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The Contingency Factor in Attorney Fee Awards

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When a lawyer bringing a suit is to be paid only if his client prevails, he may avoid cases unlikely to succeed. It might therefore seem desirable that courts awarding attorney fees to victorious plaintiffs add a contingency bonus to the basic fee award in cases that the plaintiff was unlikely to win, to give lawyers for nonpaying clients an incentive to take risky as well as sure cases. The grant of such a bonus has become increasingly common¹ as the award of attorney fees to successful plaintiffs has become more frequent² and as the standards for assessing those fees have received more attention.³

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1. Seven of the federal courts of appeals have approved the award of contingency bonuses. *See International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1273-74 (8th Cir. 1980); *Northcross v. Board of Educ.*, 611 F.2d 624, 638 (6th Cir. 1979); *Lamphere v. Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979); *Wolf v. Frank*, 555 F.2d 1213, 1218 (5th Cir. 1977) (limited to facts); *Pete v. UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1290 (D.C. Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973). Some state courts have also done so. *See Serrano v. Priest*, 20 Cal. 3d 25, 48-49, 569 P.2d 1303, 1316, 141 Cal. Rptr. 315, 328 (1977); *Washington Fed. Sav. & Loan Ass'n v. Village Mall Townhouses, Inc.*, 90 Misc. 2d 227, 231-32, 394 N.Y.S.2d 772, 776 (Sup. Ct. 1977); *cf. Thomas v. Bailey*, 611 P.2d 536, 542-43 (Alaska 1980) (conceding appropriateness of contingency bonus in some cases, but refusing to enhance fee award in instant case).

2. During the Supreme Court's October 1979 term, no less than seven cases dealt with liability to pay attorney fees. *Maher v. Gagne*, 100 S. Ct. 2570 (1980); *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980); *Roadway Express, Inc. v. Piper*, 100 S. Ct. 2455 (1980); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *Hanrahan v. Hampton*, 446 U.S. 754 (1980); *Supreme Court v. Consumers Union, Inc.*, 446 U.S. 719 (1980); *Boeing Co. v. Van Gemert*, 100 S. Ct. 745 (1980). These cases, however, did not deal with standards for calculating attorney fee awards.

3. *See, e.g., Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?* 126 U. PA. L. REV. 281 (1977); *Dawson, Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

Despite this growing acceptance, profound difficulties attend the notion that, the less likely a case was to be won, the larger the fee that the court should award the lawyer who wins it. If the weakest case gets the largest fee, lawyer-client interests will diverge: the triumphant lawyer will be tempted to build up the fee by stressing the weakness of his client's case. In addition, a court will have trouble assessing how likely a claim was to succeed when it has already found the claim meritorious. And it seems perverse to exact larger payments when there was a solid defense and the plaintiff had a weak case, and smaller payments when the plaintiff's case was strong and the defendant's resistance less justified.

The gravest flaw of the current contingency bonus, however, is its grounding in an inadequate theory of how large an incentive courts should provide for risky litigation. The contingency bonus affects the level of private litigation and can be of crucial importance in deciding how many rights are privately enforced. The current theory of contingency bonuses implies that lawyers and clients should be made as willing to bring a feeble suit as a promising one. This theory is as defective as its results would be undesirable, yet present doctrine does not point the way to a more realistic and appropriate level of incentives.

These difficulties can be avoided, this article argues, without abandoning the correct perception that reasonable fees must be larger when the plaintiff's lawyer will be paid only if his client succeeds than when he will be paid regardless of success. The key point is that the contingency bonus should not be tied to a particular claim's probability of success when it was first asserted. Rather, the contingency bonus should be prescribed for categories of cases and should reflect a judgment about how much encouragement each category should receive. This prescription may require legislative decisions; indeed, the nearest approach to it so far is found in the Justice Department's proposals for reforming the class action by statute.⁴ Absent legislation, however, a court could and should implement one of several alternative approaches. It could set a contingency bonus that would bring the success rate in fee award cases into line with that found in the market where plaintiffs pay for their own litigation. It might also simply multiply all fee awards by two, on the theory that the promise of doubled fees would encourage the bring-

4. S. 3475, 95th Cong., 2d Sess. § 2(a) (1978); see pp. 505-06 *infra* (discussing bill). This provision has been omitted from a later version of the proposed legislation. See H.R. 5103, 96th Cong., 1st Sess. (1979).

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ing of suits with at least an even chance of success. Before reaching these proposals, however, we must first have a clearer picture of the contingency factor, its emergence in fee awards, and the resulting problems.

I. The Legitimation of the Contingency Factor

The rise of the contingency factor reflects changing attitudes toward the business of lawyering. The nineteenth century cases found it hard to break loose from a view of lawyers as supplying routine services for routine fees. More recent decisions treat the lawyer as an entrepreneur, who will invest his time in litigating a case only if the expected return—the fee obtainable multiplied by the probability of obtaining it—is as large as what could be expected from competing investments.

The notion that a lawyer who risked not being paid if he lost the case should be paid more if he won made its first judicial appearance in the nineteenth century, only to be flatly rejected.⁵ The issue arose in suits by lawyers against their own clients,⁶ and the contingency involved was the inability of a poor plaintiff to pay a fee if he lost the suit. Courts rejected the claim that a poor plaintiff should pay more than a rich plaintiff, replying that the value of a lawyer's services is not determined by the client's wealth.⁷ However, as the century ended and as contingent fee contracts became more acceptable,⁸ courts⁹ and the American Bar Association¹⁰ upheld reliance on the contingency factor in assessing what a client owed his lawyer. The factor was still rejected when fees were collected from parties who had not consented to representation, wheth-

5. *Robbins v. Harvey*, 5 Conn. 335, 341-42 (1824); *Gilbert v. Fay*, 4 App. D.C. 38, 40 (1894); *O'Neill v. Crane*, 65 A.D. 358, 360, 72 N.Y.S. 812, 813-14 (1901); *Christy & Liggett v. Douglas*, [1833-36] Ohio (Wright) 485, 486 (1834).

6. The "American Rule" prevented the assertion of a fee claim against a defeated opponent. See *The Baltimore*, 75 U.S. (8 Wall.) 377, 388-92 (1869); Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301, 311-13 (1973).

7. See, e.g., *Robbins v. Harvey*, 5 Conn. 335, 342 (1824) (criticizing "the attempt to tax [the plaintiff's] poverty, by a recurrence to the doctrine of chances").

8. See F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 39, 42-44 (1964); E. WEEKS, *A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW* 717 (2d ed. 1892).

9. See, e.g., *Leitensdorfer v. King*, 7 Colo. 436, 442, 4 P. 37, 41 (1884); *Succession of Linton*, 31 La. Ann. 130, 132 (1879); *Smith v. Couch*, 117 Mo. App. 267, 272, 92 S.W. 1143, 1145 (1906).

10. ABA CANONS OF PROFESSIONAL ETHICS Nos. 12(5), 13 (1908) (current versions at ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 2-106(B)(8), ETHICAL CONSIDERATION 2-20 (1980)).

er these were losing defendants subject to statutory attorney fees¹¹ or involuntary beneficiaries of litigation.¹²

The "common fund" theory of fee awards eventually extended reliance on the contingency factor to cases involving the latter class, involuntary beneficiaries. Under the theory, when a plaintiff created a fund benefiting a group of persons, the costs of the creation were to be paid out of the fund to the plaintiff—or to his lawyer. Otherwise, the beneficiaries would have been unjustly enriched by the plaintiff's efforts.¹³ The theory purported to rest on traditional unjust enrichment principles, but as Professor Dawson has shown, it stretched these principles to an extent justifiable only by an unarticulated judgment that special incentives should be given for litigation benefiting certain groups.¹⁴

The concept of a contingency factor entered fee award doctrine in the 1930s as part of this new stress on incentives. Judge Woolsey¹⁵ and Professor Hornstein¹⁶ argued that if fee award litigation was to be brought, lawyers must be paid on a scale reflecting their risk in accepting cases that might not succeed. Thereafter, the contingency factor became a routine ground for increasing fees.¹⁷

In making awards, courts did not consider how much of an incentive was needed for different sorts of cases or, with a few exceptions,¹⁸ whether the risk of failure in the case in question had been large or small. The fee was calculated—to the extent any calculation was disclosed—as a percentage of the total recovery.¹⁹ Other

11. See *Business Men's Assurance Co. v. Campbell*, 18 F.2d 223, 226 (8th Cir. 1927); *Merchants' Fire Ins. Co. v. McAdams*, 88 Ark. 550, 557, 115 S.W. 175, 179 (1908); *Southland Life Ins. Co. v. Norton*, 5 S.W.2d 767, 768 (Tex. Civ. App. 1928).

12. See *Graham v. Dubuque Specialty Mach. Works*, 138 Iowa 456, 463, 114 N.W. 619, 622 (1908); *Louisville Bridge Co. v. Dodd*, 85 S.W. 683, 684 (Ky. 1905).

13. See, e.g., *Trustees v. Greenough*, 105 U.S. 527, 531-37 (1881).

14. Dawson, *supra* note 3, at 875; Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597, 1602-07 (1974); see Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409 (1974). The discussion in this section is much indebted to Professor Dawson's scholarship.

15. *In re Ososky*, 50 F.2d 925, 927 (S.D.N.Y. 1931).

16. Hornstein, *The Counsel Fee in Stockholders' Derivative Suits*, 39 COLUM. L. REV. 784, 812-13 (1939). See also Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956).

17. See, e.g., *Angoff v. Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959); *In re Detroit Int'l Bridge Co.*, 111 F.2d 235, 237 (6th Cir. 1940); *In re Supreme Appliance & Heating Co.*, 92 F. Supp. 487, 488 (W.D. Ky. 1950).

18. See *Stokes v. Sedberry*, 275 F.2d 894, 901 (6th Cir. 1921), *rev'd on other grounds*, 261 U.S. 571 (1923); *Confederated Bands of Ute Indians v. United States*, 120 Ct. Cl. 609, 672, 682 (1951). Some other courts noted that there was little risk in the particular case, and hence no occasion to increase the fee. See *United States v. Equitable Trust Co.*, 283 U.S. 738, 746 (1931); *Murphy v. North Am. Light & Power Co.*, 33 F. Supp. 567, 570 (S.D.N.Y. 1940).

19. E.g., *Pergament v. Kaiser-Frazer Corp.*, 224 F.2d 80, 84 (6th Cir. 1955); *Rosenfeld*

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factors might also influence the fee, though their weight was not disclosed.²⁰ The result was to put the plaintiff's lawyer roughly on a par with other contingent fee litigators. The big difference, of course, was that the members of the benefited group had never agreed to hire the lawyer. Here, the unjust enrichment rationale came into play to justify a percentage fee. Since an attorney fee was awarded because of the benefits received by the group, its size should be proportional to those benefits.²¹ A contingency factor was thus linked to the percentage contingent fee. Since much of the plaintiffs' bar was accustomed to that kind of fee²² this approach also provided sufficient—and sometimes excessive²³—incentives for the bar.

Three developments, however, necessitated changes in the method of awarding attorney fees, changes that resulted in the emergence of contingency awards as an explicit device for encouraging litigation. First, Congress increased the number of fee statutes,²⁴ which typically awarded attorney fees against defeated parties, not against benefiting ones. They were based, not on unjust enrichment principles, but on the desirability of helping to enforce the law by providing an incentive for lawyers.²⁵ Second, the number and size of fee awards²⁶ grew with the increase in fee statutes and in class actions falling

v. Black, 56 F.R.D. 604, 605 (S.D.N.Y. 1972); *Neuberger v. Barrett*, 180 Misc. 222, 224, 39 N.Y.S.2d 575, 577 (Sup. Ct. 1942).

20. See, e.g., *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931) (other factors included time fairly and properly used, quality of skill demanded by situation, skill actually employed in meeting situation, amount involved, and eminence of lawyer).

21. See Hornstein, *The Counsel Fee in Stockholders' Derivative Suits*, *supra* note 16, at 811-12.

22. See F. MACKINNON, *supra* note 8, at 115 (estimating that 14% of New York bar's gross income came from contingent fees). Since only a fraction of legal services is rendered by lawyers representing plaintiffs in civil litigation, and since only such lawyers receive contingent fees, it seems to follow from this gross income statistic that a very large share of civil litigation is handled on a contingent fee basis.

23. See, e.g., *Kiser v. Miller*, 364 F. Supp. 1311, 1315-16 (D.D.C. 1973), *modified sub nom.* *Kiser v. Huges*, 517 F.2d 1237 (D.C. Cir. 1974) (denying percentage contingent fee award because typically large size of class action judgments would make such awards excessive); cf. *Free World Foreign Cars, Inc. v. Alfa Romeo*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972) (dictum) (suggesting that principal function of liberal class action rules is to yield "golden harvest of fees" for lawyers).

24. See 3 H. NEWBERG, *CLASS ACTIONS* § 7040 (1977 & 1980 Supp.) (collecting statutes). The statutes have been generously construed. See, e.g., *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (expanding Civil Rights Act provision that authorizes fee awards in "action or proceeding thereunder" to authorize award in state administrative proceeding); *Bradley v. School Bd.*, 416 U.S. 696 (1974) (construing fee statute to authorize award for work done prior to enactment); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam) (fee award ordinarily appropriate in successful Title II suit, not merely when frivolous defenses are asserted).

25. See Berger, *supra* note 3, at 306-10 (citing authorities).

26. See, e.g., *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 79 (2d Cir. 1971), *rev'd on other grounds sub nom.* *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973) (approving fee award of \$7.5 million in extraordinary case).

under the common-fund doctrine. As fee awards became more important, standards that left trial judges free to award without explanation almost any percentage or sum were no longer tenable. Third, statutory²⁷ and other²⁸ fees were awarded in cases in which plaintiffs recovered no monetary award. No longer could courts simply award lawyers a percentage of funds already within the courts' control. The courts had to order defendants to pay and had to decide how large a payment public policy required.

During the last decade, courts have begun to compute attorney fees based on per hour rates, as modified by the contingency and other factors. The two leading cases espousing this approach are the Third Circuit's decision in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*²⁹ and the Second Circuit's in *City of Detroit v. Grinnell Corp.*³⁰ Their approach has spread from class action settlements to a variety of other actions,³¹ as well as to other courts.³²

Under *Lindy* and *Grinnell*, the contingency factor took the form that still prevails and that will be the target of this article's criti-

27. See, e.g., *Northcross v. Board of Educ.*, 412 U.S. 427 (1973) (per curiam) (statute authorizing fee for school desegregation cases).

28. By an extension of the common-fund theory, see *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939) (court of equity has discretion to award attorney fees when plaintiff's suit benefits third parties), defendant unions and corporations were required to pay for their own reform. See *Hall v. Cole*, 412 U.S. 1, 7-9 (1973) (union); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970) (corporation). *But cf.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262-71 (1975) (suit conferring public benefit does not entitle plaintiff to fee award against defendant). Attorney fees were also awarded against parties litigating in bad faith. See, e.g., *Roadway Express, Inc. v. Piper*, 100 S. Ct. 2455, 2461-62 (1980); *Brewer v. School Bd.*, 456 F.2d 943, 949-51 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972).

29. 487 F.2d 161 (3d Cir. 1973).

30. 495 F.2d 448 (2d Cir. 1974); *accord*, *Kiser v. Miller*, 364 F. Supp. 1311 (D.D.C. 1973), *modified sub nom.* *Kiser v. Huger*, 517 F.2d 1237 (D.C. Cir. 1974).

31. See, e.g., *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1214-20 (3d Cir. 1978) (Clayton Act); *Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 542 F.2d 602, 609-11 (3d Cir. 1976) (Longshoremen's and Harbor Workers' Compensation Act); *Torres v. Sachs*, 69 F.R.D. 343, 346-48 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2d Cir. 1976) (supplemental memorandum) (Voting Rights Act). *But cf.* *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977) (importance of contingency factor may be reduced when statute rather than common-benefit doctrine is source of fee award).

32. See, e.g., *Furtado v. Bishop*, 635 F.2d 915, 919-20 (1st Cir. 1980); *Copeland v. Marshall*, 23 Fair Empl. Prac. Cas. 967, 974 (D.C. Cir. Sept. 2, 1980) (en banc); *Northcross v. Board of Educ.*, 611 F.2d 624, 636-43 (6th Cir. 1979) (by implication); *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Washington Fed. Sav. & Loan Ass'n v. Village Mall Townhouses, Inc.*, 90 Misc. 2d 227, 230-32, 394 N.Y.S.2d 772, 775-76 (Sup. Ct. 1977); A. MILLER, ATTORNEYS' FEES IN CLASS ACTIONS 60-64 (1980).

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cism. Courts were to multiply the basic hourly fee award if the chances that the case in question would succeed were small.³³ The dimmer the plaintiff's original prospect, the larger the bonus his lawyer was to receive if successful. The contingency in each case was to be evaluated in light of all the obstacles the plaintiff faced when the case began, and "might well be translated into mathematical terms."³⁴

The resulting increase in the hourly fee can be far from trivial. Fees have been tripled,³⁵ although sometimes the contingency factor has not been the sole ground for the increase.³⁶ No doubt the attempt of courts to make fee awards more modest and more uniform³⁷ has led lawyers and judges who seek to sustain large awards to look to the most flexible part of the new system, the multiplication of the basic hourly fee by a figure set by the court. Indeed, the contingency bonus has been welcomed even by some courts that do not use the *Lindy-Grinnell* hourly fee approach.³⁸

33. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 448 (2d Cir. 1974).

34. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974).

35. *See Beecher v. Able*, 435 F. Supp. 397, 418 (S.D.N.Y. 1977) (fee tripled because of contingency).

36. *See Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (fee multiplied by 3.5 because of contingency, high quality of counsel's work, and inflation); *Fried v. Utilities Leasing Corp.*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,695 (E.D. Pa. 1976) (quadrupling would be warranted by contingency and high quality of counsel's work); *In re Gypsum Cases*, 386 F. Supp. 959, 967 (N.D. Cal. 1974) (tripling for contingency, ability, and success). The Justice Department's proposed bill to reform class actions, S. 3475, 95th Cong., 2d Sess. § 2(a) (1978), would authorize a risk multiplier of up to three. A recent survey reports an average multiplier of 1.5, but includes several multipliers between 2.5 and 4.03. *Attorney Fee Awards in Antitrust and Securities Class Actions*, CLASS ACT. REP. 82, 84-121 (1980).

37. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469-71 (2d Cir. 1974) (setting forth fee award standards to give "meaningful guidance" to lower courts and to avoid problem of windfall attorney fees); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-68 (3d Cir. 1973) (establishing standards to provide "meaningful guidance").

38. The Fifth Circuit, for instance, has required courts to consider twelve somewhat overlapping factors in making fee awards. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). One of these is "[w]hether the fee is fixed or contingent." *Id.* at 718. The court's original elucidation of this factor in 1974 made clear that it referred to the fee contract between the plaintiff and his lawyer. *See id.* But only three years later, the same language apparently was interpreted to allow consideration of the likelihood of success as well. *See Wolf v. Frank*, 555 F.2d 1213, 1216-18 (5th Cir. 1977) (modifying district court's fee award, but approving in principle use of factor based on "contingent nature of success" in calculating award). More recently, the Circuit has come close to adopting explicitly the *Lindy-Grinnell* approach. *See Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 583 n.15 (5th Cir. 1980); A. MILLER, *supra* note 32, at 121-34.

The contingency bonus has an economic rationale: it compensates the plaintiff's lawyer for his services as an entrepreneur who bears the risks of litigation. Samuel Berger's explanation of the *Lindy-Grinnell* approach clarifies the basis of the theory.³⁹ He argues that fees awarded either under a common-fund theory or under a statute awarding fees against unsuccessful defendants should be based on the market value of the lawyer's services. Thus, fees should be the product of the hourly rate that the lawyer charges paying clients, multiplied by the number of hours reasonably devoted to the case.⁴⁰ This eliminates—in Berger's theory, if not in judicial practice—some of the grounds on which hourly rates have been increased.⁴¹ But the logic of his theory preserves the contingency factor. A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.⁴²

Although economic reasoning justifies a contingency bonus, it does not by itself explain the *Lindy-Grinnell* approach to calculating the size of the bonus. A court concerned only with paying the market value of a lawyer's service might plausibly award a contingent fee tied to a set percentage of the total award, since that is how the market compensates lawyers who take the risk of not being paid if their clients lose.⁴³ But a percentage contingent fee approach would

39. See Berger, *supra* note 3.

40. When the lawyer has no hourly rate because he works for a legal services organization or usually charges contingent fees, a surrogate rate should be estimated. See *id.* at 324.

41. *Lindy* and *Grinnell* allow courts to boost the fee because of the lawyer's skill, see *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168-69 (3d Cir. 1973), which should already be reflected in his hourly rate. In addition, some courts consider the supposed value of the results obtained. See *National Ass'n of Regional Medical Programs, Inc. v. Weinberger*, 396 F. Supp. 842, 851 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976); A. MILLER, *supra* note 32, at 60-64, 78-100.

It should be noted that the lawyer paid on an hourly basis can often get his fee almost immediately, while the contingent-fee lawyer must wait until the end of the case. In recent years, inflation has aggravated the burden of delay: a recent survey estimates that the dollar generally loses more than a fifth of its value between the performance of the services and the fee award. *Attorney Fee Awards in Antitrust and Securities Class Actions*, *supra* note 36, at 83. *Lindy* treated this delay as part of the contingency problem, *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976), but the logical way of dealing with it would be to award interest on the basic payment, *cf. Gates v. Collier*, 616 F.2d 1268, 1272-79 (5th Cir. 1980) (interest awarded on attorney fees from date of original judgment).

42. Berger, *supra* note 3, at 324-25.

43. See *Furtado v. Bishop*, 84 F.R.D. 671, 675-77 (D. Mass. 1979), *rev'd*, 635 F.2d 915

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produce too large a fee in a class action for monetary relief and too small a fee in a "public interest" suit for nonmonetary relief. Despite the talk of fair market value, then, the goal is not to replicate the market but to reform it, creating adequate but not excessive incentives. Only part of the private market is to be imitated, the part occupied by lawyers such as those in large firms who carefully adjust their fees in light of the demand for their time and the risk of nonpayment. The less bureaucratic and more swash-buckling lawyers of the contingent fee era are no longer the models for fee awards. Neither are those dedicated lawyers whose willingness to serve does not depend on the size of the fee, although these lawyers are among the most frequent recipients of attorney fee awards.

This view of the lawyer as a calculating entrepreneur regulated by calculating judges underlies and explains the *Lindy-Grinnell* approach to fixing the size of the contingency bonus.⁴⁴ The goal is to make fee award cases as attractive financially to lawyers as their "usual" cases, in which payment of an hourly fee is certain. Judges should therefore calculate the probability of success that each successful fee award case had when the plaintiff's lawyer accepted it. If only one half of similar claims can be expected to triumph, it would be necessary to double a fee based on the lawyer's standard rate. Otherwise, he would make less from a group of similarly contingent cases than from those in which payment of his standard rate was assured.

This probabilistic rationale has two encouraging consequences for those who seek fees. One is that a contingency bonus should always be awarded except in those rare cases in which the plaintiff's lawyer can be sure of success when he accepts the case.⁴⁵ The other is that, if the plaintiff's chance of success was less than one-half, the fee should be multiplied by a factor greater than two.⁴⁶ In theory, there should be no upper limit to this process: when the chance of success was one in fifty, the fee should be multiplied by fifty, and so

(1st Cir. 1980) (statutory fee award should be no more than percentage contingent fee when suit is for monetary relief only and establishes no principle); F. MACKINNON, *supra* note 8, at 28 (contingent fee usually calculated as percentage of plaintiff's recovery).

44. See Berger, *supra* note 3, at 324-26; Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47, 71-72 (1975); Springer, *Fee Awards in Antitrust Litigation*, 44 ANTITRUST L.J. 97, 103 (1975); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 710-11 (1974).

45. Cf. Hughes v. Repko, 578 F.2d 483, 487-88 (3d Cir. 1978) (high probability of success not ground for reducing basic fee).

46. See Berger, *supra* note 3, at 326.

forth. But commentators⁴⁷ and courts⁴⁸ have not gone this far.

Because the current treatment of the contingency factor is only a few years old, courts should not regard it as immutable. Current practice grew out of the *Lindy-Grinnell* approach to fee calculation, which has not been universally accepted⁴⁹ and which is only beginning to receive informed evaluation as its results become apparent.⁵⁰ That approach is not free of paradox. It originated in a reaction against the greed of lawyers in cases with large monetary recoveries,⁵¹ but in the long run the shift away from fees based on a percentage of the recovery may benefit lawyers by making substantial fee awards possible in nonmonetary cases. As fee awards provide more of the bar's income, courts should reevaluate the standards for their calculation.

II. The Undesirability of Appraising the Contingency of Each Case: Problems of Current Practice

Current treatment of the contingency factor leaves much to be desired. Revising the fee award in the light of the plaintiff's original chances of success tempts lawyers to behave unethically, requires courts to make a difficult, long, and costly inquiry into those chances, and treats defendants unfairly. Moreover, it may impair the very goal that has led to emphasis on the contingency factor: the creation of a sound system of incentives for certain kinds of litigation.

A. *The Lawyers' Conflict of Interest*

Evaluation of the contingency factor pits lawyers against their clients. To increase his fee, the plaintiff's lawyer must show that his client had only a slight prospect of success when the case was brought.

47. See *id.* (multipliers greater than three rest on false precision and may exaggerate awards in least likely cases); Comment, *supra* note 44, at 711 (multiplier of 100 in case with one percent chance of success "patently unreasonable"; such suit might be frivolous or vexatious).

48. See *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1217 (3d Cir. 1978) (contingency multiplier as high as two "most unusual"). The highest any court appears to have gone in setting a contingency multiplier is four. See *Fried v. Utilities Leasing Corp.*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,695 (E.D. Pa. 1976) (quadrupling warranted by contingency and high quality of counsel's work); note 36 *supra* (citing other instances of high multipliers).

49. See, e.g., *Miller v. Mackey Int'l, Inc.*, 515 F.2d 241, 242-43 (5th Cir. 1975) (per curiam) (applying rule of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), discussed above, see note 38 *supra*).

50. See Mowrey, *Attorney Fees in Securities Class Actions and Derivative Suits*, 3 J. CORP. L. 267 (1978); *Attorney Fee Awards in Antitrust and Securities Class Actions*, *supra* note 36.

51. See notes 23 & 37 *supra* (citing cases).

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He will emphasize the barriers the client faced: ambiguous precedents, conflicting evidence, plausible defenses, and the like. As a result, the merits of the client's claim will be thrown into question before the judge and opposing counsel.

Meanwhile, the defendant's lawyer will be exposed to a similar problem, but one that is ultimately practical rather than ethical. The fee award can be kept down by showing that the plaintiff was virtually sure to win because of the merit of his claim. Defense counsel may therefore be tempted to weaken his client's case. But this involves no conflict of interest between lawyer and client because the fee will be paid by the client, not by the lawyer.⁵² The only question counsel faces is whether his client's interests will be helped most by conceding the strength of the plaintiff's case in order to keep down the fee award, or by allowing the award to be boosted by the contingency bonus that may result from insisting that the plaintiff's victory was freakish. The defendant's lawyer and his client therefore have not been drawn into conflict; they have, however, been placed in a highly embarrassing position in which a possibly unmerited fee award can be avoided only by stressing the weakness of the defendant's own case.

The conflict of interest and embarrassment resulting from assessment of the contingency factor are most harmful when the case still has a future at the time the fee is awarded. The award may come before the end of an action when the plaintiff has triumphed at a preliminary stage.⁵³ In other cases, the fee award and the merits of the case may go up on appeal together.⁵⁴ In either event, the points

52. Fees can, of course, be awarded directly against an obstructive lawyer. *See Roadway Express, Inc. v. Piper*, 100 S. Ct. 2455 (1980) (abuse of discovery); 28 U.S.C. § 1927 (1976), as amended by Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154 (lawyer who multiplies federal court proceedings unreasonably and vexatiously is liable for costs, expenses, and attorney fees of such conduct). Such awards are rare, however.

53. *See, e.g., Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970); *cf. Note, Interim Awards of Attorneys' Fees Under the Civil Rights Attorneys' Fees Awards Act of 1976*, 21 ARIZ. L. REV. 893, 905-16 (1979) (arguing that Act implicitly authorizes interim fee awards). *But see Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam) (plaintiffs' interlocutory victories insufficient to warrant fee award under "prevailing party" standard of 42 U.S.C. § 1988). The practice of awarding interim fees arises because the kinds of cases in which fees are awarded often take many years to be completed. *See, e.g., Bradley v. School Bd.*, 416 U.S. 696, 722-23 (1974) (delay in awarding fees until end of lengthy school desegregation litigation would work substantial hardship on plaintiffs and their attorneys).

54. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978); *cf. Boeing Co. v. Van Gemert*, 100 S. Ct. 745, 752 (1980) (Rehnquist, J., dissenting) (fee award sufficiently final to qualify for appellate review when district court has entered judgment on fees, regardless of status of case on merits).

advanced by the plaintiff's counsel to justify a high fee may later reappear in support of the defendant's position on the merits.

Yet even when litigation on the merits is completed by the time the fee is awarded, a lawyer who argues that the contingency factor should increase his fee still runs the risk of violating his duty to his client in at least three ways. First, the end of litigation does not necessarily mean the end of relations between the parties. This is particularly true in litigation resulting in injunctive relief, such as the hiring or reinstatement of a worker victimized by discrimination,⁵⁵ when exposure of the flaws in the worker's lawsuit may harm his career.⁵⁶ Second, even if no direct harm results, the lawyer's presentation could disclose confidential material relating to the case. Such conduct would violate the client's expectation of confidentiality from his lawyer. Even though the Code of Professional Responsibility contains a convenient clause allowing lawyers to disclose confidences in order to collect their fees, that clause seems inappropriate when the client is not objecting to the fee.⁵⁷ Third, for a lawyer to demolish in court the case he has just built on behalf of his client is not a seemly process, and is likely to encourage all concerned to think of law and lawyers as wholly malleable and unprincipled.⁵⁸

Do these bad practices actually occur? The conscientious lawyer, of course, will refrain from criticizing his client's case at a fee hearing. He will seek a contingency bonus without challenging the merits of his client's case, by emphasizing instead the vigor of the opposing party.⁵⁹ Yet more questionable arguments undermining a plaintiff's

55. See 42 U.S.C. § 2000e-5(g) (1976) (relief for violation of equal employment opportunity law may include reinstatement of complaining employee).

56. Cf. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 7-101 (A)(3) (1980) (forbidding intentional damage or prejudice to client by attorney).

57. See *id.*, DISCIPLINARY RULE 4-101(C)(4). One might question whether this provision should apply to a lawyer's use of the client's confidences to collect a fee from a third party who could use the confidences against the client. See Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 801-18 (1977) (discussing and criticizing breadth of disclosure that Disciplinary Rule 4-101(C)(4) permits lawyer); ABA COMM'N ON EVALUATION OF PROFESSIONAL CONDUCT, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(C)(3) (Discussion Draft Jan. 30, 1980) (attorney may make disclosures to secure fee only in establishing claim or defense in controversy between lawyer and client).

58. Cf. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 71 (1932) (attorney should not challenge validity of document he drafted). This ethical problem besets defendants' lawyers opposing high fees as well as plaintiffs' lawyers seeking them.

59. Cf. *Poster Exch., Inc. v. National Screen Serv. Corp.*, 431 F.2d 334, 341 (5th Cir. 1970) (presence of "formidable, resourceful opposition" to be considered in making fee award); 3 H. NEWBERG, *supra* note 24, § 6926k (courts properly consider experience, talent, and financial backing of defense counsel in assessing contingent risk of success).

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own case have sometimes appeared.⁶⁰ Such arguments can be expected to multiply as attorney fee statutes accomplish their goal of encouraging lawyers motivated more by money than by altruism to accept cases. In any event, lawyers should not be placed in a position in which their interests conflict directly with those of their clients, even if most lawyers will resist the temptation to put their own interests first.

It is small comfort that a few alert clients will agree in advance with their lawyers that certain arguments will not be presented when fees are sought. That remedy places on the clients the duty of finding, preventing, and policing disloyalty by their lawyers, often in cases in which the clients' sophistication and monetary stake are small. Clients cannot remove the conflict of interest by agreeing to pay their lawyers regardless of the amount awarded under the attorney fee statutes:⁶¹ if clients could give such guarantees, there would be no need for contingency bonuses.

The growth of conflicts of interest between lawyer and client is an important argument against the contingency bonus, but not necessarily a decisive one. Most current methods of paying lawyers involve some possibility of conflict with clients.⁶² Still, one should distinguish between a practice that involves some inevitable divergence between the interests of lawyers and clients and one that holds out a direct incentive to lawyers to raise their fees by attacking the strength of their clients' claims.

B. *Retroactive Calculation of the Probability of Success*

Evaluation of the contingency factor under the current system requires the court to estimate, after a plaintiff has prevailed, how likely success seemed when the lawyer first considered bringing the suit.⁶³ This task is burdensome, complicated, and often of doubtful

60. See 3 H. NEWBERG, *supra* note 24, ch. 13 app., at 1526-32 (reproducing petitioners' post-trial brief in *Lindy*, in which lawyers explained obstacles to holding that their clients had standing); *cf. id.* §§ 6926d-6926j (discussing contingency fee awards based in part on weaknesses of plaintiffs' cases).

61. Such an agreement would not affect the losing defendant's liability for fees. See, e.g., *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980); Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 411, 418-19 (1973).

62. See Clermont & Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 534-46 (1978) (examining economic conflicts of interest between lawyer and client under hourly and contingent fee systems). The possibility is especially significant in a class action because some class members have not agreed to retain the lawyer and because the interests of all members may not be identical. See *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1577-78, 1592-97 (1976).

63. See pp. 479, 481-82 *supra*.

propriety. It ultimately calls on the court to consider just how likely it was that justice would prevail in a particular case.

It is difficult enough to adjudicate a controversy between adverse parties. A large burden is added if courts must also consider each of the ways in which issues might have been decided, guess how likely each decision was, and then combine these results into an overall assessment of the plaintiff's chances. The inquiry will not be short: a large contingency multiplier brings a large fee to the lawyer litigating the matter, so he has a strong interest in presenting every possible argument.⁶⁴ The defendant, having just lost on the merits, will not want to enrich the plaintiff's lawyer, so resistance will probably be vigorous. Judges, finally, are unlikely to treat the remuneration of lawyers lightly.

Nor is it easy to apply concepts of probability to a unique litigation rather than to a series of similar events. We can explain the statement "this coin has a 0.5 probability of coming up heads" as meaning that, as the coin is thrown more often, the percentage of tosses that result in heads will come closer to fifty percent. When we deal with the probability of winning a single litigation, however, we must speculate about retrials of the same case before different judges and jurors, or imagine well-informed gamblers betting on the outcome of the case.⁶⁵ Sometimes courts cannot avoid these difficulties and must estimate a plaintiff's chances of success, particularly when he claims immediate interlocutory relief.⁶⁶ Yet that is no reason to import such complexities when they are not necessary and when they expand what should be a relatively minor part of the litigation.

That attorney fees are awarded after the merits have been decided⁶⁷ adds the confusions of hindsight to the assessment of how likely success was when the case began. In one respect, it is easier to appraise the plaintiff's chances of success after the case has been tried, for the evidence and arguments on both sides are apparent. Yet once the result is known, it is hard for judges and lawyers to regain a perspective of ignorance and to treat the result as only one of several that were initially possible. The difficulty of assessing a

64. See, e.g., *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 410 (D. Colo. 1977) (lawyers devoted 505 hours to fee claim; 125 hours would have been reasonable).

65. See, e.g., L. COHEN, *THE PROBABLE AND THE PROVABLE* § 30 (1977); Cullison, *Probability Analysis of Judicial Fact-Finding: A Preliminary Outline of the Subjective Approach*, 1 U. TOLEDO L. REV. 538 (1969).

66. See Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

67. Even when interim fees are awarded, as described above, see p. 483 & note 53 *supra*, they are awarded for the successful litigation of issues already decided by the court.

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case's original prospects after it has been decided was demonstrated amusingly in *Beazer v. New York City Transit Authority*,⁶⁸ in which the Second Circuit upheld an equal protection claim, but denied the plaintiff a contingency bonus for establishing it. The legal issues, it observed, "were relatively simple and few."⁶⁹ The Supreme Court, however, reversed on the merits, requiring three opinions covering over forty pages of the official reports to explain its views.⁷⁰ In addition, the subjectivity of any assessment of a plaintiff's original prospects will tempt judges to use contingency as a mask to conceal other considerations. Courts will grant purported contingency bonuses to reward lawyers for the quality of their work and the difficulty of the case, even though these factors should already be reflected in the hourly rate assigned to the lawyers and the number of hours for which they are compensated.

For a court that has already upheld the plaintiff's case to assess how likely it was to do so raises problems of propriety as well as practicality. In effect, the court is being asked to decide how likely it was to reach what is now recognized as the right result. One may question whether a judge should be called upon to look for the dust swept under the same rug on which he is standing.

The problem is most striking when it is claimed that the plaintiff's chances of success were less than even, so that his lawyer is entitled to have his fees multiplied by more than two. In such a case, the obvious question is why the plaintiff won at all—and the most obvious answer is that he won because the case was wrongly decided. No one, presumably, would argue that the court should increase the lawyer's fee because he succeeded in winning a case that he should have lost. Perhaps this explains why contingency factors greater than two, though not unheard of,⁷¹ are rare.⁷²

68. 558 F.2d 97 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1979).

69. *Id.* at 100.

70. *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979). For a similar example of the difficulty of estimating the likelihood of success, compare *Hughes v. Rowe*, 101 S. Ct. 173, 177-79 (1980) (*per curiam*) with *id.* at 180-82 (Rehnquist, J., dissenting).

71. See notes 35 & 36 *supra* (citing examples).

72. The difficulty of concluding that a given success was initially improbable can sometimes be avoided. When crucial evidence supporting the plaintiff's case could not be known to his lawyer at the time he accepted the case, one can decide that the chances of success seemed small without in any way impeaching the reliability of judicial proceedings. Alternatively, the impeachment may be less painful, at least for judges, when the case has been tried by a jury and it is the jury's questionable reliability that is in issue. Lastly, when the case has been settled without trial, evaluation of the plaintiff's original chances of success can obviously proceed without any hindrance from a court's resolution of the merits. This last possibility, of course, may only push the court from the frying pan into the fire: since the case has not been decided, it is hard to measure

Even when the plaintiff claims that his chances of success were greater than one-half, the court will still have to decide by how much they fell short of certainty, and will therefore face a similarly embarrassing inquiry into its own fallibility.⁷³ If the plaintiff argues that conflicting precedents made success unsure, the court must consider how likely it was that the precedents could have led it to what is now recognized as the wrong decision. If the claim is that the defendant's sorcerous lawyers dimmed the plaintiff's prospects, the court must consider how likely it was that the lawyers would succeed in their conjuring, and whether the plaintiff's lawyer should have been aware of his own ability and that of the judge to dispel the illusion. Such efforts to analyze judicial decisionmaking are likely to be as unsuccessful as they are unedifying. Some of the most unpredictable judges, for example, will by the end of the case have the most rigid confidence in the inevitability of their own judgments.

Except in rare situations, trying to look back and compute the contingency of success when the case began is thus likely to be both demoralizing and cumbersome. This is not to say that we must believe that the meritorious side always prevails at trial or that the result of litigation is usually clear in advance. But the best evidence of the likely result is usually the result that is actually reached, the result we expect the parties to live with. The lawyers should also have to live with it, absent some truly compelling reason for plunging back into the uncertainties that the trial was designed to resolve.

C. *Unfairness to Defendants*

When attorney fees are paid by the defendant, increasing them because the plaintiff's success was uncertain can produce bizarre and unfair results. The smaller the plaintiff's prospects of success, the greater the contingency bonus paid to his persevering lawyer. Yet this means that the defendant must pay more when the balance of precedent and evidence was relatively favorable to him. On the other hand, when the plaintiff was certain of success because the defen-

the plaintiff's chances of success without replicating the very trial that the settlement was meant to avoid. Just this kind of evaluation is required, however, when a court is asked to approve a class action settlement. See 3 H. NEWBERG, *supra* note 24, § 5610a.

73. For arguments that courts should recognize their fallibility and reach explicitly compromising decisions in hard cases, see Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 Nw. U.L. REV. 750 (1964), and Coons, *Compromise as Precise Justice*, in COMPROMISE IN ETHICS, LAW, AND POLITICS: NOMOS XXI at 190 (J. Pennock & J. Chapman eds. 1979).

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dant's position was hopeless or frivolous, the defendant pays no contingency bonus.⁷⁴ Furthermore, the contingency bonus is extracted from that defendant in order to reward the plaintiff's bar for bringing similar but unsuccessful suits against other defendants. If such litigation is to be subsidized, one may well ask why the subsidy should come from the defendant in another case.

These objections apply only when the defendant pays the attorney fees, but that is now the usual case. The increasingly important attorney fee statutes generally provide for payment of fees by the losing party.⁷⁵ Under the common-fund theory, those who benefit from the litigation should pay the fee,⁷⁶ but in practice the burden may still fall on the defendant. If the case is settled, for example, the settlement may provide for the establishment of a fund to compensate those injured, and for later assessment of reasonable attorney fees against the defendant by the court.⁷⁷ Even when the fee comes out of the compensation fund, much of it may be assessed against the portion of the fund that has not been claimed by those entitled to do so; in this instance, too, the defendant is ultimately burdened by the fee.⁷⁸ Lastly, in cases in which there is no fund out of which fees may be paid because the benefits are not monetary, the defendant may be required to pay the fee, on the theory that it is in the best position to pass on the burden to the beneficiaries.⁷⁹

Three arguments palliate, but do not remove, the injustice of im-

74. For similar criticism, see *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977) (referring to contingency factor in statutory fee award cases); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 375 (1980) (civil rights cases).

75. See, e.g., 42 U.S.C. § 1857h-2(d) (1976) (suits under Clean Air Amendments of 1970); 42 U.S.C. § 1988 (1976) (suits under various sections of Civil Rights Act); 42 U.S.C. § 2000e-5(k) (1976) (suits under Title VII of 1964 Civil Rights Act). *But cf.* 22 U.S.C. § 277d-21 (1976) (in claims for compensation for injury resulting from land acquisition by government, fee award comes out of recovery). Although a successful plaintiff can recover fees under these statutes except in special circumstances, a successful defendant can recover fees only when the plaintiff's claim was frivolous. See, e.g., *Hughes v. Rowe*, 101 S. Ct. 173, 178-79 (1980) (per curiam) (42 U.S.C. § 1988); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978) (Title VII).

76. See pp. 476-77 *supra* (discussing doctrine). It is fair to require these beneficiaries to pay more when their case was risky, and hence less able to attract counsel and perhaps less meritorious.

77. See 3 H. NEWBERG, *supra* note 24, § 5620b. Of course, the plaintiffs may have had to make concessions to the defendant in exchange for this commitment.

78. See *Boeing Co. v. Van Gemert*, 100 S. Ct. 745, 749-50 (1980). The Court did not decide whether the defendant in this case could recover the money ultimately remaining in the fund. *Id.* at 751 n.8.

79. See, e.g., *Hall v. Cole*, 412 U.S. 1, 8-9 (1973) (requiring defendant union to pay plaintiff's attorney fees properly forces union members to pay for plaintiff's vindication of union democracy).

posing the heaviest fees on the defendants with the strongest cases. First, no fee at all is imposed unless the defendant loses the case, and is therefore an adjudicated violator of the law.⁸⁰ It does seem fair to make those who violate the law, whatever their good faith, pay the costs of enforcing it, at least when those costs would otherwise fall on the victims of illegality.⁸¹ However, this argument supports only the imposition of attorney costs on unsuccessful defendants, not the multiplication of those costs when the plaintiff's case was not promising at the outset. It is fair for violators to pay the costs of enforcing a statute, but it is ludicrous for violators with a relatively good case to have their payments multiplied while those of flagrant violators are not.

Second, we may try to justify the contingency bonus on deterrence grounds. This argument suffers from similar defects. No doubt attorney fee awards discourage potential defendants from violating the law and resisting meritorious litigation, but the contingency bonus bears virtually no relation to this goal. If we wish to deter obstructive defenses, the largest fee awards should be charged to defendants with the weakest cases. The contingency bonus system has just the opposite effect. If we wish, alternatively, to deter the original violation of the law, the deterrent should be the largest when the violation is most indisputable, most harmful, and most profitable for the violator.⁸² None of these factors influences the contingency bonus.

Third, the contingency bonus is arguably a way of approximating the costs that plaintiffs have to pay to obtain counsel in the marketplace. A plaintiff whose chances of victory are smaller, and who cannot afford to pay his lawyer unless he wins, will have to promise his lawyer more than a plaintiff sure to succeed. Granting a larger fee award to the first plaintiff and his lawyer simply imposes on the

80. This argument is not strictly true when attorney fees are imposed as part of a settlement; nevertheless, in such a case the defendant has in effect consented to be treated as a violator.

81. We might argue that the cost of enforcing a major statutory policy should also be shared by people who are not violators, for instance those throughout society who expect to benefit from the statute. This argument leads to the use of taxes to fund enforcements, as in fact occurs when the enforcer is a government agency. So far, the government finances private legal activities in only a few instances. See, e.g., 15 U.S.C. § 57a(h) (1976), as amended by Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 10(a), (b), 94 Stat. 374 (FTC pays costs of certain parties who contribute to rulemaking proceedings); cf. 42 U.S.C. §§ 2996-2996l (1976) (establishment of Legal Services Corporation).

82. The deterrent should also be increased as the defendant's chances of detection decrease. This general rule is examined closely in Polinsky & Shavell, *The Optimal Trade-off Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979). Other factors might also be considered, such as the violator's ability to pay.

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defendant the real cost of vindicating the plaintiff's rights.⁸³ This argument, however, oversimplifies the way prices are set in the market for legal services. When a fee is not awarded by the court, the fee for plaintiffs who cannot pay unless they win is a percentage of the plaintiff's recovery,⁸⁴ not an hourly fee multiplied by a contingency factor. Furthermore, there is no evidence that lawyers scale the percentage they demand for contingent fees on the basis of the probability of success, except perhaps in a very rough way.⁸⁵ As an historical matter, the current use of the contingency factor arose not from new information about market fees but because previous approaches were thought to be too likely to yield excessive fees when there were large monetary recoveries, and inadequate payments when there were not.⁸⁶ The contingency factor's role was to provide a carefully calculated incentive, not to identify market values.

D. *Misincentives*

If the contingency bonus system is pressed to the limits of its logic,⁸⁷ every conceivable claim will be prosecuted. When a claim is sure to succeed, it will be pressed even though the recovery will be small, since all the costs of litigation are sure to be shifted to the other party.⁸⁸ As the chances of success become smaller, the fee will be multiplied by a growing contingency factor, so that uncertain claims will also be pressed.

An example may clarify the extent of the incentive that the contingency bonus provides—or would provide if its theory were fully

83. See Springer, *supra* note 44, at 103-04 (discussing this rationale for contingency multipliers in antitrust cases).

84. F. MACKINNON, *supra* note 8, at 28; Franklin, Chanin, & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 22 n.103 (1961); Reder, *Contingent Fees in Litigation with Special Reference to Medical Malpractice*, in *THE ECONOMICS OF MEDICAL MALPRACTICE* 211, 214-19 (S. Rottenberg ed. 1978).

85. For typical surveys of fee practices, see F. MACKINNON, *supra* note 8, at 17-29, 2 S. SPEISER, *ATTORNEYS' FEES* §§ 20:10-22 (1973), and Gerhart, *The Art of Billing Clients*, in 1 *LAW OFFICE ECONOMICS AND MANAGEMENT MANUAL* § 25, art. B (P. Hoffman ed. 1980). Cf. Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. LEGAL STUD. 113, 115-17 (1976) (describing fee practices in class actions).

86. See pp. 477-81 *supra*.

87. See pp. 481-82 *supra*.

88. Whether all litigation costs are in fact shifted depends on how costs that have not traditionally been taxed to the losing party are treated when attorney fees are awarded. Courts now often allow recovery of the costs of paralegals and experts. See, e.g., *Northcross v. Board of Educ.*, 611 F.2d 624, 639-40 (6th Cir. 1979) (paralegals and experts); *Aamco Automatic Transmissions, Inc. v. Tayloe*, 82 F.R.D. 405, 409-11 (E.D. Pa. 1979) (expert consultant); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F. Supp. 77, 82-83 (N.D. Cal. 1978) (paralegals). Of course, costs traditionally taxed to the loser continue to be so treated. See note 100 *infra*.

realized. Suppose a lawyer considers one hundred potential clients, each with a claim having only a five percent probability of success. Each plaintiff claims damages of \$1,000, and each claim would cost the plaintiff \$2,000 in attorney time to try. Under the contingency bonus system, the lawyer should accept all these claims. He can expect to win five cases, for each of which he will receive \$2,000, multiplied by a contingency factor of twenty because each claim had a chance of one in twenty of succeeding. His total winnings will be \$200,000, precisely what he would have been paid had each of the hundred clients been willing to pay the costs of litigation.

A lawyer would consequently have no apparent incentive to prefer strong cases to weak ones, so long as the latter had some slight chance of success. Even if more clients sought him out than he could represent, he would have no reason to waste time inquiring into the merits of their cases before deciding which ones to accept. The only remunerative inquiry would be to find cases that a judge would view as highly contingent but that the lawyer considered solid winners.

Such a set of incentives would lead to either of two undesirable situations. In the first, every conceivable case would be brought, regardless of its prospects of success, its litigation costs, or the size of the benefits it would bring.⁸⁹ Perhaps the only approximation to this result that now exists is the appeal brought by an indigent criminal defendant, who does not pay for his lawyer and therefore has nothing to lose and everything to gain. If the resulting frequency of appeals is desirable,⁹⁰ it is because criminal sanctions should not be imposed without exceptional procedural safeguards, not because it is desirable that all conceivable claims be litigated.

In the second, total litigation would be prevented only by the limited capacity of courts and lawyers. It would then be necessary to decide which plaintiffs would have their cases heard. Various selection techniques could be used: waiting one's turn at the lawyer's office and courthouse; extra payments by clients to lawyers or to other clients; or preliminary hearings to decide which cases should be tried.⁹¹ None of these methods seems likely to bring about the

89. See Dam, *supra* note 44, at 71 (discussing this scenario); Comment, *supra* note 44, at 711 (same).

90. But see P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 93-95 (1976) (defendants should be paid not to appeal).

91. See I THE ROYAL COMM'N ON LEGAL SERVICES, FINAL REPORT 140-41 (1979) (discussing standards English civil legal aid committees should use in deciding to accept cases); Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 343-62 (1978) (examining legal services organizations' decisions to accept cases in light of ethical duty to make counsel available).

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nondiscriminatory access to effective justice that attorney fee statutes and doctrine are meant to promote.

These horribles are of course imaginary: they postulate that the contingency bonus has been carried far beyond what courts and commentators have yet accepted.⁹² But how close the present system will bring us to the extremes described above or to some other undesirable condition of litigation depends on the answers to a number of questions.

First, how large will contingency multipliers become? After all, lawyers may draw back from the pessimistic portrayal of their clients' chances needed to support a high multiplier, and judges will rarely decide that a plaintiff whose claims they have ruled meritorious was unlikely to succeed.⁹³ On the other hand, once contingency multipliers have been set at a given level in a number of cases, judges may find it hard to deny lawyers in other cases compensation at the same level. Some tendency toward bonus inflation may thus develop.

Second, what alternatives are available to lawyers who do not take attorney fee award cases? If those cases must compete for lawyer attention with contingent fee cases that promise a large percentage of a large recovery, even the contingency bonus may not make court-awarded fee cases very attractive. On the other hand, those cases will be very attractive to lawyers who would otherwise have unemployed time or to public interest firms that would otherwise serve without any fee at all.⁹⁴ The greater the number of such lawyers and firms, the more likely fee award cases are to be brought.⁹⁵

Third, how averse are plaintiffs and law firms to risk? Many people prefer a sure income of \$20,000 to a one-tenth chance of winning

92. See notes 47 & 48 *supra* (citing authorities).

93. See pp. 484, 486-87 *supra*.

94. Such firms can recover fees. See, e.g., *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980); Note, *supra* note 61, at 412-21.

95. It is by no means true, of course, that all good lawyers are motivated solely by the size and probability of the fee. The behavior of lawyers is influenced by attitudes ranging from public spirit, see J. HANDLER, E. HOLLINGSWORTH, & H. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 66 (1978), to preference for wealthy clients, Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUNDATION RESEARCH J. 155, 177-78, to desire for publicity and advancement, see Komcsar & Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in *PUBLIC INTEREST LAW* 81, 86-87 (B. Weisbrod ed. 1978); S. WEAVER, *DECISION TO PROSECUTE* 39-41 (1977). Nevertheless, it seems likely that in the long run a sufficiently widespread practice of awarding attorney fees could encourage people to become or remain lawyers, even though their gains might be less than those of lawyers specializing in paying clients. Of course, this might not be desirable if it led to a fee-award bar that is less able, as well as less prosperous, than the regular litigating bar that represents defendants.

\$200,000. Such people will be reluctant to accept risky cases promising a high multiplier if successful, unless the multiplier is raised still higher to compensate for the unpleasantness of the risk.⁹⁶ Others prefer a small chance of a large reward to the more humdrum recompenses of other legal work. We do not know how many plaintiffs' lawyers fall into each of these classes, and therefore do not know how a given contingency bonus will affect the bar.

Fourth, how predictable are contingency multipliers? The attorney fee award is made only after the plaintiff has prevailed. Any incentive to take the case must operate much earlier, when the client first seeks representation. Under the current system, the size of the contingency bonus is unpredictable, and its effect is therefore unclear. Lawyers must reckon, not only with the contingencies of litigation, but also with those of awards. In addition, some lawyers will be more confident than others that they will win or that a large bonus will be granted.

Fifth, how are the incentives for lawyers to accept cases modified by the incentives to work on or neglect them once accepted? The current approach focuses on the decision to accept cases, offering a contingency multiplier based on the prospects of success then apparent. This means that, should the lawyer become more hopeful of success as the case proceeds, he may be tempted to swell the time devoted to the case, hoping to reap both his usual time charges and a pleasing bonus. To disallow wasted hours when awarding the attorney fee is only a partial remedy, since any attempt to distinguish appropriate from inappropriate hours must be crude.⁹⁷ A few courts have therefore broken down the litigation into stages, fixing a contingency multiplier for each stage in light of the prospects of triumph at that particular stage.⁹⁸ This could correct the incentive to overprepare the case, but may also derange the incentive to accept it.

96. Cf. Schaefer, *Uncertainty and the Law of Damages*, 19 WM. & MARY L.Q. 719, 719 (1978) (uncertainty lessens value of any opportunity to receive future earnings). A firm large enough to handle many risky cases can reduce the relative impact of uncertain litigation results, since the overall success rate will be more stable and predictable than the results of a single case.

97. See *Northcross v. Board of Educ.*, 611 F.2d 624, 641 (6th Cir. 1979) (using five percent reduction factor rather than attempting to identify duplicative hours); *Attorney Fee Awards in Antitrust and Securities Class Actions*, *supra* note 36, at 130 (4.8% of hours sought disallowed).

98. E.g., *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1100 (2d Cir. 1977). Similarly, courts have denied any contingency bonus for the time spent seeking the attorney fees, since by the time the fee was sought, the plaintiff had already won the case and there was no remaining contingency. E.g., *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1219 (3d Cir. 1978); cf. *Jorstad v. IDS Realty Trust*, [1981] FED. SEC. L. REP. (CCH) ¶ 97,902, at 90,581 (8th Cir. 1981) (reversing bonus award for fee application time

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Sixth, what do contingency multipliers multiply? The theory is that the multiplicand is a fee set according to the lawyer's fair market value for the number of hours reasonably devoted to the case. But neither the fair market value nor the number of hours can be known precisely. The rate a lawyer is able to charge varies from case to case, sometimes including additions or subtractions on account of the difficulty and success of the case or the wealth and pliability of the client.⁹⁹ The number of hours attributed to a case can be expanded by optimistic record-keeping, and contracted by a skeptical judge, and the reasonableness of those hours is always open to debate. When the dust clears, the fee that the contingency factor multiplies may be larger or smaller than what the lawyer would have earned had his time been hired by paying clients. Without a good deal of empirical research, it is impossible to say whether these variances will show any systematic trends, or how they will affect the willingness of lawyers to accept fee award cases.

Seventh, how will the impact of fee incentives be modified by the interplay between lawyers and clients? Incentives may make a lawyer willing to sue, but his clients may still draw back. They must balance what they hope to obtain from the suit against the prospect of paying the defendant's costs other than attorney fees,¹⁰⁰ the disadvantages of an open dispute with the defendant, and the revolting experiences of litigation. On the other hand, an enthusiastic client may be able to add to the incentives of court-awarded fees by promising his lawyer part of the recovery.¹⁰¹ The general tendency of such arrangements

because reasonable fee provided for and because plaintiff conceded such increase would be improper). These are all instances in which the contingency of the case declines while it is pending; an increase, however, is also possible, for instance when the court denies class action certification. See Cohen, "Not Dead but Only Sleeping": *The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification*, 59 B.U. L. REV. 257, 291-300 (1979).

99. Cf. S. NAGEL & M. NEEF, *DECISION THEORY AND THE LEGAL PROCESS* 217-48 (1979) (applying portfolio theory to lawyers' allocation of time between cases); Clermont & Currivan, *supra* note 62, at 534-46 (discussing failure of either contingent fee or hourly fee to resolve economic conflicts of interest between lawyer and client).

100. See 28 U.S.C. § 1920 (1976 & Supp. III 1979) (taxation of various court fees and compensation of certain experts and interpreters); FED. R. CIV. P. 54(d) (costs ordinarily allowed to prevailing party).

101. Lawyers and clients have some freedom to reach their own fee arrangements with each other without affecting the amount of the fee that the court will award. See, e.g., *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 538 (5th Cir. 1970) (lawyer allegedly received nothing); *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 86 (1st Cir. 1970) (contract for lawyer to receive more than statutory fee). One discrepancy between these two cases shows the solicitude of courts for lawyers. If the client agrees to pay the lawyer a fee in addition to the statutory fee, *Farmington* allows the lawyer to keep both fees unless this would be plainly inequitable or unethical. 421 F.2d at 87-91. But even if the lawyer agrees not to be paid by the client, *Miller* permits the lawyer to

should be to increase the number of cases brought, since they make it possible for lawyer and client to adjust the division of the possible pie so that litigation is desirable for both of them.

Thus, current contingency factor practice cannot be justified on the ground that it provides an appropriate incentive for litigation. The reasoning on which the practice is based points toward a plainly inappropriate incentive, one that would exclude entirely the costs of litigation from the calculations of those contemplating suit. The practice no doubt falls short of this end, but it is impossible to say just how far short it falls and how much of an incentive is actually provided.¹⁰² Only extensive empirical research of a sort that has not yet been conducted could answer these questions.

Even that research would not tell us how large an incentive is desirable if we reject the current theory's implicit goal of litigating all but the most hopeless claims. Indeed, that theory's greatest flaw is to hide the inescapable conclusion that a contingency factor implies a decision about how far society wishes to go to encourage claims at

recover a statutory fee, with no crumb allowed to reach the client. *See also* Dennis v. Chang, 611 F.2d 1302, 1309 (9th Cir. 1980) (despite statutory language, fee should be paid to legal service organization, not to client). But the shoe may soon be on the other foot if the Justice Department's class action bill passes, since it provides for certain incentive payments to private relators that may not be passed on directly or indirectly to their lawyers. H.R. 5103, 96th Cong., 1st Sess., § 2(a) (1979); *cf.* Hamilton v. Econo-Car Int'l, No. 79-2179 (D.C. Cir., Nov. 14, 1980), *noted in* NAT'L L.J., Dec. 1, 1980, at 43, col. 1 (fees awarded as discovery sanction must go to client when lawyers retained on contingency basis); International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1278 (8th Cir. 1980) (attorney fees reduced when contingency fee agreement between lawyer and client results in unreasonable fee); Sargeant v. Sharp, 579 F.2d 645, 648 (1st Cir. 1978) (if contingent fee in addition to statutory fee award would overcompensate lawyer, court can require statutory award to be paid to client).

102. The impossibility of determining on general principles the incentive provided by fee practices is shown strikingly by the results of a survey that concluded that fewer than forty-five percent of the federal class actions for damages brought in the District of Columbia had any success. *See* Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1135-38 (1974); *cf.* DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience* (pt. 2), 1976 AM. B. FOUNDATION RESEARCH J. 1273, 1327 (18 out of 27 antitrust class actions obtained some relief). Attorney fees are available in class actions for damages under the common-fund theory, and often also under such statutes as 15 U.S.C. § 15 (1976) (recovery in antitrust suits). Under the reasoning that supports the present contingency bonus system, this low success rate suggests that ample incentives exist to bring class actions that do not enjoy an overwhelming likelihood of success. But a more plausible view is that lack of success reflects the tremendous expense and complexity of litigating a class action to a successful conclusion, not lack of intrinsic merit. *Cf.* DuVal, *supra*, at 1332-44 (by implication) (discussing factors reducing degree of success); Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. REV. 542, 545, 564-67 (1980) (study of 205 suits against corporations reporting 75.3% success rate and large attorney fees). If so, the percentage of success might be increased by increasing the fee awards available, or by using some entirely different way of financing big cases. *See, e.g.*, 15 U.S.C. § 15c (1976) (monetary relief in parens patriae antitrust suit by state attorney general); NAT'L L.J., Oct. 16, 1980, at 3, col. 1 (loans to finance suits).

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the expense of unsuccessful defendants. The theory aspires to the inevitability of mathematics and has given rise to a practice entangled in assessing the likelihood that particular cases would succeed. The most that can be said for today's system is that it is possible to imagine a variety of other systems that would provide plainly inappropriate incentives, while the appropriateness or inappropriateness of the present system's incentives at least remains unascertained. This faint praise would be equally applicable to a far simpler system, such as one that automatically added a fifty percent bonus to all fee awards.¹⁰³

III. The Contingency Bonus and Other Litigation Incentives

If the existing system of contingency bonuses is in conceptual disarray, we face an important question: why is *any* practice of awarding increased attorney fees an appropriate means to encourage suits of a certain type? The existence of statutes and doctrines providing for attorney fees (without a contingency bonus) to successful plaintiffs does not resolve the matter. These legal rules reflect a judgment that some kind of incentive is desirable, but they tell us little about the nature and size of the appropriate incentive. In addition, there are many other ways of encouraging litigation: we can change the substantive law to make a claim easier to prove, we can increase damage awards, or we can simply award unaugmented attorney fees, discarding any notion of contingency bonuses. Nevertheless, when we examine these alternatives and compare them with the contingency bonus, the latter sometimes emerges as a more easily justified incentive. The justification, however, is complex and requires that the current system of contingency bonuses be reshaped in a more defensible form.

Changes in substantive law, particularly in elements and burdens of proof, have an initial appeal as ways to increase the number of actions brought.¹⁰⁴ We might, for example, wish to encourage more school desegregation suits, and we might choose to do so by simplifying the complex and expensive task of proving that a public school system has been intentionally segregated.¹⁰⁵ One way to simplify

103. The fifty percent figure has an analogue in English practice, in which a figure designed to reflect the actual cost of pretrial work is increased automatically by an arbitrary amount, often fifty percent of the original figure. *See Regina v. Wilkinson*, [1980] 1 W.L.R. 396 (Q.B. 1979). This increase, however, is not contingent on the client's success.

104. *Cf.* Comment, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 365-71 (1971) (examining tendency of class actions to relax requirements of Rule 10b-5 suits).

105. *See, e.g.,* *Keyes v. School Dist. No. 1*, 313 F. Supp. 61 (D. Colo.), *supplemented in* 313 F. Supp. 90 (D. Colo. 1970), *aff'd in part and rev'd in part*, 445 F.2d 990 (10th Cir. 1971), *modified*, 413 U.S. 189 (1973), *on remand*, 368 F. Supp. 207 (D. Colo. 1973), *aff'd*

the proof would be to eliminate entirely the requirement that plaintiffs show intentionally segregative governmental action. This reform, however, would obviously make it possible to desegregate any school system in which segregation has arisen without intentional governmental help. Whether that should be allowed turns on considerations that transcend the desirability of encouraging the litigation of claims of intentional segregation.¹⁰⁶

A second approach to litigation incentives is to modify remedies. The most notable example of remedy modification is the provision for treble damages in antitrust actions.¹⁰⁷ In the desegregation area discussed above, one might award successful plaintiffs damages or novel injunctive relief of great value. Such measures encourage plaintiffs to sue and discourage defendants from committing violations and defending close cases instead of settling. This approach, however, is subject to two objections. First, remedy modification might contravene the policies implicit in the law of remedies. Defendants would have to pay more, and plaintiffs would receive more, than previous judges or legislators thought just or politic.¹⁰⁸ Second, remedial changes have inconsistent results, increasing only certain types of suits. A treble damage provision, for instance, provides a strong incentive to sue if large damages have been inflicted, a weak incentive if the damages have been small, and no incentive if only injunctive relief can be claimed. This variable set of incentives makes sense if our goal is to minimize the economic injury caused by violations. It makes less sense if we wish to maximize compliance with the law regardless of the economic impact caused by violations, or to help potential plaintiffs who could not otherwise afford to sue.

A properly shaped contingency bonus, by contrast, implies no challenge to existing substantive or remedial policy. Rather, it reflects the view that the costs of enforcing certain legal rules that we want enforced should be spread among those who made the litigation necessary.¹⁰⁹ As such, the contingency bonus stands on an independent

in relevant part, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). More than 10,000 hours were devoted by the plaintiffs' lawyers to the case, including both the violation and remedy phases. *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 407-16 (D. Colo. 1977).

106. See generally Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

107. *E.g.*, 15 U.S.C. § 15 (1976).

108. See, *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (limits on antitrust damages); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980).

109. Of course, this is not a universal principle; in most areas of litigation we do not make defeated defendants pay even a basic attorney fee, much less a contingency bonus. Nor does the principle justify the present approach to the contingency bonus. See pp. 490-91 *supra*.

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policy footing. In addition, the contingency bonus is less likely to encourage only claims for large damages. Legal costs constitute a weighty deterrent to virtually all litigation, regardless of the remedy sought or the injury caused by the violation. The award even of unmultiplied attorney fees to successful plaintiffs should therefore encourage most suits that are likely to succeed.¹¹⁰ The added effect of a contingency bonus should be particularly strong on those suits in which smaller or no damages are claimed, because suits in which a large sum is likely to be recovered will tend to be brought even in the absence of a fee award provision. As the bonus rises, the encouragement will spread to suits that are progressively less likely to succeed.

A third alternative to the contingency bonus would be the award of unenhanced attorney fees. If the promise of compensation for successful suits is a sufficient incentive for plaintiff's lawyers, why bother with a contingency multiplier at all? The short answer to this alternative is that it is incomplete: although we may want to encourage many kinds of claims, we may also want to encourage some more than others. In particular, we must decide how much encouragement to give suits of varying degrees of promise. Ironically, this answer brings us back to the primary weakness of present contingency bonus doctrine: the doctrine does not make the requisite policy judgments about what suits to encourage and how much to encourage them. It seems to rest on the virtually indefensible judgment that every suit not inescapably marked for failure should be brought, regardless of its cost.¹¹¹ In part, decisions about how much encouragement is desirable can be aided by empirical investigation of the obstacles to litigating a particular claim. If, for example, the main hindrance to litigation is the difficulty of uncovering violations, we could give incentives proportional to that difficulty.¹¹² Setting an appropriate level of encouragement, however, involves policy considerations as well as empirical inquiry. And as it stands, the contingency bonus is not much better, as a flexible policy instrument, than a flat award of attorney fees with no eye to desirability of suit or likelihood of success.

110. Whether the fee should be awarded to the lawyer or to the client is another question. I think it should go to the client, subject to fair contractual arrangements between lawyer and client. This is not current practice, however. *See* note 101 *supra* (discussing effects of contracts on fee awards).

111. *See* pp. 491-93 *supra* (discussing effect of pressing every conceivable claim).

112. *See* Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1455-64 (1980) (punitive contract damages would counterbalance likelihood that some breaches will not be detected); *cf.* Polinsky & Shavell, *supra* note 82 (examining levels of fines where probability of conviction is less than one).

Three more plausible policy judgments, however, suggest bases for a more moderate contingency bonus doctrine. First, the legislature might decide that certain classes of cases should be litigated even when their success is far from certain. Second, bonuses could be set so that litigation of cases in which attorney fee awards are available is at least as likely to occur as it is in cases brought by clients who can afford to pay. Third, fee awards might simply be set so that cases more likely than not to succeed if litigated will be brought. Each judgment leads to different practices and results; but each articulates an intelligible basis for setting litigation incentives. The three approaches will be examined in the next section.¹¹³

Acceptance of these policy judgments does not compel us to conclude that a contingency bonus system is better for any given class of cases than some other incentive, such as attorney fees without a bonus. Because we cannot say just how much incentive is provided by the current contingency factor practice,¹¹⁴ it is possible that, in a particular case, a fee award alone might provide a sufficient incentive. Nor do the language or legislative histories of fee statutes compel the award of a bonus. More generally, the incentive scheme provided by a contingency bonus is more desirable in some cases than in others. It is useful in enforcing rights that should be enforced even when little monetary damage results from their violation. Constitutional rights fall in this category, as do other civil rights whose violation is an affront to basic values. Environmental law violations are also better remedied when attorney fee awards are multiplied, since damages are usually not recoverable even when injury has resulted.¹¹⁵ A system of contingency bonuses is helpful for statutes in these and other areas that contemplate enforcement by private attorneys general. By contrast, such a system would not be a useful adjunct to classical contract law, whose remedial scheme was not shaped to deter all breaches or to encourage suit regardless of the ratio between the sum recoverable and the cost of litigation.¹¹⁶

113. See pp. 505-12 *infra*.

114. See pp. 493-97 *supra* (discussing problems of misincentives created by current contingency bonus practices).

115. See, e.g., 33 U.S.C. § 1365(a) (1976) (in private suits to enforce Federal Water Pollution Control Act courts may assess civil penalties against offenders; no provision for award of damages to plaintiff); 42 U.S.C. § 7604(a) (Supp. III 1979) (authorizing private injunctive suits to enforce Clean Air Act; no damages provision).

116. See Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558-77 (1977). One could defend an award of attorney fees under the Goetz and Scott analysis on the ground that contract breakers should take into account resulting litigation costs, but this reasoning would not justify a contingency bonus.

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Despite these limitations, the contingency bonus still seems desirable if attorney fee statutes and doctrines are to accomplish their purposes. These purposes include providing plaintiffs—even some plaintiffs not absolutely assured of success—with lawyers comparable in quality to those representing defendants.¹¹⁷ Although lawyers' motivations cannot be reduced to a formula, most lawyers of this quality do seem to consider the prospects of success and the fee recoverable before adding to their crowded calendars a case in which payment is contingent.¹¹⁸ Some Elizabethans believed that carrying a piece of hyena gut would enable one to “foreknow the success and event of his petitions and sutes in Law,”¹¹⁹ but lawyers today are less credulous. Some allowance for the contingency factor is therefore appropriate.

IV. Alternatives

A contingency award does not require an inquiry into the likelihood of success in each case. At least three simpler approaches are available that would achieve more tenable goals than the present system's half-hearted attempt to make weak cases as desirable to lawyers as strong ones. The common feature of the three approaches is their use of formulas applicable to broad classes of cases, thus avoiding the problems of measuring each case's likelihood of success.

A. *The Need for a Comprehensive Approach*

The solution to many of the problems of current practice is to establish a standard contingency multiplier, unrelated to the contingencies of the particular case.¹²⁰ For the moment, we need not consider precisely how this multiplier would be determined, what class of cases it will affect, or whether it should govern all the time that a lawyer devotes to a case.¹²¹ What is important is that the same formula be applied to all cases in a broad class.

This approach would remove the ethical dilemmas explored above.

117. Some of my colleagues at Boston University, indeed, suggest simply awarding successful plaintiffs a fee equal to what the defendant paid its own lawyers.

118. See Dietz, Baird, & Berul, *The Medical Malpractice Legal System*, in U.S. DEPT OF HEW, SECRETARY'S COMM'N ON MEDICAL MALPRACTICE, MEDICAL MALPRACTICE app., at 87, 97-100, 104 (1973); DuVal, *supra* note 102, at 1293-96.

119. THE ELIZABETHAN ZOO 142 (M. Byrne ed. 1979).

120. *But see* A. MILLER, *supra* note 32, at 373-74 (proposing that contingency adjustments should be based only on risks of particular case in question). What Professor Miller seems to object to is the claim that a lawyer should get a larger fee in a winning case because the lawyer has also brought several losing cases; he does not discuss the across-the-board approach urged here.

121. These questions are discussed below. See pp. 505-12 *infra*.

A lawyer seeking a fee would not be tempted to display the original weaknesses of his client's case, since the infirmities of a particular claim are irrelevant to the fee calculation. The only relevant facts would be those bearing on the success rate and other characteristics of a class of similar cases. Retrospective evaluation of each case's prospects of success would likewise be replaced by an inquiry into the success of that class of cases. That inquiry would be easier and less embarrassing than what can occur at present.

Furthermore, since all defeated defendants in the class would pay attorney fees based on the same contingency multiplier, there would no longer be discrimination against those defendants whose cases were strongest. It might still be argued that any contingency bonus is unfair to losing defendants because it is not designed to pay the cost of enforcing the law against them, but rather to encourage plaintiffs' lawyers to keep on litigating even though they lose cases against other, innocent defendants. Yet in a broader sense it is fair that those whose violation of the law makes enforcement necessary pay the costs of a system that makes meritorious suits possible, even though some of those costs are incurred in connection with unsuccessful suits. After all, in order to become liable for a fee, one must not only violate the law, but also refuse redress until some variety of enforcement proceeding has been started.¹²² Moreover, under an across-the-board system, some perceived unfairness could be eliminated by setting the level of the contingency bonus so that unsuccessful defendants do not pay the whole cost of enforcement, but only an amount that would encourage and pay for suits of some appropriate level of merit.

The incentive to lawyers to accept cases would be less prone to distortion under a comprehensive system than it is now, though much uncertainty as to the system's actual effects would remain.¹²³ For one thing, once the contingency multiplier had been set, it would be known to the bar. The incentive would therefore be more effective and consistent in its effects than under the present system, which depends on a lawyer's ability to guess how much of a bonus he will receive. For another, as experience with a given multiplier accumulated, it would be possible to appraise its effect on litigation, and adjust it accordingly. The incentive could be more reliably calibrated than under the present system, which purports to shape a fitting in-

122. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980) (Title VII; fee recoverable for legal services in state administrative proceeding); *Maher v. Gagne*, 100 S. Ct. 2570, 2576-77 (1980) (42 U.S.C. § 1983; fee recoverable when suit leads to settlement and consent decree).

123. See pp. 491-97 *supra* (discussing misincentives that current system may create).

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centive for each case individually, but must do so on the basis of retrospective guesswork. Finally, a uniform contingency multiplier would provide a greater incentive for lawyers to accept cases likely to succeed than to accept weaker cases. The screening of cases, inevitable in any system short of universal litigation, would then reach more sensible results.

Although it may seem indiscriminating to assess the same contingency bonus in both promising and unpromising cases, comparably uniform practices are common when attorney fees are awarded by courts or billed by lawyers. Public interest law firms, for instance, recover attorney fee awards calculated on substantially the same principles as those paid to private lawyers,¹²⁴ even though economic theory would predict that this would create an incentive to accept every case, promising or unpromising, in which a fee is possible, instead of working for nonpaying clients. Yet once the principles have been established for lawyers who seek profit, it has seemed unfair to deny their benefit to public interest lawyers, or to excuse defendants sued by the latter from paying fees. Uniformity is also furthered when a fee is assessed under the *Lindy-Grinnell* approach,¹²⁵ rather than under the long list of relevant factors favored by some courts.¹²⁶ In addition, statutes providing for fee awards usually call simply for "reasonable" awards,¹²⁷ requiring courts to work out uniform standards for what is reasonable in light of the relevant policies, including the policy against wasteful fee litigation.¹²⁸

124. *E.g.*, *Watkins v. Mobile Hous. Bd.*, 632 F.2d 565, 567 (5th Cir. 1980) (per curiam); *Rodriguez v. Taylor*, 569 F.2d 1231, 1247-48 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Torres v. Sachs*, 538 F.2d 10, 13 (2d Cir. 1976). *But see* *EEOC v. Enterprise Ass'n Steamfitters Local 638*, 542 F.2d 579, 593 (2d Cir. 1976) (no abuse of discretion to grant low award when amount was determined in part because plaintiff's counsel was public interest law firm).

125. *See* pp. 478-82 *supra* (under *Lindy-Grinnell*, basic fee multiplied by precise contingency multiplier yields award).

126. Such factors include the time and labor required, the novelty and difficulty of the questions, the legal skill required, preclusion of other employment, the customary fee, the fixed or contingent nature of the fee, the time constraints imposed by the case, the amount involved and the results obtained, the experience, reputation, and ability of the lawyers, the undesirability of the case, the nature and length of the lawyer's professional relationship with the client, and the awards in similar cases. *See, e.g.*, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

127. *See, e.g.*, 15 U.S.C. § 15 (1976) (antitrust damage suit); IDAHO CODE §§ 12-120 to -121 (1979) (civil actions). Some laws, however, specify criteria for making fee awards. *See, e.g.*, 15 U.S.C. § 2059(e)(4) (1976) (reasonable fee based on actual time used and expenses reasonably incurred, computed at prevailing rate for similar services); ALASKA CIV. R. 82(a)(1) (fee based on percentage of recovery, decreasing as recovery grows, and increased if case reaches trial); UNIFORM CLASS ACTIONS ACT § 16(e) (multi-factor approach).

128. An across-the-board approach could be qualified to meet special problems, notably the incentive for the plaintiff's lawyer to pour extra hours into a case once victory seems

The shift from an individualized approach to fee awards to an across-the-board approach should not require legislative action. When equitable doctrines support fee awards, the courts should be free to develop fee standards fulfilling the goals of those doctrines. Indeed, the standards now used have already been shaped and reshaped by the courts.¹²⁹ The common statutory mandate to award "reasonable" fees leaves room for courts to award contingency bonuses under their own standards. The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976¹³⁰ cites with approval a case in which a contingency bonus was awarded, but does not tie courts down to a particular computational method.¹³¹

To agree that an across-the-board multiplier would be superior to the current handling of the contingency factor, however, does not tell us what multiplier should be used. Indeed, trying to find a multiplier reveals just how difficult a problem of social engineering current doctrine conceals, and illuminates the basic problems of access to justice involved in attorney fee standards. Nevertheless, at least three possible solutions can be identified: multipliers could be fixed by statute for certain classes of cases; multipliers could be set so that cases in which fee awards are made are as likely to be brought as similar, non-award cases; or a uniform multiplier of two could be set, encouraging at least those claims with a better-than-even chance of success.

likely. A judge now may deal with this problem by using different multipliers for lawyer hours at different stages of the case. *See, e.g.,* *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1100 (2d Cir. 1977). Under an across-the-board approach, rates could be specified for relevant stages of litigation, as has been proposed for class actions. *See* pp. 505-06 *infra*. These rates should be set so that, in an average case, they would result in an overall contingency bonus of the right size, as defined by the principles to be discussed below. *See* pp. 505-12 *infra*.

129. *See* pp. 476-77, 478-82 *supra* (discussing development of common-fund doctrine and *Lindy-Grinnell* approach).

130. 42 U.S.C. § 1988 (1976).

131. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913 (citing supplemental district court opinion in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974)). Of the other two cases cited in the report as properly applying the appropriate standard, one said nothing about the contingency factor, *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. 5047 (C.D. Cal. 1974), and the other held only that plaintiffs should not be denied a fee award because they had not contracted to pay their lawyers a fixed fee, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 486 (W.D.N.C. 1975). *See also* S. REP. NO. 295, 94th Cong., 1st Sess. 41-42, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 774, 808 (Voting Rights Act of 1965 Extension; citing same three cases). The situation is further complicated by the fact that the first but not the second report cited says that the "appropriate standards, *see Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)," are correctly applied in the three cases cited, although the *Johnson* approach is not identical with that used in *Davis*.

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B. *A Legislative Solution*

A principal function of the contingency multiplier is to regulate the volume of litigation. Do we wish plaintiffs with feeble claims to be able to litigate them without financial risk? If so, a sufficiently high multiplier will make it worthwhile for some lawyers to abandon paying clients in order to specialize in such claims. Do we wish claims to be brought only if they are almost sure to succeed? If so, a low multiplier will discourage lawyers capable of evaluating cases from accepting risky ones unless the clients are willing to pay.¹³²

Such questions are virtually impossible for a court to answer. The passage of attorney fee statutes reflects a congressional desire to provide incentives for certain kinds of litigation,¹³³ but Congress has not said just how strong an incentive it wishes. There are dozens of attorney fee statutes; they are found in legislation ranging from hobby protection to mass poisoning.¹³⁴ No court has the ability or authority to evaluate even roughly the relative importance of these statutes, much less to give them the comparative numerical values that are necessary for contingency multipliers.¹³⁵ The problem is no simpler when fees are awarded under the courts' own doctrine of a common fund or benefit. There, too, acceptance of the appropriateness of an incentive does not tell us how large it should be.

A legislature is not so limited. Although no legislation concerning across-the-board multipliers has been enacted, the 1978 version of the Justice Department's class action reform bill suggests what could be done.¹³⁶ The bill would have left previous attorney fee legislation in

132. Plea bargaining practices provide a similar regulation for criminal litigation: the greater the sentence reduction given to those who plead guilty, the less likely a defendant with a questionable case will be to go to trial. See McCoy & Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 887-88 (1980).

133. See, e.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (per curiam) (incentive to sue under Title II of Civil Rights Act of 1964); Berger, *supra* note 3, at 306-10 (discussing legislative histories).

134. See 15 U.S.C. § 2102 (1976) (proper labeling of hobby items); 15 U.S.C. § 2619(c)(2) (1976) (toxic substances control). Other statutes are discussed above. See note 75 *supra*.

135. Cf. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975) (28 U.S.C. § 1923 does not permit federal courts to award attorney fees depending on courts' assessment of importance of public policies involved). Some courts, however, have increased fees in cases thought to confer particularly great public benefit. E.g., National Ass'n of Regional Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842, 851 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976) (suit successfully challenging impoundment of \$125 million in federal funds for health programs).

136. S. 3475, 95th Cong., 2d Sess. (1978). See generally Wells, *Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal*, 16 HARV. J. LEGIS. 543 (1979) (examining bill). The 1979 version of this bill eliminates the features discussed here. H.R. 5103, 96th Cong., 1st Sess. (1979). See generally Berry, *Ending Sub-*

effect, and also provided for the award of fees to a private relator who brought or instigated a successful "public action."¹³⁷ More importantly, the bill set forth detailed standards for the calculation of fees whenever they were recoverable.¹³⁸ The fee was to be based on the hours reasonably devoted by lawyers and paralegals to the case, multiplied by their usual billing rate or (for those not billing by the hour) an hourly fair market value for similar services. This product was to be multiplied by a risk factor, whose permissible limits were specified. When the lawyer had relied on evidence or a judgment resulting from a previous governmental proceeding, the maximum multiplier was 1.75.¹³⁹ Otherwise, the judge could set a multiplier between two and three for time spent before the end of the preliminary hearing that recognized the suit as a class action, and between 1.75 and 2.5 for subsequent time.

Although the stated purpose of this provision was to confine judicial discretion,¹⁴⁰ implicit in the means the drafters chose was a judgment about the incentive appropriate to class actions. To promise a lawyer who institutes a class action that, if he succeeds, he will receive twice his hourly rate or even more, is to make it attractive to sue even if there is significant doubt of success. The incentive not only would have encouraged suits, but also would have encouraged the expansion into class actions of what otherwise might have been individual suits, since the multipliers available in class actions under the statute were larger than those typically set now in either class or individual suits.

stance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action, 80 COLUM. L. REV. 299, 322-43 (1980) (analyzing 1979 bill).

An important recent statute provides another method of shaping incentives: in actions by or against the government, fees are authorized if the prevailing party meets certain wealth standards, but are limited to no more than \$75 per hour except in special circumstances. See Equal Access to Justice Act, Pub. L. No. 96-481, § 204(a), 94 Stat. 2325 (1980) (amending 28 U.S.C. § 2412(d) (1976)). The legislative history indicates that this provision was not meant to affect standards for fee awards under other statutes. See H. REP. NO. 1418, 96th Cong., 2d Sess. 14-15, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 8631, 8640.

137. S. 3475, 95th Cong., 2d Sess. § 2(a) (1978). A public action could be brought under the 1978 bill by a state or the federal attorney general, or sometimes by a private relator, when a violation of a federal commercial statute inflicted injuries no greater than \$300 per person on 200 or more people, and the total injury exceeded \$60,000. See Wells, *supra* note 136, at 547-51.

138. S. 3475, 95th Cong., 2d Sess. § 2(a) (1978); see Wells, *supra* note 136, at 547.

139. Commentators and courts have often noted that ability to rely on the results of a government proceeding reduces the contingency of a case. *E.g.*, 3 H. NEWBERG, *supra* note 24, § 6926h, at 1174-80.

140. U.S. Dep't of Justice, Office for Improvements in the Administration of Justice, Proposed Revisions in Federal Class Damage Procedures: S. 3475 Bill Commentary (1978), reprinted in *Reform of Class Action Litigation Procedures: Hearings Before the Subcomm. on Judicial Machinery of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 297, 359-63 (1978).

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For Congress to use such a means to encourage a suitable kind of class action seems eminently appropriate. Until Congress does so, however, some other approach less tied to statutory policies must be used by courts to set uniform contingency multipliers.

C. *An Equalizing Solution*

Courts might set the contingency multiplier so that claims in which success is uncertain will be as likely to be litigated as are similar claims of people who can afford to pay for ordinary litigation. Even wealthy corporations do not litigate every claim. They balance the benefits that they anticipate from victory against the costs of litigating in light of the probability of success. Under an equalizing approach, the contingency multiplier would attempt to induce fee-award lawyers and clients to undertake a similar balancing. The similarity would be imperfect because the fee would be paid to the lawyer, while other benefits and harms of the litigation would flow to the client. But to the extent that lawyers and clients are free to bargain with each other about whether the lawyer will receive the court-awarded fee or a smaller or larger one,¹⁴¹ we might hope that all the relevant costs and benefits would be taken into account in the decision whether to litigate.

Implementation of the equalizing approach would require a determination of the success rates in an appropriate class of paying cases. A contingency multiplier could then be calculated to produce an equivalent success rate in fee award cases. For instance, if two-thirds of the paying cases succeed, a contingency multiplier of 1.5 should make it profitable for lawyers who might obtain paying cases to accept fee award cases when they believe that two-thirds or more of those cases will be successful. Of course, since this effect is highly conjectural,¹⁴² the actual effects of the multiplier should be traced and the multiplier adjusted so as to produce a closer approximation of the desired success rate.

This approach would force lawyers and clients to balance the costs and benefits of litigation, discouraging suits so unlikely to win that clients able to pay would not think the case worthwhile.¹⁴³ Any suc-

141. See pp. 493-96 *supra*. Of course, even if lawyer and client are free to bargain, it does not follow that they will actually do so, particularly when it comes to concessions by the lawyer.

142. See pp. 493-97 *supra* (discussing unclear effects of contingency multipliers).

143. Cf. I THE ROYAL COMM'N ON LEGAL SERVICES, *supra* note 91, ¶¶ 13.24-26 (whether civil suit receives legal aid depends in part on whether paying client would be advised to bring it).

successful plaintiff would receive a fee award that would provide at least a reasonable hourly payment, calculated at market rates, for every hour devoted to the case. This equalizing approach does, of course, imply a judgment that any additional fee award should not be made so large as to induce lawyers to accept every case, or even every case arising under a favored statute. If we really think that justice requires free lawyers for all claims, the appropriate reaction is to establish a system of legal insurance or a subsidized bar.¹⁴⁴ It is not to award huge fees in some cases in order to tempt lawyers to abandon others.

An equalizing approach is closely related to the problem that makes a contingency bonus necessary at all; the problem is not the contingency of litigation, but the differing ways that paying and nonpaying clients deal with that contingency. Both kinds of clients want to bring suits in which success is uncertain, but when a paying client does so, his lawyer does not bear the resulting risk. If nonpaying clients could offer similar terms—for instance, by getting a commitment from an agency that a given suit would be paid for out of public funds—there would be no need to swell the payment with a contingency bonus. This is what happens in legal aid cases brought in England: cases are approved in advance for payment.¹⁴⁵ On the other hand, if we had a convention that lawyers for paying clients were paid only when they succeeded, there would again be no need for a contingency bonus: lawyers for nonpaying clients could simply be awarded fees calculated in the same way as those paid by paying clients. The contingency bonus is required because clients who cannot (or will not) pay unless the court awards them fees must compete for lawyers with clients who can and will pay regardless of whether they win or lose. An equalizing approach aims to close the gap thus created.

This goal is consistent with some grounds on which Congress has authorized fee awards. Such awards are sometimes given because plaintiffs are expected to be too poor to pay lawyers in advance, and because even a successful suit will not yield a money judgment from which a contingent fee can be paid.¹⁴⁶ In other instances, a fee award

144. See M. FRANKEL, *JUSTICE: COMMODITY OR PUBLIC SERVICE* 7-8 (1978) (proposing subsidized national legal service). In criminal cases, for instance, the federal government either hires salaried defense counsel or arranges to appoint counsel who are assured of payment whether they win or lose and therefore require no contingency bonus. Perhaps the costs of a similar scheme for civil cases could be paid in whole or in part by taxing unsuccessful litigants.

145. 1 THE ROYAL COMM'N ON LEGAL SERVICES, *supra* note 91, ¶¶ 13.1-72; M. ZANDER, *LEGAL SERVICES FOR THE COMMUNITY* 32-36 (1978).

146. *E.g.*, 15 U.S.C. § 26 (1976) (injunctive antitrust suit); 42 U.S.C. § 1988 (1976) (constitutional and other claims against state officials); see H. REP. NO. 499, 94th Cong.,

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is appropriate because cases are thought to spread benefits among many people, who cannot reasonably be required to help pay the lawyer bills.¹⁴⁷ In such situations, it is sensible to regard the attorney fee award as a way to bring litigation obstructed by these problems into line with practices followed in paying cases.¹⁴⁸

What class of paying cases should be the source of the statistics from which an equalizing contingency multiplier is calculated? Sometimes, it may be possible to find a class closely analogous to a class of fee award cases. In certain federal housing discrimination suits, for instance, attorney fee awards are available only to plaintiffs who cannot afford their own lawyers.¹⁴⁹ It might therefore be possible to obtain statistics on housing discrimination cases brought by paying clients, who could not recover fees, and to use the success rates of such cases as a goal for fee award cases. In most contexts, however, this method would be impossible, since the success rates in many classes of cases—antitrust damage suits, for instance—already reflect the incentives or disincentives contributed by current fee award practices.

Ordinarily, then, we would have to turn to information on categories of litigation unaffected by fee awards. There is some information of this kind, and it indicates success rates ranging from forty-five percent to eighty percent.¹⁵⁰ This would yield an initial contingency mul-

2d Sess. 20, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2589 (discussing 15 U.S.C. § 26); S. REP. NO. 1558, 94th Cong., 2d Sess. 1-2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5808, 5909-10 (discussing 42 U.S.C. § 1988). Other fee statutes accomplish a similar purpose by limiting fee awards to plaintiffs unable to litigate without them. *See* 42 U.S.C. § 3612(c) (1970); Equal Access to Justice Act, Pub. L. No. 96-481, § 204(a), 94 Stat. 2325 (1980) (amending 28 U.S.C. § 2412(d)(2)(B) (1976)).

147. *E.g.*, 5 U.S.C. § 552(a)(4)(E) (1976) (disclosure of government documents); *see* CONF. REP. NO. 1200, 93d Cong., 2d Sess. 4-5, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6285, 6288. Cost spreading is of course a prime justification for the common-fund and benefit theories. *See* pp. 476-77 *supra*.

148. *See* Berger, *supra* note 3, at 314 (“[P]ublic interest cases must be placed on a comparable financial footing with the competing demands for legal services, which compensate attorneys at the full market value”)

149. *See* 42 U.S.C. § 3612(c) (1970). Housing discrimination can also be challenged in the federal courts under 42 U.S.C. § 1982, *see* Jones v. Mayer Co., 392 U.S. 409 (1968), in which case the attorney fee provisions of 42 U.S.C. § 1988 apply. There might therefore be some tendency for plaintiffs who can pay to follow this second route.

150. *See* C. CLARK & H. SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT 22, 30-31 (1937) (45% success rate in miscellaneous civil litigation); A. CONARD, J. MORGAN, R. PRATT, JR., C. VOLTZ, & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 154-56 (1964) (favorable results by settlement or judgment for plaintiffs in 80% of auto accident cases in which suit is filed); U.S. DEP'T OF HEW, SECRETARY'S COMM'N ON MEDICAL MALPRACTICE, MEDICAL MALPRACTICE 10 (1973) (60% success rate for malpractice claims); *cf.* M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 60 (1964) (plaintiffs recover something in 92% of personal injury cases still contested 100 days after service of process). Except in the last instance, I have computed these percentages from data in the works cited, rounding them off to the nearest five percent. More de-

tiplier of 1.25 to 2.2, which is comparable to many current awards. However, selecting the success rate that the contingency multiplier is meant to yield could not be entirely objective. Different kinds of paying litigation have different success rates influenced by the wealth and power of plaintiffs and defendants, the value of the stakes to each, and the reactions of lawyers, judges, and jurors. To select any rate as the goal necessarily implies a judgment about how much litigation should be encouraged. As in other situations, reference to the market provides no escape from value judgments.

Once contingency multipliers are set, one could adjust them by collecting separate statistics on the success rates in such categories of cases as suits under different statutes, suits for monetary and for non-monetary relief, and suits brought by rural plaintiffs as against those brought by plaintiffs who must find counsel in a more expensive market. Although the courts alone could implement this system, centralizing the process would have obvious advantages.¹⁵¹ Methods of centralization range from the mere compilation of relevant data by the Federal Judicial Center, with its use left to the courts, to the promulgation of a federal rule of civil procedure specifying the contingency factors to be used by federal courts and perhaps also standard hourly time rates to be used in calculating court-awarded fees for different kinds of lawyers. Centralization would make it possible to obtain better information at less cost and to promote more uniform results than would be possible if the contingency factor had to be worked out in ordinary judicial proceedings. More important, it would avoid the huge litigation costs that could result were the contingency factor open to redetermination in every Circuit, in every kind of case, each time new information became available. If such redetermination became common, little time and money would have been saved by rejecting the present cumbersome system.

tailed consideration would certainly reveal imprecisions and failures of comparability between the various studies involved.

The relevant statistics should count as victories those cases in which plaintiffs prevail by settlement, since attorney fees may be recovered in such cases. *See* *Maher v. Gagne*, 100 S. Ct. 2570, 2576-77 (1980) (fees recoverable in settlement of suit under 42 U.S.C. § 1983). The same comment applies to cases in which plaintiffs recover less than they claimed. But when several claims are asserted and only some succeed, some courts in effect treat the claims as separate suits, and allow fee awards only for the successful ones. *E.g.*, *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1214 (3d Cir. 1978). To the extent that this practice is significant, a comparable approach would have to be followed in compiling statistics on success rates.

151. *Cf.* 1 THE ROYAL COMM'N ON LEGAL SERVICES, *supra* note 91, ¶¶ 37.89-98 (proposing single body to fix levels of legal fees and charges).

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D. *A Simple Solution*

There remains one remarkably straightforward approach to setting a contingency multiplier. Until Congress provides more guidance, courts could simply double attorney fee awards.

The main argument for this solution is that any claim more likely than not to prevail should be heard. If lawyers in successful cases receive a fee twice what they would have received from clients whose payment is not contingent on success, they will find it profitable to accept any group of cases of which they expected half or more to succeed. The system would be predictable, so its incentive for plaintiffs and their lawyers—and its disincentive for defendants—would be unhindered by ignorance. It would be uniform, thus minimizing any remaining tendency to favor suits for money damages over civil rights suits.¹⁵² And it would be cheap to administer.

This reasoning is subject to flaws already noted. First, the actual incentive effect of a multiplier of two would probably vary in unpredictable ways from what simplistic economics implies.¹⁵³ Second and more critically, should cases be brought when they are more likely to succeed than to fail, and not otherwise? It makes good sense to *decide* civil cases, once the evidence is heard, according to whether the plaintiff's version of the facts is slightly more probable than that of the defendant. This traditional test reflects the belief that there is no reason, other than what the evidence may furnish, to prefer victory for the plaintiff over victory for the defendant. But that does not mean that the same test should govern whether cases should be brought in the first place. Courts exist precisely to sift through claims whose true strength cannot be known without a trial.

Despite these difficulties, a doubled fee would serve as a reasonable compromise solution. Whatever the level of litigation sought, it does seem to make intuitive sense that at the least those suits more likely to succeed than to fail should be brought. This appeal is particularly strong when we are dealing with classes of cases that Congress or the courts have found worthy of encouragement through fee awards to successful plaintiffs. Congress might desire a still higher level of in-

152. See S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913 (fees should not be reduced in nonpecuniary cases); Berger, *supra* note 3, at 310-18 (same).

153. See pp. 493-97 *supra* (suggesting factors making incentive effect difficult to identify).

centive, but it has not spoken. We should not readily assume a desire to encourage suits unlikely to be found meritorious; doubling would not do so, but would still provide a very significant incentive. Indeed, doubling would probably lead to fee awards larger than today's average awards and to a greater proportion of unsuccessful suits among those relying on fee awards than among those brought by paying clients. Yet these increases would not be large, and defendants could find some consolation in relief from the unpredictability of today's occasional mammoth awards and from the multiplying of awards for reasons other than the contingency factor. There would also, of course, be relief from litigation about the appropriate multiplier, litigation in which defendants must often pay for the plaintiff's lawyers as well as their own.¹⁵⁴

The precision that we seem to abandon by adopting a doubling multiplier is a false precision. Legal reasoning cannot specify the precise effect of any fee award or practice on the amount of litigation that will be brought in the future. The market for legal services is huge and diverse. Lawyers differ in their motivation, ability to accept and handle litigation, need for new clients, customary fee formulas and levels, arrangements for dividing fees with partners, and arrangements with nonpaying clients. Plaintiffs and defendants likewise vary in wealth, motivation, organization, complexity, and strength of claim. Finally, the unpredictable circumstances of litigation are further clouded by uncertainty about exactly how much Congress or the courts want to encourage litigation under the dozens of provisions providing for attorney fee awards.

The first approach to contingency multipliers presented in this article, legislation,¹⁵⁵ requires Congress to consider how much litigation to encourage. Even without congressional help, the second approach, a market-equalizing solution,¹⁵⁶ could be implemented if courts have faith in present litigation statistics and in their ability to gather information on the effects of a tentative multiplier and to use it without constant relitigation. Should these conditions not be met, doubling fee awards would provide a simple and principled approach that would substantially fulfill the various policies involved in the assessment of a contingency bonus.

154. On the recovery of legal fees for time spent recovering legal fees, see 3 H. NEWBERG, *supra* note 24, at 688-90 (1980 Supp.) (citing cases).

155. See pp. 505-07 *supra*.

156. See pp. 507-10 *supra*.

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Conclusion

As the increase in the availability of attorney fee awards continues, simple and standardized ways of computing fees will become essential. This will require a more appropriate treatment of the contingency factor. Indeed, even if the need for court-awarded fees were dissolved by the provision of universal legal services, it would still be necessary to face the question at the heart of the contingency factor problem: to what extent should society encourage litigation of claims whose merit is unclear? The selection of a contingency multiplier provides an intriguing opportunity to wrestle with this question, but the answers given so far have not been satisfactory. This article attempts to mark the path toward better answers.