fifth Circuit rule, pointed to the "economic inefficiency and abuse" likely to result from it.[191] According to *Shipes v. Trinity Industries, Inc.*, the long term consequences of the rule is a "heightened likelihood of denying civil rights litigants access to the courts."[192] The court referred to other consequences of the rule as follows:

> [The rule] invites attorneys on both sides of the bar to elect the more extravagant option of personally performing pretrial tasks that are more cheaply and efficiently left to others. Title VII attorneys who are so cost-conscious, scrupulous, or foolhardy, as to continue to retain specialists for the statistical aspects of their cases, ultimately may find that they are unable to secure more than a Pyrrhic victory on behalf of their clients.
>
> This potential for economic inefficiency and abuse threatens all litigants. Both plaintiffs and defendants will be saddled with higher legal bills while litigation is pending. Ultimately, the losing party will be taxed far more, in increased attorneys fees, than formerly had been the case when experts' costs were taxable.[193]

B. The Seventh Circuit: A Minority View

The Seventh Circuit refused to go along with those circuits that applied *Crawford Fitting* to civil rights cases.[194] In *Friedrich v. City of Chicago*,[195] the court concluded that, pursuant to section 1988, district courts have the power

187. Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988); *see* Martin v. Mabus, 734 F. Supp. 1216 (S.D. Miss. 1990) (denying excess expert fees under both the Voting Rights Act and section 1988); Beamon v. City of Ridgeland, 666 F. Supp. 937 (S.D. Miss. 1987).

188. Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 953 (N.D. Ohio 1988).

189. 831 F.2d at 584.

190. *Id.* at 579 n.4.

191. Shipes v. Trinity Indus., Inc., 685 F. Supp. 612 (E.D. Tex. 1987) (Title VII case applying *Woodworkers* to expert testimony and out-of-court services of experts).

192. *Id.* at 614-15.

193. *Id.* at 616.

194. Friedrich v. Chicago, 888 F.2d 511 (7th Cir. 1989), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991); King v. Board of Regents of Univ. of Wis. System, 748 F. Supp. 686 (E.D. Wis. 1990); Jones v. City of Chicago, 1987 WL 19800 (N.D. Ill. November 10, 1987) ("the case law overwhelmingly supports the proposition that 'attorney's fee' includes out-of-pocket expenses in preparation for trial"). *But see* Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 123 F.R.D. 584, 589 (N.D. Ill. 1988) (applying *Crawford Fitting* in an antitrust case).

195. 888 F.2d 511 (7th Cir. 1989), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991).

to award testimonial and nontestimonial expert expenses as a part of the attorney's fee, despite the fact that section 1988 does not explicitly refer to expert fees. Writing for the court, Judge Posner rejected a literalist approach by relying on the Supreme Court's previous non-literal interpretation of section 1988 in *Missouri v. Jenkins*.[196] There, the court held that section 1988 authorizes an award of paralegal fees.[197] A non-literal interpretation was also supported by the longstanding practice of authorizing an attorney's travel expense or long distance telephone expense as a part of the attorney's fee.[198] Judge Posner wrote:

> The defendants argue that a paralegal is more like an attorney than is an economist, a psychiatrist, a police commissioner (one of the experts here), or a sociologist (the other — William Whyte of *Organization Man* fame). That may be, but it does not touch the question whether the fee statute is to be read literally. A sheep is more like a goat than it is like an ostrich; but if a statute regulating sheep had been applied to goats, an attempted application to ostriches should not be defeated simply by pointing out than an ostrich is not a sheep. If "attorney" in the fee statute can mean something different from attorney, and "fee" something different from fee, then maybe one of the other things "attorney's fee" can mean is the fee paid an expert witness or consultant.[199]

In *Friedrich*, the court explained that the "superficial clarity" of a literalist approach is treacherous since Congress often legislates "in haste, without considering fully the potential application of their words to novel settings."[200] Therefore, "[w]hen a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation — it is interpretation in a sense that has been orthodox since Aristotle — for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words."[201] Judge Posner concluded that the non-literal result in *Missouri v. Jenkins* was completely consistent with the legislative purpose of section 1988 and in fact was necessary to make sense of the statute. Declining to award paralegal fees would result in attorneys having to devote their more expensive time to tasks normally undertaken by paralegals; this would result in higher awards of attorneys fees.[202] Judge Posner reasoned that the same sort of non-literal interpretation is necessary in determining whether experts fees can be shifted as a part of the attorneys' fee:

196. 491 U.S. 274 (1989).
197. *Id.*
198. Henry v. Webermeier, 738 F.2d 188, 192 (7th Cir. 1984).
199. 888 F.2d at 513.
200. *Id.* at 514.
201. *Id.*
202. *Id.*

> Experts are not only hired to testify; sometimes they are hired, also or instead, to educate counsel in a technical matter germane to the suit. The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise. To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work.[203]

Judge Posner thus concluded that with respect to nontestimonial expert expenses, *Missouri v. Jenkins*, not *Crawford Fitting*, governs.

Judge Posner next examined whether expenses related to the testimonial services of the expert are governed by *Crawford Fitting*'s statement that "we will not lightly infer that Congress has repealed sections 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees . . . . We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920."[204] Once again, Judge Posner rejected a literalist interpretation. Instead, he asked:

> whether we can be confident that if someone had told Congress in the deliberations leading up to the enactment that it had neglected to say anything about the shifting of expert-witness fees, Congress would have added language making clear to the most literal-minded that such fees could be shifted. We think it would have, and one reason is simply that we are given and can think of no reason against such shifting — especially given our earlier point that expert fees for advice and consultation can be shifted along with paralegal and other incidental expenses normally incurred in litigation. There would be a reason if the civil rights fees statute had been a hard-fought compromise between those who wanted judges to have the broad equitable authority they had exercised before *Alyeska* and those who wanted no inroads made on *Alyeska*, for then the court's duty would be to give effect to the compromise, not to give proponents a victory that had eluded them in the legislative arena. But there is no indication of compromise on any issue relevant to this case. . . . All the evidence is to the contrary. Recognizing that most civil rights suits were not lucrative for the plaintiffs' lawyers, Congress wanted to make losing defendants bear the expenses of suit beyond the usual items taxable as costs.[205]

Friedrich thus adopted the position that both testimonial and nontestimonial

203. *Id.*
204. 482 U.S. 437, 445 (1981).
205. 888 F.2d at 517-18 (citations omitted).

expert expenses are recoverable as a part of the attorney's fee within the meaning of section 1988.[206]

C. Ambiguous Results

Several circuits produced inconsistent results in applying the *Crawford Fitting* rule to civil rights cases. For example, in *Sapa Najin v. Gunter*,[207] an Eighth Circuit panel held that expert witness fees are recoverable, not as a cost pursuant to 28 U.S.C. § 1821, but rather as a reasonable expense of litigation recoverable as a part of the attorney's fee within the meaning of section 1988. However, in *Gilbert v. City of Little Rock*,[208] an en banc Eighth Circuit affirmed, by an equally divided panel, a district court order which, pursuant to the perceived constraints of *Crawford Fitting*, limited expert witness fees to thirty-dollar-per-day in a case involving section 1988.

Neither the Ninth nor Tenth Circuits addressed the issue of expert witness fees and section 1988. Lower court opinions within the Ninth Circuit suggest confusion. One district court case, *United States v. City & County of San Francisco*,[209] relying on Judge Posner's analysis in *Friedrich*, concluded that *Crawford Fitting* did not preclude an award of expert fees pursuant to Title VII. However, in *Pacific West Cable Co. v. City of Sacramento*,[210] the district court suggested that *Crawford Fitting* forecloses recovery of expert fees under section 1988, but declined to rest its decision on that basis, having found other reasons why plaintiffs were not entitled to recover the cost of their experts.[211] In the Tenth Circuit, circuit law prior to *Crawford Fitting* clearly

206. The Second Circuit, while not expressly resolving the issue of the applicability of *Crawford Fitting* to civil rights cases, summarily affirmed one case in which the district court concluded that *Crawford Fitting* did not control fee awards under section 1988. Hillburn v. Comm'r, Connecticut Dep't of Income Maintenence, 847 F.2d 835 (2d Cir. 1988). In all but one case, the district courts within the Second Circuit ruled that *Crawford Fitting*'s holding was limited to expenses sought pursuant to Rule 54(d) and did not limit the court's authority to award expert expenses under section 1988. Wilkinson v. Fors., 729 F. Supp. 1416 (D. Conn. 1990) (noting that it is "the general practice of the district courts in our Circuit to make such awards" under section 1988); Williams v. City of New York, 728 F. Supp. 1067 (S.D.N.Y. 1990); Hillburn v. Comm'r, Connecticut Dep't of Income Maintenance, 683 F. Supp. 23 (D. Conn. 1987), *aff'd*, 847 F.2d 835 (2d Cir. 1988); United States v. Yonkers, 118 F.R.D. 326 (1987); Powell v. Ward, No. 74 Civ. 4628, slip op. at 10 (S.D.N.Y. Aug. 23, 1989); *see also* Cefali v. Buffalo Brass Co., 748 F. Supp. 1011 (W.D.N.Y. 1990) (ERISA case); Maturo v. National Graphics, Inc., 722 F. Supp. 916 (D. Conn. 1989) (Title VII case). *But see* Huertas v. East River Housing Corp. 674 F. Supp. 440 (S.D.N.Y. 1987) (applying *Crawford Fitting* to housing discrimination claims asserted under Title VIII and sections 1981 and 1982).

207. 857 F.2d 463 (8th Cir. 1988). *But see* DeGidio v. Pung, 723 F. Supp. 135, 140 (D.Minn. 1989) (calling excess witness fees "arguably non-compensable").

208. 867 F.2d 1062 (8th Cir.) (en banc), *cert. denied*, 110 S. Ct. 57 (1989); *see also* Catlett v. Missouri Highway & Transp. Comm'n, 828 F.2d 1260, 1272 (8th Cir. 1987) (remanding a sex discrimination claim arising under section 1983 and Title VII so that defendants can challenge an earlier award of expert witness fees), *cert. denied*, 485 U.S. 1021 (1988).

209. 748 F. Supp. 1416, 1440 (N.D. Cal. 1990).

210. 693 F. Supp. 865 (E.D. Cal. 1988).

211. *Id.* at 875; *see also* Seven Gables Corp. v. Sterling Recreation Org. Co., 686 F. Supp. 1418 (W.D. Wash. 1988) (applying *Crawford Fitting* to the Clayton Act).

established that reasonably necessary expert fees are recoverable as a part of the attorney's fee pursuant to section 1988.[212] In one of its two post-*Crawford Fitting* decisions,[213] the Tenth Circuit stated in dicta that *Crawford Fitting* does not foreclose reimbursement for excess expert fees under the Age Discrimination in Employment Act. One district court reached the same result, concluding that a denial of expert fees would undermine the goal of fee shifting provisions in antidiscrimination statutes to "encourage private persons to bring meritorious actions and provide a public service by discouraging and eliminating unlawful discrimination."[214] In a second post-*Crawford Fitting* decision, the Tenth Circuit held that prevailing parties cannot recover excess expert expenses under the Clayton Act.[215]

The Eleventh Circuit addressed only the applicability of *Crawford Fitting* to the Equal Pay Act. In *Glenn v. General Motors Corp.*,[216] the court concluded that the broad language of *Crawford Fitting* does not permit an award of excess expert expenses under the fee shifting provision of the Equal Pay Act.[217] The Eleventh Circuit found no basis for distinguishing *Crawford Fitting* from a case arising under a fee shifting statute unless the statute refers explicitly to expert fees.[218] The court further noted that the fee shifting provision of the Equal Pay Act is sufficiently similar to section 1988 and to the fee shifting provision of Title VII to suggest similar results under both statutes.[219] But despite the broad language in *Glenn*, two lower court opinions concluded that expert witness fees are reimbursable as a part of the attorney's fee pursuant to section 1988.[220]

---

212. Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983).

213. Furr v. A.T.&T. Technologies, 824 F.2d 1537, 1550 (10th Cir. 1987). The statement was merely dicta because the parties had entered into a stipulation regarding expert fees.

214. Johns v. Whirlpool Corp., 55 Fair Empl. Prac. Cas. (BNA) 850 (D. Kan. 1988) (refusing to apply *Crawford Fitting* to a claim arising under the Age Discrimination in Employment Act, which, according to the court, should be interpreted consistently with section 1988).

215. Reazin v. Blue Cross, 899 F.2d 951 (10th Cir. 1990); *see also* Chaparral Resources, Inc. v. Monsanto Co., 849 F.2d 1286 (10th Cir. 1988) (diversity case in which court concluded that Colorado statute did not explicitly authorize assessment of expert witness fees as costs).

216. 841 F.2d 1567 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988).

217. 29 U.S.C. § 216(b) (1988).

218. 841 F.2d at 1575.

219. *Id.* at 1575 n.23.

220. Military Circle Pet Center v. Cobb County, Ga., 734 F. Supp. 502 (N.D. Ga. 1990); *see also* Allen v. Freeman, 122 F.R.D. 589 (S.D. Fla. 1988).

The D.C. Circuit also produced little law on the subject, although one district court opinion applied *Crawford Fitting* in a Title VII case, Noble v. Herrington, 732 F. Supp. 114, 118 (D.D.C. 1989); and the United States Claims Court refused to extend *Crawford Fitting* to claims arising under the National Childhood Vaccine Injury Act. *See* Shaw v. Sec. of Dep't of Health and Human Services, 18 Cl. Ct. 646 (1989); Strother v. Sec. of Health and Human Services, 18 Cl. Ct. 816 (1989); Brown v. Sec. of Dep't of Health and Human Services, 18 Cl. Ct. 834 (1989).

Finally, while the Sixth Circuit did not decide the issue, there were at least two reported district court rulings. In Knop v. Johnson, 712 F. Supp. 571, 589 (W.D. Mich. 1989), the court concluded that *Crawford Fitting*, though "illogical," prohibits reimbursement of expert witness fees under section 1988 in excess of the $30-per-day cap contained in 28 U.S.C. § 1821(b). *See also* Beamon v. City of Ridgeland, Mississippi, 666 F. Supp. 937 (S.D. Miss. 1987) (denying expert witness fees under the Voting Rights Act).

This review of the conflicting caselaw that preceded *West Virginia University Hospitals* reveals that although the majority of post-*Crawford Fitting* courts declined to award expert fees sought in connection with attorney's fees applications, they reached this result reluctantly, recognizing that the *Crawford Fitting* rule will likely operate as a "significant disincentive to would-be enforcers" of civil rights laws.[221] It is not surprising that most courts felt constrained to extend *Crawford Fitting* to civil rights cases in light of the opinion's language which mischievously invited its application to cases involving fee shifting statutes that do not clearly and explicitly authorize an award of excess expert expenses. However, these decisions reflect a mechanical application of *Crawford Fitting* unaccompanied by any independent reason for abandoning a previous willingness to treat expert fees as a litigation expense reimbursable as part of the attorney's fee. These decisions also provide no analysis or explanation of why expert expenses should be treated differently from other litigation expenses that are routinely billed separately to fee-paying clients.

V.

WEST VIRGINIA UNIVERSITY HOSPITALS, INC. V. CASEY

A. An Overview of West Virginia University Hospitals

West Virginia University Hospitals (WVUH), due to its location six miles south of the border between Pennsylvania and West Virginia, treats a significant number of medicaid recipients who are Pennsylvania residents.[222] WVUH commenced this section 1983 action against Pennsylvania Governor Robert Casey and other Pennsylvania officials to contest new medicaid reimbursement rates applicable to Pennsylvania residents on the ground that they violated the minimum reimbursement standards contained in the federal Social Security Act.[223] WVUH also challenged the adequacy of Pennsylvania's administrative appeals system.[224] A six-day trial was conducted in the United States District Court for the Middle District of Pennsylvania. Three expert witnesses, who had assisted in the pretrial preparation of the case, testified for WVUH concerning the deficiencies in Pennsylvania's reimbursement schedule and the inadequacy of Pennsylvania's administrative appeals system.[225] The

221. Denny v. Westfield State College, 880 F.2d 1465, 1472 (1st Cir. 1989); *see* West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11, 33-34 (3d Cir. 1989), *aff'd*, 111 S. Ct. 1138 (1991); Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988).

222. West Virginia Univ. Hosp., Inc. v Casey, 701 F. Supp. 496, 498-99 (M.D. Pa 1988), *aff'd in part, rev'd in part*, 885 F.2d 11 (3d Cir. 1989), *aff'd*, 111 S. Ct. 1138 (1991).

223. 42 U.S.C. § 1396a(a)(13)(A) (1988). WVUH claimed that Pennsylvania, in setting its reimbursement rates, failed to adequately take into account low-income patients with special needs. 701 F. Supp. at 513.

224. WVUH claimed that Pennsylvania's administrative appeals system was contrary to 42 U.S.C. § 1396a(a)(37) (1988) and implementing regulations.

225. Petition for Writ of Certiorari at 4, West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138 (1991) (No. 89-994).

district court ruled for WVUH on both claims[226] and awarded the hospital, as the prevailing party, attorney's fees of $500,000, which included $104,133 for the experts' pretrial and trial work.[227] The parties stipulated that the experts' time was necessary and that $104,133 represented reasonable compensation for the work performed. The district court stated that "its reliance on the testimony of plaintiff's expert witnesses . . . was essential to an understanding of the theories, issues, and facts crucial to the court's analysis and ultimate factual and legal determinations."[228]

On appeal, the Third Circuit upheld the district court decision with respect to the new reimbursement rates but reversed on the issue of the adequacy of Pennsylvania's appeals system.[229] With respect to the award of attorney's fees, the Third Circuit disallowed that portion of the attorney's fee that represented reimbursement for the expenses associated with the experts.[230]

West Virginia University Hospitals was argued before the Supreme Court on October 9, 1990. The argument drew a crowd, not because of publicity generated by the case, but because it was Justice David Souter's first day on the bench.[231] Robert Adams, the attorney for the hospital, contended that the legislative history of the Civil Rights Attorney's Fees Awards Act demonstrated that the term "attorney's fee" encompasses expert expenses.[232] Mr. Adams maintained that Congress had explicitly relied on the language of the fee shifting provision in Title VII and that Congress had cited lower court cases which had authorized an award including expert fees.[233] Several members of the Court responded to this legislative intent argument with obvious disdain. Justice Scalia, for example, suggested that the argument presupposed that every member of Congress who voted for the Act understood what was in the legislative report and actually read the cases cited in the report. This assumption, Justice Scalia maintained, could not be borne out by reality.[234]

In addition to legislative intent, Mr. Adams relied upon precedent. In *Missouri v. Jenkins*,[235] the Court, in an opinion by Justice Brennan, interpreted the term "attorney's fee" in section 1988 to include paralegal costs.[236] Mr. Adams argued that *Jenkins* evinced the Court's understanding that an award of attorney's fees may include costs beyond those reflecting the attor-

226. 701 F. Supp. at 526.

227. 885 F.2d 11 at 32.

228. West Virginia Univ. Hosp., Inc. v. Casey, No. 86-0955 (M.D. Pa. Jan. 30, 1989) (attached as Appendix C to Petition for Writ of Certiorari).

229. 885 F.2d at 35.

230. *Id.*

231. *See* 59 U.S.L.W. 2212 (1990).

232. Official Transcript Proceedings before the Supreme Court of the United States, at 8, West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138 (1991) (No. 89-994) [hereinafter Official Transcript].

233. *Id.* at 6-8.

234. *Id.* at 8-9

235. 491 U.S. 274 (1989).

236. *Id.*

ney's own work. Rather, section 1988 authorizes a "fully compensatory fee" that covers the work product not only of the attorney but also of those individuals whose labor contributes to the work product of the attorney.[237]

The significance of *Jenkins* also arose in the context of an interesting exchange between Justices White and Stevens. Responding to Mr. Adam's legislative intent argument, Justice White asked whether the language of the statute itself, without consideration of its legislative history, was ambiguous.[238] When Mr. Adams stated that the language was not ambiguous,[239] Justice White responded: "[T]hen it's just a plain language case and you lose." Justice Stevens, however, interjected that under this analysis, *Jenkins* must be viewed as wrongly decided.[240]

Other Justices expressed the view that *Jenkins* did not support petitioner's argument because paralegal fees are not analogous to expenses associated with experts.[241] Justice O'Connor stated that paralegals undertake part of the attorney's work, whereas experts operating outside the law office engage in work beyond the scope of the lawyer's activity.[242] Similarly, Justice Kennedy read *Jenkins* as referring only to office costs.[243] Later in the argument, Justice O'Connor asked the state's attorney to address the relevance of the language in *Jenkins* that the term "attorney's fee" refers to the work product of the attorney and others whose labor contributes to the work product.[244] Respondent's attorney indicated that *Jenkins* should be read to apply only to intra-office work.[245]

While the Court reacted to petitioner's legislative intent argument with hostility, Mr. Koons, representing the state of Pennsylvania, faced tough questions on how to distinguish litigation expenses that are reimbursable pursuant to section 1988 from those that are not.[246] Justice Stevens pointed out that Pennsylvania had not challenged that portion of the attorney's fee award that compensated petitioner for telephone, travel, and other items traditionally billed to the client as expenditures or disbursements.[247] Justice Stevens asked how these expenses are compensable if the plain language of the statute covers only the lawyer's fee.[248] Before Mr. Koons could respond, Justice Scalia interjected that the attorney's fee includes anything that the attorney would bill to the client as work in the case, including cabfare and other similar expenses.[249]

237. Official Transcript, *supra* note 232, at 15.
238. *Id.* at 12.
239. *Id.*
240. *Id.* at 12-13.
241. *Id.* at 13.
242. Id. at 14-15.
243. *Id.* at 34.
244. *Id.*
245. *Id.*
246. *Id.* at 24-30.
247. Id. at 25. These expenses amounted to $45,867. *Id.*
248. *Id.*
249. *Id.* at 26.

Justice Stevens persisted in his effort to distinguish those litigation expenses that are a part of the fee from those that are not by asking whether the costs of long distance telephone calls, copying, and traveling to depositions, which are not considered taxable costs, are properly considered a part of the attorney's fee.[250] When Mr. Koons expressed uncertainty, Justice Stevens suggested using the standard proferred by Justice Scalia — that the attorney's fee covers those expenses that are normally billed separately by the attorney. Justice Scalia added the caveat that the expenses must be for the attorney's own work.[251]

The argument then shifted to the issue of experts as consultants in the preparation of the case as opposed to experts serving as witnesses at trial. Justice Stevens asked whether historians hired to write a brief in a case such as *Brown v. Board of Education*[252] would be covered.[253] Predictably, the answer was no.[254] Justice Marshall, obviously chagrined, rhetorically asked how someone working with an attorney for two years on a case could not be considered to be contributing to the legal work.[255]

The decision was rendered on March 19, 1991. Justice Scalia, writing for a 6-3 majority, concluded that expert fees constitute a separate element of the cost of litigation and are not considered a part of the attorney's fee.[256] This conclusion was supported by the fact that at least thirty-four fee shifting statutes explicitly shift expert witness fees and a few explicitly shift nontestimonial expert expenses.[257] In the majority's view, this statutory usage "shows beyond question that attorney's fees and expert fees are distinct items of expense. If, as WVUH argues, the one includes the other, dozens of statutes referring to the two separately become an inexplicable exercise in redundancy."[258]

Justice Scalia's opinion reviewed pre-1976 common law practice and statutory usage and concluded that at the time the Civil Rights Attorney's Fees Awards Act was passed, the phrase "attorney's fee" was not thought to embrace expert expenses.[259] As expected from the oral argument and from his earlier opinions,[260] Justice Scalia rejected petitioner's argument that section 1988 should be interpreted in light of its legislative history to restore fee-shift-

250. Id. at 27.
251. *Id.* at 18-29.
252. 347 U.S. 483 (1954).
253. Official Transcript, *supra* note 232, at 34.
254. *Id.*
255. *Id.* at 39.
256. West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138 (1991).
257. *Id.* at 1141-43.
258. *Id.* at 1143.
259. *Id.* at 1143-46.
260. *See, e.g.*, Taylor v. United States, 495 U.S. 575, 603 (1990) (Scalia, J., concurring) (detailed examination of legislative history "does not uncover anything useful (*i.e.*, anything that tempts us to alter the meaning we deduce from the text anyway), but that is the usual consequence of these inquiries (and a good thing, too)"); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 318 (1988) (Scalia, J., concurring in part, dissenting in part) ("The authority to clarify an ambiguity in a statute is not the authority to alter even its unambiguous applications.").

ing in civil rights actions to pre-*Alyeska* practice. Justice Scalia reiterated his view that when an enactment "contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."[261]

Finally, Justice Scalia dismissed the argument that the phrase "attorney's fee" in section 1988 had already been broadly interpreted by the Court to cover items that are not strictly within the lawyer's own fee. He distinguished *Missouri v. Jenkins*[262] on the ground that paralegal fees, though separately billed under current practice, were traditionally included in the attorney's hourly rate. Such a tradition never existed for expenses associated with hiring experts.[263]

Justice Stevens, in a dissent joined by Justices Marshall and Blackmun, criticized the Court's formalistic approach. The majority, Justice Stevens claimed, had donned its "thick grammarian's spectacles" and ignored congressional purpose as well as the Court's previous interpretations of the statute.[264] Stevens looked to *Missouri v. Jenkins*,[265] in which the Court explained:

> The fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided by the statute should compensate the work of paralegals, as well as that of attorneys.[266]

The *Jenkins* decision acknowledged that the use of paralegals ultimately reduces the amount of the attorney's fee. If attorneys had to perform the work of paralegals, the hourly rate would obviously be higher, thus driving up the overall award.[267] Justice Stevens argued that this reasoning applies with equal force to the use of experts. Drawing on Judge Posner's analysis in *Friedrich v.*

---

261. *West Virginia University Hospitals*, 111 S. Ct. at 1147.

262. 491 U.S. 274 (1989).

263. *West Virginia University Hospitals*, 111 S. Ct. at 1147.

264. *Id.* at 1154. In fact, Justice Stevens criticized the Court's increased use of this literal, formalistic approach and pointed to a series of instances where Congress has legislatively overruled the Court's interpretation of legislative enactments. *E.g.* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (overruled by the Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (1988)); Grove City College v. Bell, 465 U.S. 555 (1984) (overruled by the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28, 20 U.S.C. § 1687 (1988)).

265. 491 U.S. 274 (1989)

266. *Id.* at 285.

267. *Id.* at 288.

Chicago,[268] Justice Stevens' opinion makes the law and economics argument that attorneys would have to devote far more time to accomplishing the work performed by experts which can only serve to increase the overall fee award.[269]

With respect to the legislative history, Justice Stevens found a clear intent to restore fee shifting to its pre-*Alyeska* practice of shifting expert expenses along with attorney's fees. Citing the Senate report on the Civil Rights Attorney's Fees Awards Act, Justice Stevens concluded that "[i]t was to this pre-*Alyeska* regime, in which courts could award expert witness fees along with attorney's fees, that the Senate Committee intended to return through the passage of the fee-shifting amendment to § 1988."[270] Justice Stevens also relied on the House report for evidence that Congress intended section 1988 to alleviate the hardships suffered by civil rights claimants as a result of *Alyeska* and to return fee shifting in civil rights cases to the "practice in which courts should shift fees, including expert witness fees, and make those who acted as private attorneys general whole again, thus encouraging the enforcement of civil rights laws."[271] Justice Stevens thus concluded that forcing petitioner to absorb more than $100,000 in expert expenses conflicts with previous interpretations of section 1988, which require that petitioner's recovery be "fully compensatory"[272] and "comparable to what is 'traditional with attorneys compensated by a fee-paying client.' "[273]

B. Restricting Fee Shifting for Expert Witness Expenses Under West Virginia University Hospitals

The Court's decision to apply the thirty-dollar-per-day limit of 28 U.S.C. § 1821(b) to applications for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act and to reject an interpretation of attorney's fees which encompasses necessary and reasonable expert expenses is seriously misguided. Inasmuch as this decision is likely to deter civil rights plaintiffs from

268. 888 F.2d 511 (7th Cir. 1989), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991).

269. 111 S. Ct. 1138, 1151 (1991).

270. *Id.* at 1152. The Senate report on the Civil Rights Attorneys' Fees Awards Act explained that the purpose of the proposed amendment to 42 U.S.C. § 1988 was "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Aleyska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws." S. REP. No. 1011, *supra* note 129, at 7.

271. 111 S. Ct. at 1152-53. The House Report expressed concerns similar to those raised by the Senate Report. It noted that "[t]he effective enforcement of federal civil rights statutes depends largely on the efforts of private citizens" and that the House bill was "designed to give such persons effective access to the judicial proces." H.R. REP. No. 1558, 94th Cong., 2d Sess. 1 (1976) [hereinafter H.R. REP. No. 1558].

272. *Id.* (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)).

273. *Id.* (quoting Missouri v. Jenkins, 491 U.S.274, 286 (1989) (quoting S. REP. No. 94-1011, *supra* note 129, at 6)).

bringing meritorious civil rights claims[274] or severely hamper the efforts of counsel to properly litigate the case, it runs contrary to the purpose of the Civil Rights Attorney's Fees Awards Act, as expressed in the legislative history surrounding its enactment and as previously interpreted by the Court.

As described above,[275] the goal of the Civil Rights Attorney's Fees Awards Act was to ensure private enforcement of federal civil rights laws. The statute was explicitly enacted to legislatively overrule the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*[276] and to restore authority to the federal courts to shift the cost of civil rights actions to the losing party. The legislative history contains several references to Congress' appreciation of the extent to which a failure to shift costs would prevent the initiation of civil rights litigation.[277] The House report indicated that a fee shifting statute was necessary "because a vast majority of the victims of civil rights violations cannot afford legal counsel . . . [and] are unable to present their cases to the courts."[278] The House report further noted that "civil rights litigants were suffering very severe hardships because of the *Alyeska* decision"[279] and that "private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short on resources, could not afford to do so."[280]

Until *West Virginia University Hospitals*,[281] the Supreme Court had consistently interpreted the Civil Rights Attorney's Fees Awards Act in a way that furthered the congressional goal of removing financial obstacles which "deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large."[282] As the Court stated in *City of Riverside v. Rivera*:[283]

---

274. *See* Denny v. Westfield State College, 880 F.2d, 1465, 1472 (1st Cir. 1989); *see also* H.R. REP. No. 1558, *supra* note 271, at 2, 3.

275. *See supra* text accompanying notes 128-31.

276. 421 U.S. 240 (1975).

277. *See supra* text accompanying notes 129-36.

278. H.R. REP. No. 1558, *supra* note 271, at 1.

279. *Id.* at 2.

280. *Id.* at 3.

281. 111 S. Ct. 1138 (1991).

282. Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 737 (1987) (Blackmun, J., dissenting). Other examples of the Court interpreting section 1988 so as to promote the congressional purpose of facilitating private enforcement of civil rights violations can be found in Hensley v. Eckerhart, 461 U.S. 424, 429-30 (1983), where the Court adopted the "lodestar" method of computing fee awards; Blum v. Stenson, 465 U.S. 886 (1984), where the Court held that public interest organizations are to be compensated pursuant to market rates; Texas State Teachers Ass'n v. Garland, 489 U.S. 782, 791-92 (1989), where the Court held that a prevailing party is one who has succeeded on any significant issue which achieves some of the benefit sought; City of Riverside v. Rivera, 477 U.S. 561, 567, 576 (1986), where the Court rejected an interpretation that the fee should be proportionate to the amount of damages recovered; and Blanchard v. Bergeron, 489 U.S. 87, 91-92 (1989), where the Court held that a contingent fee agreement does not impose an automatic ceiling on a section 1988 award. Notably, in each of these cases, the Court relied heavily on Senate and House reports for guidance in interpreting the text of section 1988.

283. 477 U.S. 561 (1986).

> Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market.[284]

The Court reaffirmed this view in *Hensley v. Eckerhart*,[285] holding that the prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust."[286] Under section 1988, the "plaintiff is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority."[287] Accordingly, in *Hughes v. Rowe*,[288] the Court held that different standards govern an award of attorney's fees to prevailing defendants. Whereas prevailing plaintiffs are presumptively entitled to an award of attorney's fees,[289] prevailing defendants may recover fees only if "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[290] The decision in *Hughes* clearly reflects an understanding that exposing unsuccessful civil rights plaintiffs to crushing attorney's fees awards could serve to deter meritorious claims.[291]

In *West Virginia University Hospitals*, the Supreme Court abruptly ended a line of cases in which section 1988 was read to authorize all reasonable litigation expenses incurred by attorneys that are normally billed separately to fee-paying clients. In these cases, the Court repeatedly construed the phrase "reasonable attorney's fee" by reference to the marketplace.[292] In *Blum v. Stenson*,[293] the Court held that "[t]he statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community."[294] In sharp contrast to Justice Scalia's refusal to credit congressional reports to support the argument

284. *Id.* at 576 (citations omitted).

285. 461 U.S. 424 (1983).

286. *Id.* at 429.

287. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978).

288. 449 U.S. 5 (1980).

289. Smith v. Robinson, 468 U.S. 992, 1006 (1984); Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

290. Hughes v. Rowe, 449 U.S. 5, 14 (1980); *see* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (same result under Title VII). It should be noted that *Hughes* may have been decided differently under Justice Scalia's formalistic, plain-language approach because the statutory text authorizes an award of attorney's fees without distinguishing between prevailing plaintiffs and defendants.

291. *See* Aller v. New York Bd. of Elections, 586 F. Supp. 603, 605 (S.D.N.Y. 1984) (the "more stringent standard applicable to defendants is intended to ensure that plaintiffs with uncertain but arguably meritorious claims are not altogether deterred from initiating litigation by the threat of incurring onerous legal fees should their claims fail").

292. *See* Missouri v. Jenkins, 491 U.S. 274, 283 (1989) ("In determining how other elements of the attorney's fee are to be calculated, we have consistently looked to the marketplace as our guide to what is 'reasonable.' ").

293. 465 U.S. 886 (1984).

294. *Id.* at 895; *see* Pennsylvania v. Delaware Council Citizens' Council, 483 U.S. 711, 732

that Congress meant to encompass expert expenses within the term "attorney's fee," the Court in *Blum v. Stenson* explicitly relied on Senate and House reports. The reports cited four lower court cases which applied the appropriate standard[295] by referring to billing rates or practices in the community.[296]

The Court again looked to the marketplace as the appropriate source for determining the scope of attorney's fees in *Missouri v. Jenkins*:[297]

> A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, i.e., 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation,' . . . and one that grants the successful civil rights plaintiff a 'fully compensatory fee,' . . . comparable to what 'is tradition with attorneys compensated by a fee-paying client.'[298]

The Court thus considered it a "self-evident proposition" that the term "reasonable attorney's fee" refers not just to the work performed personally by members of the bar, but rather to the overall work product of an attorney, including the cost of hiring paralegals.[299] The Court stated:

> The term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit.[300]

In *Jenkins*, Justice Rehnquist argued alone in dissent that the term "attorney's fee" is limited to a "fee charged for services rendered by an individual who has been licensed to practice law."[301] Justice Rehnquist maintained that the term "attorney's fee" covers only what is included in the attorney's hourly rate and that the holding in *Crawford Fitting* precludes reimbursement for any out-of-pocket expenses not specifically enumerated in 28 U.S.C.§ 1920.[302] Just two years later, the position taken in Justice Rehnquist's sole dissent in *Jenkins* won the day. Had the question of expert fees in *West Virginia University Hospitals* been analyzed pursuant to the customary practice in the private

(1987) (O'Connor, J., concurring) (determination regarding contingency enhancements is "how the market in a community compensates for contingency").

295. 465 U.S. at 892.

296. Johnson v. Georgia Highway Express, 488 F.2d 714, 718 (5th Cir. 1974); Swann v. Charlotte-Mecklenberg Bd. of Educ., 66 F.R.D. 483, 486 (W.D.N.C. 1975); Stanford Daily v. Zurcher, 64 F.R.D. 680, 682 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048 (C.D. Cal. 1974).

297. 491 U.S. 274 (1989).

298. *Id.* at 286 (citations omitted).

299. *Id.* at 285.

300. *Id.*

301. *Id.* at 296 (Rehnquist, J., dissenting).

302. *Id.* at 297-98.

market, there would have been no question that this particular litigation expense is separately billed to the client by the private bar.[303] As chronicled earlier,[304] virtually all of the lower federal courts, with the exception of the Fourth Circuit, had concluded that nontestimonial expert expenses are properly treated as a litigation expense which is reimbursable as part of the attorney's fee because private attorneys do indeed bill fee-paying clients separately for this expense. In fact, this billing practice appears mandated by the Rules of Professional Conduct, which caution an attorney not to acquire a financial interest in the outcome of litigation by undertaking to pay litigation expenses.[305] Thus, even where an attorney advances litigation expenses — including those for experts — for her client, the client remains ultimately liable for the expenditure.[306]

West Virginia University Hospitals can produce only blatantly unjust and inefficient results. The decision is unjust because it will either deter the institution of civil rights litigation[307] or lead to incomplete and ineffective trial preparation.[308] The decision is inefficient because it will result in attorneys spending added time acquiring the knowledge possessed by experts whom they can no longer afford to hire, which will ultimately result in driving up the overall fee award.[309] Moreover, the decision will prove unwieldy if not unworkable for the courts to administer because it will require judges to parse each hour of the attorney's time in order to determine whether the attorney is functioning more like an attorney or more like an expert or consultant. The decision also invites mischief in that courts may now be repeatedly called upon to determine whether a particular type of litigation expense is more like a paralegal expense, which is reimbursable,[310] than an expert witness expense, which is not.[311] As the court noted in *Knop v. Johnson*,[312] "[e]xpert witnesses, as surely as long distance telephone calls, photocopies and airline tickets, are necessary ex-

303. *But see id.* at 274 ("I do not think Congress intended the meaning of the statutory term 'attorney's fee' to expand and contract with each and every vagary of local billing practice.").

304. *See supra* text accompanying notes 151-53.

305. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-8 (1983).

306. *Id.*; DR 5-103(B); MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.8(c) (1991).

307. *See* Denny v. Westfield State College, 880 F.2d 1465, 1472 (1st Cir. 1989); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.) (en banc) ("Counsel must have the assistance of experts to furnish effective and competent representation. In most civil rights litigation, . . . expert testimony is a vital ingredient in the proper presentation and decision of a case. Without the ability to recover experts' fees, plaintiffs . . . will be unable to bring these cases."), *cert. dismissed*, Ledbetter v. Jones, 453 U.S. 950 (1981); Shipes v. Trinity Industries, Inc., 685 F. Supp. 612 (E.D.Tex. 1987); United States v. Yonkers Bd. of Educ., 118 F.R.D. 326, 330 (S.D.N.Y. 1987).

308. *See* Jones v. Diamond, 636 F.2d at 1382.

309. *See* Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991); Shipes v. Trinity Industries, Inc., 685 F. Supp. 612 (E.D. Tex. 1987); *see also* West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1151 (1991) (Stevens, J., dissenting).

310. Missouri v. Jenkins, 491 U.S. 274 (1989).

311. West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138 (1991).

312. 712 F. Supp. 571 (W.D. Mich. 1989).

penses in many civil rights cases."[313] It is unlikely that the courts will be able to make a principled distinction among the wide variety of litigation expenses typically incurred in civil rights litigation.

Accordingly, *West Virginia University Hospitals* may have far-reaching effects beyond the pernicious effect of the actual holding. Consider, for example, litigation expenses incurred as a result of hiring translators. It is difficult to conceive of an expenditure more essential to litigation than one designed to insure that the attorney understands her own client. *Gomez v. Myers*[314] provides a graphic illustration of the problem. In this case, the district court appointed an attorney to represent an indigent plaintiff who had filed a civil rights complaint in Spanish alleging denial of access to the courts and denial of access to medical care based on a language barrier.[315] Mr. Gomez could not afford the costs of translation.[316] The court observed that "[t]he obstacle to Gomez proceeding with prosecution of his claim is determining who, if anyone, should pay for the costs of translating the complaint and other proceedings."[317] After concluding that there is no statutory authority or federal rule authorizing the payment of translation expenses in cases of this kind,[318] the court ruled that the court-appointed attorney would be expected to bear the costs of interpreters and translation.[319] The district court consoled the attorney by pointing out that upon completion of the litigation, if the plaintiff prevailed, the attorney would receive reimbursement for these litigation expenses and attorney's fees pursuant to section 1988.[320]

But is it clear, after *West Virginia University Hospitals*, that translation costs will be reimbursable? Translation costs may well be determined to be more like expert expenses than paralegal expenses. In fact, translation costs seem strikingly similar to nontestimonial expert expenses since an expert hired as a consultant basically serves as a kind of translator to attorneys. Whether the contested issue involves medicine,[321] psychiatry,[322] the intricacies of multiple regression analysis,[323] or the demographics of urban politics,[324] experts serve as necessary translators when they are hired as consultants by attorneys.

Since there is little basis for distinguishing among these necessary litigation expenses, it is possible that the decision in *West Virginia University Hospitals* could ultimately lead to disallowing all litigation expenses save the actual attorney's fee derived from multiplying the attorney's hourly rate by the

313. *Id.* at 589.
314. 627 F. Supp. 183 (E.D. Tex. 1985).
315. *Id.*
316. *Id.*
317. *Id.* at 186.
318. *Id.*
319. *Id.*
320. *Id.*
321. *See supra* note 52.
322. *See supra* note 53.
323. *See supra* note 44.
324. *See supra* notes 35-39.

number of hours reasonably expended on the litigation.[325] This result directly undercuts the underlying purpose of section 1988 to "ensur[e] that civil rights plaintiffs obtain 'effective access to the judicial process.' "[326] As one senator stated during the debate on the Civil Rights Attorney's Fees Award Act, "if the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers."[327]

The hostility of the majority in *West Virginia University Hospitals* to the underlying goals of the Civil Rights Attorney's Fees Awards Act emerges from the fact that the decision could easily have been written in a way that did nothing more than apply *Crawford Fitting* to civil rights cases. The Court could have distinguished between the use of experts as witnesses and the use of experts in preparing the case for litigation. The opinion could have concluded that civil rights cases, like all others, must be governed by the explicit monetary cap on expert witness fees contained in 29 U.S.C. § 1821(b). This would have left in place the longstanding practice in most circuits of awarding all necessary litigation expenses, including the use of experts as consultants, to prevailing parties in civil rights cases as a part of the attorney's fee. However, the Court in *West Virginia University Hospitals* went beyond merely applying *Crawford Fitting* to civil rights cases. It concluded that federal courts lack authority altogether to award nontestimonial expert expenses as a part of the attorney's fee or as a part of the costs. This far reaching aspect of the opinion casts doubt upon whether not only translation fees but a range of other necessary litigation expenses, such as messengers, photocopying, and telephone calls, will remain compensable litigation expenses.

The result in *West Virginia University Hospitals* is wrong, both as a matter of statutory construction and as a matter of policy. While the decision purports to be based on the plain language of the statute, the meaning of the term "attorney's fee" is far from clear, as is demonstrated by the lower courts' practice of authorizing expert expenses as a part of the fee prior to *Crawford Fitting* and by the split of authority that existed even after *Crawford Fitting*. However, in reading the majority opinion in *West Virginia University Hospitals*, one would never guess that expert fees had been routinely awarded as a part of the attorney's fee. There is a seductive internal logic to the opinion that is based on two critical assumptions: first, that it is "beyond question that attorney's fees and expert fees are distinct items of expense"[328] and, second, that Congress knew how to authorize expert fees when it wanted to, so that the omission of that language in section 1988 must be considered pur-

325. This, of course, is precisely the result advocated by Justice Rehnquist in his dissent in Missouri v. Jenkins, 491 U.S. 274, 296-98 (1989) (Rehnquist, J. dissenting).

326. Marek v. Chesny, 473 U.S. 1, 10 (1985) (citation omitted).

327. 122 CONG. REC. 33313 (1976) (remarks of Sen. Tunney), *quoted in* City of Riverside v. Rivera 477 U.S. 561, 575 (1986).

328. West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1143 (1991).

poseful.[329] By relying on these assumptions, the Court effectively finessed two indisputable facts: first, that the Civil Rights Attorney's Fees Awards Act was intended to remove the economic obstacles that prevent the vindication of civil rights and second, that the denial of expert expenses renders that congressional purpose meaningless in a significant number of cases. In light of a legislative history that clearly and explicitly reveals Congress' goal of enhancing access to the courts by removing the economic barriers that prevent the enforcement of civil rights laws, the Court has used "literalness . . . to strangle meaning."[330]

VI.

A RESPONSE: INCREASED USE OF RULE 706 UNTIL CONGRESS OVERTURNS *WEST VIRGINIA UNIVERSITY HOSPITALS*

Congress should immediately act to amend section 1988 by making clear that the statute authorizes the shifting of both attorney's fees and reasonable litigation expenses, including expenses associated with hiring experts.[331] Specifically, the statute should be amended to encompass a reasonable attorney's fee, including reasonable expert testimonial and nontestimonial fees and other reasonable litigation expenses, as part of the costs.[332]

Until such time as this legislation is enacted, courts and litigants should make increased use of Rule 706 of the Federal Rules of Evidence.[333] This rule

329. *Id.* at 1141-43.

330. Lynch v. Overholser, 369 U.S. 705, 710 (1962), *cited in* Marek v. Chesny, 473 U.S. 1, 16 n.5 (1985) (Brennan, J., dissenting).

331. Not surprisingly, there are already reported decisions where the lower courts have applied *West Virginia University Hospitals* to deny expert expenses. In Huntington Branch NAACP v. Town of Huntington, 762 F. Supp. 528 (E.D.N.Y. 1991), the district court recalled its attorney's fees order in a Fair Housing Act case by deleting $19,889.80 which represented expert witness fees; *see also* Wedemeier v. City of Ballwin, Mo., 931 F.2d 24 (8th Cir. 1991) (false arrest and excessive force claims); Rivera v. Dyett, 762 F. Supp. 1109 (S.D.N.Y. 1991) (prisoner's Eighth Amendment claim alleging inadequacy of medical, psychiatric, and hygienic treatment).

332. Comparable changes should made in other fee shifting statutes. As has previously been noted, Congress has already acted to authorize an award of expert fees in cases brought under Title VII and 42 U.S.C. § 1981. *See supra* note 8.

333. Rule 706 provides:

> (a) Appointment. The court may on its own or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
>
> (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is

enables the federal courts, on their own motion or on motion of any party, to appoint expert witnesses who consent to serve and who receive compensation from the parties "in such proportion . . . as the court directs."[334] Rule 706 provides explicit authority for courts to assess these expenses as taxable costs against the losing party. The rule was adopted in 1975 "to restore impartiality, to eliminate venality, to procure a higher caliber of expert and most importantly to assist in settlement or to assist the jury to reach a meaningful decision."[335]

Additional advantages that arise from the use of court-appointed experts include the likelihood that experts would be selected whose views are representative of the scientific community; that bias against financially disadvantaged litigants would be reduced; that experts would be more amenable to testify because they would be functioning more as scientists than as hired guns; that the testimony would be impartial and unbiased; and that it would reduce battles between experts.[336] While one commentator argues that one of the grounds for the adoption of Rule 706 was to provide experts in cases involving indigent litigants,[337] the primary concern was a mistrust of party-controlled experts.[338]

Whatever its purposes, Rule 706 has not been extensively used.[339] The "remarkably few cases in which federal judges have appointed experts"[340] is explained, in part, by concerns that court appointment of experts is inconsistent with the adversarial model, that court-sponsored experts usurp the function of juries, that there is no such thing as a "neutral witness,' " and that court-appointed experts will do a superficial job.[341] A considerable body of social science research concludes that, in general, adversarial procedures are more effective than nonadversarial procedures.[342] In particular, the use of

---

payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection."

FED. R. CIV. P. 706.

334. *Id.*

335. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, § 706[01] (1980) [hereinafter WEINSTEIN'S EVIDENCE].

336. Nancy J. Brekke, Peter J. Enko, Gail Clavet & Eric Seelau, *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial Versus Adversarial Expert Testimony*, 15 LAW & HUM. BEHAVIOR, 451, 453-54 (1991) [hereinafter Brekke, et al.].

337. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, § 706.1 (3d ed. 1991).

338. *Id.*; *see also* WEINSTEIN'S EVIDENCE, *supra* note 335, at § 706[01].

339. WEINSTEIN'S EVIDENCE, *supra* note 335, at § 706[01].

340. Brekke, et al., *supra* note 336, at 453.

341. *Id.*

342. *Id.* at 452.

court-appointed, nonadversarial experts often raises the objection that jurors, viewing these experts as bearing the court's imprimatur, will place undue weight on their testimony.[343]

Despite the prevalence of this concern among commentators, there is surprisingly little empirical research to document this phenomenon.[344] Two studies point to the critical influence of court-appointed experts in the outcome of trials. First, an experimental study indicated that jurors accepted the views of the court-appointed expert. However, because no control study was performed, it is impossible to know whether the result would have been different had adversarial experts been used.[345] Second, in the only jury simulation experiment conducted to examine the relative impact of court-appointed and adversarial experts on jury judgments, the researchers observed that the fact that an expert is appointed by the court "did not boost the expert's credibility." They concluded that "fears that a court-appointed expert would overwhelm and unduly influence jurors are largely unsupported."[346] However, the experiment further found that jurors tend to pay less attention to the content of the testimony of a court-appointed expert and are less able to recall the nonadversarial expert's testimony than the adversarial expert's testimony.[347] The researchers concluded that "[c]ourt-appointed experts may, in fact, deliver more accurate, unbiased testimony than their adversarial counterparts, but this increased accuracy may be lost on jurors who are no longer paying careful attention to the expert's testimony."[348]

Few courts have utilized Rule 706. Among the few that have, only a handful recognize the rule's utility when plaintiffs are indigent and unable to hire necessary experts.[349] Rule 706 has thus not played a significant role in civil rights litigation. In fact, there seems to be some reluctance on the part of district court judges to look to Rule 706 to fill the gap that currently exists for indigent civil rights plaintiffs who require expert witnesses to establish their claim. The Seventh Circuit in *McNeil v. Lowney*[350] affirmed the district court's denial of an indigent inmate's request to appoint physicians as expert witnesses in a case challenging the adequacy of medical care under the Eighth Amendment.[351] Without mentioning Rule 706, the court concluded that there was no authority to waive witness fees.[352] Similarly, in *Boring v.*

343. *Id.* at 454 (quoting Kian v. Mirro Aluminum Co., 88 F.R.D. 351, 356 (E.D. Mich. 1980)) (court-appointed expert creates "a strong, if not overwhelming, impression of 'impartiality' and 'objectivity' [that] could potentially transform a trial by jury into a trial by witness").

344. *Id.* at 454-55.

345. *Id.*

346. *Id.* at 468.

347. *Id.* at 469-71.

348. *Id.* at 470.

349. *See, e.g.*, United States Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984) (en banc); Cagle v. Cox, 87 F.R.D. 467, 471 (E.D. Va. 1988); Maldonado v. Parasole, 66 F.R.D. 388, 390 (E.D.N.Y. 1975).

350. 831 F.2d 1368 (7th Cir. 1987), *cert denied*, 485 U.S. 965 (1988).

351. *Id.* at 1373-4.

352. *Id.* at 1373.

Kozakiewicz,[353] the court dismissed a section 1983 claim brought by indigent pretrial detainees alleging a failure to provide medical treatment. The ground for dismissal was plaintiffs' failure to provide expert testimony to demonstrate the severity of their medical needs.[354] As discussed above,[355] the court acknowledged "plaintiffs' dilemma in being unable to proceed . . . because of the inability to pay for an expert witness." Nevertheless, it declined to appoint an expert, concluding, without discussing Rule 706, that it lacked authority to do so.[356]

In contrast, the Ninth Circuit has shown a better understanding of the role Rule 706 may play. In *McKinney v. Anderson*,[357] a pro se inmate brought a section 1983 action, alleging an Eighth Amendment violation on account of exposure to environmental tobacco smoke (ETS). The district court denied plaintiff's request for a court-appointed expert to testify on the health effects of ETS because the plaintiff, due to his indigency, would be unable to pay his proportional share.[358] The Ninth Circuit reversed, finding that an environmental toxicologist would have offered relevant and important evidence regarding plaintiff's Eighth Amendment claim, and that the district court's denial of a court appointed expert constituted an "unduly restrictive reading" of Rule 706.[359] According to the Ninth Circuit, Rule 706 permits the court to apportion all costs to one side. "Otherwise we are faced with an inflexible rule that would prevent the district court from appointing an expert witness whenever one of the parties in an action is indigent, even when the expert would significantly help the court."[360]

Civil rights litigants and district courts should follow the lead of the Ninth Circuit and utilize Rule 706 to help alleviate the hardships created by *West Virginia University Hospitals*. However, Rule 706 will provide only a partial solution. It offers no assistance in cases where experts are necessary to evaluate and prepare claims for litigation. More importantly, Rule 706 does not take the place of real fee shifting in that it does not permit indigent litigants to select and control their experts. Furthermore, the objections to Rule 706 that explain its underutilization apply with equal force in the civil rights context.[361] However, despite its shortcomings, Rule 706 does suggest a stop-

353. 833 F.2d 468, 474 (3rd Cir. 1987), *cert. denied*, 485 U.S. 991 (1988).

354. *Id.* This claim was governed by the Due Process Clause rather than the Eighth Amendment because the plaintiffs were pretrial detainees. *See* Bell v. Wolfish, 441 U.S. 520 (1979). The standard, however, is essentially the same for measuring the constitutional adequacy of the medical treatment. *See* Boring v. Kozakiewicz, 833 F.2d at 472.

355. *See supra* text accompanying notes 72-76.

356. 833 F.2d at 474.

357. 924 F.2d 1500 (9th Cir. 1991), *cert. granted and judgment vacated*, Helling v. McKinney, 112 S. Ct. 291 (1991).

358. *Id.* at 1511.

359. *Id.*

360. *Id.*

361. *See supra* text accompanying note 341.

gap measure to nudge the courthouse door ajar until such time as Congress acts to legislatively overrule *West Virginia University Hospitals.*

CONCLUSION

Prompt, corrective legislation is essential unless we are prepared to retreat from the commitment, previously evidenced by section 1988, to increase access to the courts in order to encourage the vindication of civil rights violations. The Supreme Court has repeatedly recognized that a reasonable attorney's fee is one capable of attracting competent counsel.[362] However, competent counsel will not take cases which require the hiring of experts if there is no provision authorizing compensation for their services. By leaving civil rights laws on the books but not affording meaningful access to the courts, we have indeed chosen the insidious path by denying "victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their cases to court."[363]

362. *See, e.g.*, Blum v. Stenson, 465 U.S. 886, 892, 896 (1984); Hensley v. Eckerhart, 461 U.S. 424, 430 (1983); *see also* S. REP. No. 1011, *supra* note 129, at 9 ("fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys").

363. Hidle v. Geneva County Bd. of Education, 681 F. Supp. 752, 758-59 (M.D.Ala. 1988), cited in Justice Marshall's dissent in West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1149 (Marshall, J., dissenting).