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Asymmetric Fees Awards in Civil Rights Litigation: A Critical Reevaluation

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This article posits that the prevailing approach to attorneys' fees ? under which awards for defendants are appropriate only in extraordinary or extreme circumstances ? rests upon increasingly archaic assumptions concerning legal practice and the significance of fee awards in encouraging private citizens to seek vindication of civil rights violations in a judicial forum. The fee recovery is not as important as it arguably once was in inducing competent plaintiffs' counsels to undertake legal representation in civil rights disputes, which casts doubt on the principal public policy rationale for fee-shifting statutes themselves. For example, plaintiffs are now better able to maintain complex or prolonged litigation as a result of changes in ethics rules that enable attorneys to undertake matters on credit or through litigation funding. Additionally, technological advances in discovery and other essential legal processes increasingly allow firms with limited resources to operate more efficiently, thereby significantly neutralizing any resource advantages large defense firms may possess. The prevailing judicial orientation toward fee-shifting also disregards the influence of powerful societal trends, which have heightened sensitivity to the existence and harm of discriminatory practices and provide a powerful independent incentive for counsel to undertake representation in civil rights matters.

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