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REQUIEM FOR SECTION 1983

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ABSTRACT

Section 1983 no longer serves as a remedial statute for the people most in need of its protection. Those who have suffered a violation of their civil rights at the hands of state authorities, but who cannot afford a lawyer because they have only modest damages or seek only equitable remedies, are foreclosed from relief, because lawyers shun their cases. Today civil rights plaintiffs are treated the same as ordinary tort plaintiffs by the private bar: without high damages, civil rights plaintiffs are denied access to the courts because no one will represent them.

Congress understood that civil rights laws are only as good as their enforcement. When Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, it wanted to ensure that meritorious claims would be heard and that all illegal conduct would be deterred. The enforcement mechanism that Congress chose—fee-shifting—guaranteed access to the courts even when damages were modest or the form of relief was equitable. So-called "private attorneys general" would accept all meritorious claims, knowing that if they won they would be paid by the liable

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defendants at reasonable market rates pursuant to the fee-shifting provisions of the law.

In 1986, however, in Evans v. Jeff D.*, the U.S. Supreme Court allowed defendants to condition settlement of civil rights cases on the waiver or reduction of plaintiffs' attorney's fees. Two decades later, it is evident that* Evans *destroyed the enforcement mechanism of the Civil Rights Act. Today civil rights plaintiffs who have only modest damages or who seek equitable relief are without a remedy. Although fee waivers (and their effects) were the subject of much debate after* Evans *was decided, in recent years the issue has dropped off the radar screen. It is time for Congress to amend the Fees Act in order to resurrect section 1983 as the robust remedial law Congress meant it to be.*

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INTRODUCTION

In the second half of the twentieth century, the Civil Rights Act[1] became the paradigmatic federal remedial statute. Section 1983 held state governmental actors accountable for violating people's civil rights. Yet for many people *today*, section 1983 provides no remedy. The courtroom doors are closed to those who seek injunctive relief or lack high damages, because no lawyers will take their cases. The failure to provide these people with access to justice has largely gone unnoticed in recent years, especially in Congress. This Article calls attention to the problem by declaiming last rites for section 1983.

It is beyond question that Congress intended section 1983 to benefit people who could not afford a lawyer. In 1976, Congress passed the Civil Rights Attorney's Fees Award Act.[2] The Fees Act guaranteed that even those who could not afford a lawyer would have access to the courts by virtue of the ingenious device of fee-shifting. Fee-shifting makes defendants liable for the prevailing plaintiff's attorney's fees,[3] thus creating an incentive for private lawyers to take civil rights cases even when the damages are too low to make those cases otherwise profitable. As the Senate Report on the bill noted, "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases."[4] The

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1. 42 U.S.C. § 1983 (1871). *Monroe v. Pape*, 365 U.S. 167 (1961), is credited with giving new life to a statute that had been mostly dormant for the preceding ninety years. *Monroe* both expanded the range of state action that could be challenged under section 1983 and limited the range of defenses that could be raised. *See, e.g.*, 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 2:2 (4th ed. 2006).

2. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2000)) [hereinafter Fees Act].

3. In writing about attorney's fees, one must first decide the delicate "'threshold issue of style' bedeviling courts and commentators for decades now: Of the eleven alternatives, what is the correct terminology and spelling of the payment for the work of the prevailing party's lawyer?" Gil Deford, *The Prevailing Winds After* Buckhannon, 38 CLEARINGHOUSE REV. 313, 313 n.2 (2002). I will take the majority position and use the singular possessive adjective and the plural noun. Haymond v. Lundy, 205 F. Supp. 2d 403, 406 n.2 (E.D. Pa. 2002). This is also permitted by my home circuit. *See* Ridder v. City of Springfield, 109 F.3d 288, 290 n.1 (6th Cir. 1997).

4. S. REP. No. 94-1011, at 6 (1976). Senator Edward Kennedy, who sponsored the amended version of the Fees Act, put it this way: "Long experience has demonstrated . . . that Government enforcement alone cannot accomplish [compliance with the civil rights laws]. Private enforcement of these laws by those most directly affected must continue to receive full congressional support. Fee shifting provides a mechanism which can give full effect to our civil rights laws, at no added cost to the Government." 122 CONG. REC. 31, 472 (1976). The House Report contained similar sentiments: "The effect of the [Fees Act] will be to promote the

idea—well proven in the ten years after the bill's enactment—was that fee-shifting would produce a corps of "private attorneys general" to take on illegal state action on a case by case basis, for profit.

In 1986, however, in *Evans v. Jeff D.*,[5] the U.S. Supreme Court held that defendants in civil rights lawsuits[6] could condition settlement on the waiver of the plaintiffs' attorney's fees. *Evans* gave states a powerful new defense weapon. By pitting plaintiffs against their own lawyers, defendants acting under color of state law could eliminate or greatly reduce their exposure for fees.[7] At the same time, every "*Evans* offer" accepted would deter plaintiffs' lawyers from bringing future cases because, despite the victory for their clients, the losing *lawyers* would be unlikely to take on the state again.

Twenty-plus years later, it is clear that *Evans* destroyed section 1983 as a remedy for civil rights plaintiffs with only modest damages. *Evans* foreclosed relief for those plaintiffs by driving their lawyers out of the civil rights business. *Evans* also severely limited section 1983 as a remedy for plaintiffs seeking equitable relief, by driving *their* lawyers out of the civil rights business. In both cases, *Evans* rendered the "private attorney general" an extinct species.

Evans pushed a small shockwave into the public-interest/plaintiffs' bar. Before *Evans*, many plaintiffs' lawyers (and many defense lawyers as well) had assumed that settlement offers conditioning relief on the waiver or reduction[8] of the plaintiffs' attorney's fees were unethical,[9] or were barred by the Fees Act itself.

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enforcement of the . . . civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens." H.R. REP. NO. 94-1558, at 9 (1976).

5. 475 U.S. 717 (1986).

6. Although I mean cases brought under 42 U.S.C. § 1983, much of this article applies equally to other remedial statutes with fee-shifting provisions.

7. In 1986, absent a fee waiver, a settlement would have entitled the plaintiff class to reasonable attorney's fees at market rates, payable to the "prevailing party" under the fee-shifting provisions of the Fees Act.

8. The most common form of an *Evans* offer is a lump sum offer, which forces the plaintiff and the lawyer to negotiate who will receive what share of the settlement dollars. The offer is designed to be high enough that the plaintiff cannot reject it, but low enough that the plaintiff's lawyer will be significantly underpaid.

9. Some state bar ethics boards had prohibited such offers (or had signaled tacit disapproval of them). *See Evans*, 475 U.S. at 728 n.15 (citing bar opinions from New York, Maine, and the District of Columbia, as well as one state ethics board (Georgia) that had approved the practice of simultaneous negotiations). Other states had skirted the issue, so that the practice—even if discouraged—would not subject a lawyer to discipline for making a combined merits-and-fees offer. *See, e.g.*, State Bar of Michigan, Formal Ethics Op. C-235 (1985); Connecticut Informal Ethics Op. 85-19 (1985).

In *Evans*, however, the Court rejected both claims, thus altering the balance of power in the negotiation of civil rights cases.

After *Evans*, there was a brief flurry of activity to minimize its harm. Publicly-funded legal aid lawyers and private plaintiffs' civil rights attorneys scrambled to rewrite their retainer agreements to avoid *Evans* problems. But few of those retainers were tested, and the practical and ethical issues inherent in them were never satisfactorily resolved. Ten years later, in 1996, when Congress barred Legal Services Corporation (LSC) offices from accepting attorney's fees in all cases,[10] the *Evans* problem disappeared for federally-funded lawyers. But private plaintiffs' civil rights lawyers and non-LSC public interest lawyers remain subject to settlement offers conditioned on the waiver or reduction of statutory attorney's fees.

In the first section of this Article, I review *Evans* and its effect on civil rights practice in the two decades since its publication. In the second section, I describe the plaintiffs' bar's efforts to contract around *Evans*, and I explain why those efforts were unsuccessful. In the third section, I address the special problem of injunctive relief. In the fourth section, I describe changes since *Evans* that have made civil rights cases even less attractive to private plaintiffs' lawyers, and I briefly review the available data on civil rights filings. In the last section, I address how Congress can revive the Fees Act to restore the benefits of pre-*Evans* practice and breathe new life into section 1983.

I. *EVANS V. JEFF D.*

A. *An Overview of the Case*

Evans is now old enough that many readers will have forgotten its specifics. The Idaho Legal Aid Society filed suit against state officials on behalf of a class of disabled children. The plaintiffs' core claims

10. From the start, the Legal Services Corporation Act restricted the use of LSC funds. *See* 42 U.S.C. §§ 2996e–2996f (1974). More restrictions were added over the years. In 1996, an unusually hostile Congress imposed sweeping new restrictions, limiting the practice of LSC lawyers. The 1996 amendments barred LSC offices from participating in class action litigation and from collecting or retaining "attorney's fees pursuant to any federal or state law permitting or requiring the awarding of such fees." *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 504(a)(7), 504(a)(13), 110 Stat. 1321, 1353–54 (1996). The only restriction to have been successfully challenged was section 504(a)(16), which prohibited advocacy "to amend or otherwise challenge existing law." The Supreme Court struck down that restriction on First Amendment grounds in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

were that Idaho's educational and medical services for the children were constitutionally deficient, and thus actionable under section 1983.

The parties quickly worked out a settlement as to the educational services, and counsel signed a stipulation disposing of that piece of the case. The agreement provided that each side would bear its own attorney's fees and costs incurred to that point. The district court entered an order approving the partial settlement.[11] The parties could not agree, however, as to the medical services, so the case went forward. As the Idaho Legal Aid Society's time spent on the case escalated, the defendants' settlement proposals always included a demand for a waiver of the plaintiffs' attorney's fees, while the plaintiffs' counter-proposals rejected any fee waiver. Indeed, the Legal Aid Society instructed its lawyer handling the case to turn down any proposal conditioned on the waiver of fees.[12]

Cross motions for summary judgment narrowed the plaintiffs' claims, but the district court eventually set the case for trial. A week before trial, the state defendants made a new proposal that offered virtually all the injunctive relief the plaintiffs had sought in their complaint, and "more than the district court in earlier hearings had indicated it was willing to grant."[13] Faced with an offer that gave the plaintiffs everything they wanted (except fees), the plaintiffs' lawyer "ultimately determined that his ethical obligation to his clients mandated acceptance of the proposal."[14] He signed the consent decree—which included a waiver of attorney's fees—"if so approved by the Court."[15]

The lawyer then asked the court to approve the settlement *except for the waiver of fees*. At the hearing on that motion, the plaintiffs' lawyer argued first that the defendants' offer exploited his ethical duty to his clients. He said that he was effectively "forced" to waive his fees or lose the ideal settlement on the merits and go forward to trial.[16] Second, he argued that a settlement conditioned on the waiver

11. *See* FED. R. CIV. P. 23(e) (requiring class settlements to be court-approved).
12. *Evans*, 475 U.S. at 722.
13. *Id.*
14. *Id.*
15. *Id.* at 722 n.5.
16. *Id.* at 723–24. *Evans* was complicated by the fact that the lead counsel was not just the plaintiffs' lawyer but also their "next friend" on the pleadings. His dual role highlighted the ethical dilemma because, as the decision-maker for the class, he would have had to negotiate with himself about the relative value of the settlement *versus* the fees. Thus, having created an

of fees violated the policy underlying the fee-shifting provisions of the Fees Act.

The defendants countered that the settlement was no different from any other commercial settlement involving the expenditure of state funds. That is, they claimed that the promised medical services were *not* required by law, but the defendants were willing to provide them to put an end to the litigation and to cap the state's costs. The plaintiffs, according to the defendants, were free to accept or reject the settlement offer, the same as in any other litigation. What the plaintiffs could not get was both the settlement *and* their attorney's fees.[17]

The district court sided with the defendants. It denied the plaintiffs' attorney's fees and issued a stay pending appeal.[18] On appeal the Ninth Circuit reversed, invalidating the fee waiver while leaving the rest of the consent decree intact. The court relied on circuit precedent that "'disapproved simultaneous negotiation of settlements and attorney's fees' absent a showing of 'unusual circumstances.'"[19] The Ninth Circuit said that any other rule would violate the "strong federal policy embodied in the Fees Act," which "normally requires an award of fees to prevailing plaintiffs in civil rights actions, including those who have prevailed through settlement."[20] The court remanded the case for a determination of reasonable attorney's fees, finding that "[t]he historical background of both rule 23 and section 1983, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court."[21]

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internal conflict of interest, he had little choice but to trade Idaho Legal Aid's fees for his "next friends'" advantageous settlement.

17. *Id.* at 721–24.

18. The record is silent as to whether or not, at this point, the plaintiffs' counsel felt that he had a similar ethical obligation to drop the appeal. The situation had not changed. As long as the stay remained in effect, the class would not get the medical services the defendants had agreed to supply, only because the plaintiffs' lawyer, acting as their next friend, had chosen to appeal the case in order to win back the fees he had waived (in return for relief) in the first place. The plaintiffs' counsel sought and got emergency orders in the court of appeals requiring enforcement pending the appeal. *Id.* at 724.

19. *Id.* at 725 (quoting Jeff D. v. Evans, 743 F.2d 648, 652 (9th Cir. 1984)). The precedent cited was *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980), which had disapproved the simultaneous negotiation of merits and fees to avoid conflict between the plaintiffs and their attorneys.

20. *Evans*, 475 U.S. at 724–25.

21. *Id.* at 725 (quoting *Jeff D. v. Evans*, 743 F.2d at 652).

The U.S. Supreme Court granted certiorari because of a circuit split on this issue.[22] In a 6-3 decision authored by Justice Stevens, the Court reversed the Ninth Circuit. The Court said, first, that "Rule 23(e) does not give a court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection."[23] Thus, if the fee waiver in *Evans* violated public policy, the entire agreement was unenforceable—the court of appeals could not rewrite the consent decree to suit the court's own sense of what ought to be done. The only question, therefore, said the Court, was whether "the District Court had a duty to reject the proposed settlement because it included a waiver of statutorily authorized attorney's fees."[24]

The majority gave the plaintiffs' ethical argument short shrift, disposing of it in a single paragraph:

> [W]e do not believe that the "dilemma" was an "ethical" one in the sense that [the lawyer] had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, [the lawyer] had no *ethical* obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently. Since the proposal to settle the merits was more favorable than the probable outcome of the trial, [his] decision to recommend acceptance was consistent with the highest standards of our profession. The District Court, therefore, correctly concluded that approval of the settlement involved no breach of ethics in this case.[25]

The Court said that the defect, if any, in the negotiated fee waiver must be traced not to the rules of ethics but to the Fees Act.[26]

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22. The Ninth Circuit, in *Mendoza*, 623 F.2d at 1338, and the Third Circuit, in *Prandini v. National Tea Co.*, 557 F.2d 1015 (1977), had strongly discouraged simultaneous negotiation of merits and fees, while four circuits had permitted it, at least in some circumstances. *Evans*, 475 U.S. at 726 n.10.

23. *Evans*, 475 U.S. at 727.

24. *Id.*

25. *Id.* at 727–28 (footnotes omitted). The thorny ethical issue, of course, was not whether the plaintiffs' LSC attorneys *could* accept the offer and renounce their own fees, but whether they were *required to*. On that question, the Court's analysis was singularly unhelpful.

26. The Court noted that there was no fee agreement because the plaintiffs were minors and one of the lawyers was their next friend. "[The] special character of both the class and its attorney-client relationship . . . explains why [Legal Aid] did not enter into any agreement covering the various contingencies that might arise during the course of settlement negotiations of a class action of this kind." *Id.* at 721.

Turning to the purpose of the Fees Act, the Court found that although Congress expected the fee-shifting provision to attract so-called "private attorneys general" to vindicate the rights of people deprived of their civil rights, Congress wrote into the Act only "a statutory eligibility for a discretionary award of attorney's fees," and it gave that eligibility only to the prevailing *party*.[27] Congress did not give the *attorney* a right to the fees, nor did it intend to render them non-negotiable "any more than it intended to bar a concession on damages to secure broader injunctive relief."[28] Accordingly, the Court said that the fee-shifting provision should be viewed as simply one of "the arsenal of remedies available to combat violations of civil rights."[29]

In dissent, Justice Brennan reviewed the statutory history of the Fees Act in detail.[30] He argued that the Act's primary purpose was to induce private lawyers to handle plaintiffs' civil rights cases. In his view, that inducement must be preserved even at the cost of losing *some* settlements. He wrote that simultaneous negotiation of the merits and fees should therefore be limited to ensure that plaintiffs'

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27. *Id.* at 730.

28. *Id.* at 731.

29. *Id.* at 732.

30. *Id.* at 745–52 (Brennan, J., dissenting). The legislative history of the Fees Act is both atypically thick and unusually consistent and clear. *See* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 309–15, 364 n.422 (1990) (noting that the history is more than 300 pages long, with almost no disagreement, and that the bill passed 57-15 in the Senate and 306-68 in the House). From the statutory history, Brand identifies the Fees Act's intended "benchmarks" as (1) attracting lawyers for private enforcement of the civil rights laws; (2) increasing the number of civil rights cases by increasing access to lawyers; (3) ensuring competitive rates to accomplish (1) and (2); and (4) promoting close supervision over fee issues decided by the district courts. *Id.*; *see also* James Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976*, 29 VILL. L. REV. 597, 603–04 (1984). Perhaps the most eloquent statement of the bill's purpose was made by its original sponsor:

> The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all. Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of law. . . . But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire nation, not just the individual citizen, suffers.

122 CONG. REC. 33, 313 (1976) (statement of Sen. Tunney).

lawyers earn a reasonable fee. Of special force was Justice Brennan's concession that fees *could* still be negotiated across a considerable range, as long as the final settlement—subject to the district court's approval—provided for a reasonable fee. He thought that all the benefits of simultaneous negotiation, including the defendants' need to know the bottom line, could thus be preserved without jeopardizing the primary statutory purpose of the Fees Act: to attract lawyers to handle civil rights cases that would otherwise go unlitigated. Justice Brennan said that the Court had put its own judicial policy (to promote settlements in order to reduce dockets) over *Congress's* statutory policy to guarantee lawyers for civil rights plaintiffs.[31]

Justice Brennan's concern was that once the practice of negotiating fee waivers had the Court's *imprimatur*, defense counsel would invariably use it. Indeed, he thought that defense lawyers would be "remiss *not* to demand that the plaintiff waive statutory attorney's fees," and he predicted that "in the future, we must expect settlement offers routinely to contain demands for waivers of statutory fees."[32] Brennan foresaw that routine fee waiver demands would drive "private attorneys general" out of the market for civil rights cases.

In the majority opinion, Justice Stevens belittled Brennan's concern:

> We are cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases. If this occurred, the pool of lawyers willing to represent plaintiffs in such cases might shrink, constricting the "effective access to the judicial process" for persons with civil rights grievances which the Fees Act was intended to provide. H.R. Rep. No. 94-1558, p. 1 (1976). That the "tyranny of small

31. *Evans*, 475 U.S. at 755–66. Both at the time and since, commentators have strongly supported Justice Brennan's view that in *Evans* the Court ignored or understated the primary purpose of the Fees Act—to enforce the civil rights acts by inducing private lawyers to take cases that they otherwise could not afford to accept. *See, e.g.*, Brand, *supra* note 30, at 363; Daniel L. Lowery, *"Prevailing Party" Status for Civil Rights Plaintiffs: Fee-shifting's Shifting Threshold*, 61 U. CIN. L. REV. 1141, 1446 (1993); Jay H. Krulewitch, Note, *Anatomy of a Double Whammy: The Application of Rule 68 Offers and Fee Waivers of Civil Rights Attorney's Fees under Section 1988*, 37 DRAKE L. REV. 103, 105, 128 (1987/1988); Randy M. Stedman, Note, Evans v. Jeff D.*: Putting Private Attorneys General on Waiver*, 41 VAND. L. REV. 1273, 1289 (1988).

32. *Evans*, 475 U.S. at 758.

> decisions" may operate in this fashion is not to say there is any reason or documentation to support such a concern at the present time. Comment on this issue is therefore premature at this juncture. We believe, however, that as a practical matter the likelihood of this circumstance arising is remote.[33]

More than two decades later, we can see whose crystal ball was clearer. If anything, Justice Brennan was too sanguine, and Justice Stevens was just plain wrong. Although we lack an absolute empirical answer,[34] there is much evidence (and near unanimity within the plaintiffs' bar) that *Evan*s killed section 1983 as a remedial statute for plaintiffs in need of private lawyers to litigate civil rights cases involving only modest damages or equitable relief. Today the "tyranny of small decisions" is the ruling order. Upon reflection, and as Justice Brennan and a host of commentators[35] foresaw, this result is wholly unsurprising.[36]

B. The Effects of Evans *Since 1986*

1. What Section 1988 Was Supposed to Do—The "American rule" on attorney's fees has long held that parties should bear their

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33. *Id*. at 741 n.34 (majority opinion) (citation omitted).

34. No one has done a formal long-term empirical study of this issue, but Julie Davies interviewed some thirty-five plaintiffs' civil rights lawyers in 1996–97 to try to get a handle on the effect of *Evans* and other cases that had made winning attorney's fees more difficult. *See* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HAST. L.J. 197 (1997). Her conclusion was that most civil rights cases are treated no differently from other tort cases, and that therefore unless the plaintiff has substantial damages, the plaintiff will not find a lawyer to represent him. *Id.* at 261–67. *See also* Daniel Nazer, Note, *Conflict and Solidarity: The Legacy of* Evans v. Jeff D., 17 GEO. J. LEGAL ETHICS 499, 537–38 (2004) (agreeing with Davies as to the private bar, but arguing that *Evans* had a less pronounced effect in non-profit settings). Both authors understate the effect of *Evans* to the extent that they report that demands for fee *waivers* are relatively rare. In practice it is nearly always fee *reductions* that preclude plaintiffs' lawyers from making money on civil rights cases, not full fee waivers. *See infra* Part II.

35. *See, e.g.*, David Paul Enzminger, Case Note, *Waive Goodbye to Law in the Public Interest: The Use of Coercive Waivers in Civil Rights Actions,* Evans v. Jeff D.*, 475 U.S. 717 (1986)*, 19 ARIZ. ST. L.J. 749 (1987); F. Allen Phaup II, Case Note, Evans v. Jeff D.*: Putting the Squeeze on Private Attorneys General*, 9 GEO. MASON L. REV. 389 (1987); Debra Watts McCormick, *The Effect of* Evans v. Jeff D. *on Civil Rights Litigation*, 12 OKLA. CITY U. L. REV. 415, 416 (1987); Judy Elledge, Note, Evans v. Jeff D.*: No Judicial Prohibition of Coerced Waivers of Attorney's Fees under the Civil Rights Attorney's Fees Awards Act of 1976*, 24 HOUS. L. REV. 1021, 1022 (1987); Stedman, *supra* note 31; Krulewitch, *supra* note 31; Neil M. Goldstein, Comment, *Preserving Fee-Shifting after* Evans v. Jeff D.*: Joint Attorney/Client Control of Settlement*, 11 INDUS. REL. L.J. 267 (1989).

36. What *is* surprising is that Congress has allowed the failure of the Fees Act to persist for two decades.

own costs of litigation. An exception developed, however, where a plaintiff's success established or vindicated important public rights.[37] The plaintiff was said to have acted as a "private attorney general" not just for the plaintiff's own benefit but in the public interest.[38] By the 1970s, U.S. courts were beginning to award attorney's fees in such cases, even if the underlying statute did not contain a fee-shifting provision. In 1975, however, in *Alyeska Pipeline Service Co. v. Wilderness Society*,[39] the U.S. Supreme Court put a halt to that practice. The Court held that only Congress, and not the courts, could change the American rule and authorize fee-shifting.

Congress reacted swiftly, passing the Civil Rights Attorney's Fees Awards Act in 1976.[40] The Fees Act permitted courts to award reasonable attorney's fees (at market rates) to prevailing plaintiffs in civil rights actions. The statutory history of section 1988 made clear that its purpose was to guarantee enforcement of the Civil Rights Act through the "private attorneys general" model.[41] The Congressional Record was filled with comments by the bill's supporters that without fee-shifting the poor and underprivileged would have legal rights without a remedy: absent fee-shifting, the courthouse door would be barred to them.

2. Damages Cases: Comparing Fee-Shifting to the Normal Tort Regime—In thinking about the effect of *Evans*, it is useful to look at the conventional tort regime that matches plaintiffs with tort lawyers

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37. For a useful review of the development of this exception to the American rule, see Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 666 (1974).

38. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), the Court had held that a prevailing plaintiff under Title II of the Civil Rights Act of 1964 should ordinarily recover fees unless special circumstances rendered such an award unjust—even though on its face the Act made the granting of fees discretionary with the district court. The Court said that when the Act was passed, Congress knew that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. Such litigation "is thus private in form only," because if a plaintiff obtains relief, he does so "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.* at 401–02. The term "private attorney general" has been traced back to Judge Jerome Frank in *Associated Industries of New York State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). *See* David Shub, Note, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 708 n.10 (1992).

39. 421 U.S. 240 (1975).

40. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2000)).

41. In *Evans*, Justice Brennan said the statutory history established the point with "monotonous clarity." Evans v. Jeff D., 475 U.S. 717, 749 (1986) (Brennan, J., dissenting). *See also* Brand, *supra* note 30, at 309–15.

through the marketplace.[42] In most tort cases, where fee-shifting is not part of the equation, plaintiffs' lawyers are paid on a contingent fee basis. The lawyer must therefore do a careful cost–benefit analysis to determine if she[43] can make money on a case. The lawyer knows she will have to pay the litigation expenses up front, and she assumes she will be paid (in the form of a contingent fee) only if she wins a favorable verdict or settlement.[44] Most plaintiffs' lawyers therefore will not take a contingent-fee case unless: (1) the claim is strong enough to give the defense reasonable pause about going to trial; and (2) the damages are high enough that the lawyer's contingent share of any settlement will pay a reasonable return on what the lawyer has invested in the case, at the point when settlement is likely to occur.

At bottom—from the perspective of plaintiffs' lawyers—there are just four categories of contingent tort cases, which can be set out in the following rough matrix:

1. Good Liability/Good Damages	3. Bad Liability/Good Damages
2. Good Liability/Bad Damages	4. Bad Liability/Bad Damages

I will briefly review the four categories, the choices the plaintiff's lawyer must make with each, and how fee-shifting laws like section 1988 change the calculation.

Category One: Good Liability/Good Damages—The good-liability/good-damages case is the case every tort lawyer wants. Although the lawyer always has some small risk of an outright loss (or of her client being risk-averse and accepting a settlement below the

42. For this discussion I assume that the civil rights plaintiff is seeking damages, and not just injunctive relief. I discuss injunctive relief in Part III, *infra.*

43. For the sake of clarity and consistency, throughout this discussion I will use the singular masculine pronoun "he" when referring to the client, and the singular feminine pronoun "she" when referring to the lawyer. Because there are usually multiple defendants (and often multiple defense lawyers) in a case, I will refer to the defendants and their counsel using the plural pronoun "they."

44. The percentage of the contingent fee is controlled by state law and varies considerably. For example, Michigan caps the contingent fee in tort cases at one-third, see MICH. CT. R. 8.121(B) (1985) (setting the one-third cap on fees); MICH. RULES OF PROF'L CONDUCT 1.5 (2006) (requiring that fees be "reasonable" and enumerating factors to be considered in evaluating reasonableness), while Oklahoma permits the lawyer and client to work as equal partners, sharing the recovery 50/50. *See, e.g.*, Martin v. Buckman, 883 P.2d 185, 192 (Okla. App. Div. 4 1994) (citing OKLA. STAT. tit. 5 § 7 (1991)).

"value" of the case), the odds are high that the lawyer will earn a hefty contingent fee. Indeed, translated into hourly rates the contingent fee may strike the public and the defense bar (and often the bench) as too high.[45]

A civil rights plaintiff with a good-liability/good-damages case can therefore always find a lawyer, with or without a fee-shifting law. Fee-shifting is not necessary for this plaintiff to retain counsel because the contingent fee system takes care of him in the same way that it takes care of non-civil-rights tort plaintiffs with good-liability/good-damages claims. No *extra* inducement is needed for the lawyer to take the case because the competition for good-liability/good-damages cases is always keen: lawyers line up for them.[46]

Category Two: Good Liability/Bad Damages—The good-liability/bad-damages case, whether in tort or civil rights, is almost never accepted by the plaintiffs' bar. The plaintiff's lawyer has little bargaining power because the claim is not worth much. This is no secret—the defense attorneys, too, know that the claim is not worth much, and the defense can put great pressure on the plaintiff's lawyer by running up her hours with motions and discovery. Very soon every extra hour that the plaintiff's lawyer puts into the case is an hour lost, as the lawyer's time exceeds the value of the contingent percentage of any reasonable settlement or verdict.[47] In effect, the defense can paper the plaintiff's lawyer to death, until she has no choice but to cut her losses. The more successful or seasoned the plaintiff's lawyer, the less likely she is to accept a good-liability/bad-damages case in the first instance.[48]

For this category, fee-shifting radically changes the client's ability to hire a lawyer. With a fee-shifting regime in a good-liability/bad-

45. The justification for the high fee is that it is a reward for the risk that the plaintiff's lawyer takes. Even with good-liability/good-damages cases, *some* of the cases may still be lost or settle at a loss, after the lawyer has spent a lot of time and money on them.

46. Competition for clients takes the form of aggressive advertising—or elaborate displays of past success—rather than *price* competition. I have yet to see a lawyer's ad that read, "Lowest percentage on the market—will not be undersold."

47. Occasionally a novice tort lawyer might get stuck with one of these cases. Having no other work to do, she might foolishly say yes to a case that will cost more to litigate than she can recover. The lesson will be painful and one not soon forgotten.

48. One exception to this generalization is the overwhelmingly strong case with low damages, which a lawyer might accept on the theory that she can get a quick settlement for very little work. Such a case may settle even before the filing of a lawsuit. But the prototypical good-liability/bad-damages case is rejected out of hand by the private bar, because litigation costs will exceed any likely recovery.

damages case, the lawyer expects to be paid not from a percentage of the settlement or verdict but *by the defendants* pursuant to the fee-shifting law. The lawyer who takes the case expects to win (good liability), and expects to earn a reasonable hourly rate for her services, paid by the defendants. In short, the "private attorneys general" model is the only way a client with a good-liability/bad-damages case is ever going to find a lawyer, because without fee-shifting, there is no market for his case.

Category Three: Bad Liability/Good Damages—The bad-liability/good-damages case is a high-risk proposition for a plaintiffs' lawyer. Often the defense will not consider settlement unless or until the plaintiff has survived summary judgment. Even after summary judgment, the defendants may choose to go to trial because they have several bites left at the apple: they can win a directed verdict, a jury verdict at trial, a judgment notwithstanding the verdict, or a reversal of the denial of summary judgment or of an adverse verdict on appeal. The litigation costs will likely be very high. Therefore, unless the damages are extraordinarily high, most experienced lawyers will avoid such cases, knowing that they can become sinkholes of costs. (Recall the environmental lawsuit described in *A Civil Action*[49]—a classic bad-liability/good-damages case that destroyed the firm and bankrupted the plaintiffs' counsel.)[50] In most bad-liability/good-damages cases, the plaintiff will not be able to find a lawyer, because even a quick cost–benefit analysis will confirm that the lawyer cannot make money on the file.

Fee-shifting also has virtually no effect in bad-liability/good-damages cases: whether in the end a lawyer says yes or no to the case, the availability of *statutory* attorney's fees is largely irrelevant. The consenting lawyer knows that the case probably will not settle quickly or easily (because of the bad liability), and that if the plaintiff loses, the lawyer will earn nothing. The bait that lures the rare lawyer to such a case is not the incentive of fee-shifting but the possibility of getting a percentage of a huge verdict or settlement. It is the far-

49. JONATHAN HARR, A CIVIL ACTION (Jonathan Harr & Marty Asher eds., Random House 1995).

50. It is worth noting, however, that category three (bad-liability/good-damages) cases that get past summary judgment might settle. The combination of high transaction costs and high exposure for the defense, together with the plaintiff's risk of non-recovery, can be a recipe for settlement, because both sides have reason to compromise.

above-market-rate payout, not reasonable attorney's fees, that draws a lawyer to take this type of case—if a lawyer can be found at all.

Category Four: Bad Liability/Bad Damages—Only a *pro se* litigant or a foolhardy lawyer files a bad-liability/bad-damages case. The odds of winning are too low for the plaintiff ever to prevail, and the damages are too low to support a pure contingent fee, even if a miraculous victory were to occur. No plaintiff with a bad-liability/bad-damages *civil rights* case can find a lawyer, with or without a fee-shifting law, because there is no market for it.

3. Lessons from the Matrix—This simple matrix clarifies the obvious: without fee-shifting, tort plaintiffs typically are only able to find counsel if their lawsuit fits category one (and rarely category three) above. *Without good damages, the market for legal services is closed to tort plaintiffs*. They must abandon their claims or proceed *in pro per*. The matrix illustrates that a fee-shifting statute like section 1988 only serves as a significant inducement to lawyers in good-liability/bad-damages cases, because only in that category does the plaintiff's lawyer *expect* to be paid through a fee award. Fee-shifting serves little or no purpose in the other three categories, because in each the plaintiff can already secure a lawyer through the contingent fee system, or the plaintiff cannot secure a lawyer at all, even with fee-shifting.

Congress passed section 1988 to induce "private attorneys general" to represent plaintiffs whose civil rights were violated. But in the good-damages cases, lawyers do not need fee-shifting laws to entice them to take cases because the contingent fee system already entices them with superb market efficiency. Therefore the target population of section 1988 *had* to be people with meritorious claims who otherwise could not find a lawyer to represent them and for whom fee-shifting would make a difference—those whose rights had clearly been violated but who suffered low or modest damages.[51]

This makes perfect sense. When Congress attaches a fee-shifting provision to a remedy-creating law, it sends a strong message. Congress is saying that the rights secured by the law are important enough that the injured plaintiff should be compensated and the legal

51. Obviously the same argument applies with even more force to cases seeking only declaratory or injunctive relief. But for fee-shifting, plaintiffs seeking equitable remedies would not find private counsel to represent them. *See infra* Part III.

wrong righted, even if the dollar value of the harm is relatively low. Tort laws make plaintiffs shop in the market for a lawyer, where most meritorious but low-value cases will go unclaimed. But laws like the Civil Rights Act, by virtue of their fee-shifting provisions, are to be enforced regardless of whether or not the market would otherwise enforce them.

Fee-shifting also makes the most sense as public policy in good-liability/bad-damages cases. Where Congress has rejected the American rule and granted the prevailing plaintiff an entitlement to attorney's fees from the losing defendants, the underlying cause of action typically involves significant legal rights or litigation between parties of unequal power. Most federal fee-shifting statutes, like section 1988, are attached to laws that address major public issues like civil rights, discrimination, consumer protection, or unfair action by the government.[52] The cases tend to be ones where we view the *right* itself as important, even if the harm—measured in terms of money damages—is often relatively small. Put concretely, Congress wants rogue cops, or discriminating corporations, or predatory lenders, to be held accountable for these important civil wrongs and to be deterred by the threat of litigation, even in cases where the money damages are modest.[53]

At bottom, these statutes are intended to regulate behavior. The vehicle to deter the unwanted behavior is the private lawsuit: the defendants risk having to pay the plaintiff a judgment *and* his attorney's fees if the defendants defend and lose. In a good-liability/bad-damages case, that statutory incentive can only work if the defendant is forced to pay the plaintiff's attorney's fees. Otherwise the damages alone are too low either to induce plaintiffs' counsel to bring the case or to deter the unwanted conduct. Without the risk of having to pay attorney's fees, the defendants will either

52. By 1985, Congress had already passed more than 100 fee-shifting statutes. *See* Marek v. Chesny, 473 U.S. 1, app. 43–51 (1985) (Brennan, J., dissenting) (listing and categorizing federal fee-shifting laws).

53. In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the Court held that prevailing plaintiffs can recover their full attorney's fees even where the fees far exceed the amount of the damages. "Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private cases, to depend on obtaining substantial monetary relief." *Id.* at 575. Courts routinely award full attorney's fees to plaintiffs who prevail at trial even where the fees are ten-to-forty times the amount of the damages. *See* MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, POLICE MISCONDUCT LAW AND LITIGATION § 14:2 (3d ed. 2003) (listing examples of low-damages/high-fees awards).

never be sued at all, or they will view the low damages as an acceptable (and deductible) cost of their illegal conduct, happily paying for their sins.

4. *Evans* Effects—Because fee-shifting attracts plaintiffs' lawyers only in good-liability/bad-damages cases, the harm caused by *Evans* is more serious than would appear at first glance. Before *Evans*, fee-shifting guaranteed that a good-liability/bad-damages civil rights plaintiff could find a lawyer to represent him and to vindicate his rights. The legal wrong would be righted as Congress intended; the plaintiff would be made whole and the lawyer would earn a living at market rates for her socially useful work. After *Evans*, the defendants can argue persuasively (in a good-liability/bad-damages case) that their settlement offer is great for the plaintiff, and that the only obstacle to settlement is the hourly fee claimed by the plaintiff's attorney. The defendants will pay the plaintiff everything—a small sum—if the attorney will walk away from (or reduce) her fee. All the bargaining power rests with the defendants, and the plaintiff and his attorney are put in a position of open conflict with each other.[54]

The matrix teaches one other useful point. Although fee-shifting helps civil rights plaintiffs get lawyers only in good-liability/bad-damages cases, in the other three categories of cases *Evans* offers by the defendants *will not work*. In a good-liability/good-damages case, the lawyer's contingent fees will typically exceed any fees paid under the fee-shifting law, and therefore the defense cannot plausibly offer a settlement that does not include significant fees. The fee-shifting act will be irrelevant, because the pattern of bargaining will mimic the pattern of bargaining that would occur in any good-liability/good-damages tort case where fee-shifting is not available.

In a bad-liability/good-damages case, the *Evans* offer will be equally irrelevant. The rare plaintiffs' lawyer who takes such a case does so not for the hourly fee, but for the chance at a big verdict or settlement. As with a category-one case, as long as a third of the

54. This conflict is different from the conflict that arises in pure contingent fee cases, because in those cases (which almost always involve high damages) the lawyer and the client go into each case *expecting* that its value will be high enough (1) to satisfy the client's wish to be made whole, and (2) to pay the lawyer a reasonable if not generous fee. Indeed, if the lawyer had thought, for example, that two-thirds of the payout would not be enough to satisfy the client and one-third of the payout would not be enough to cover her own costs and time, she would not have taken the case. And, of course, if both the lawyer and the client got it wrong, they share the loss.

settlement exceeds the value of the billable hours in the case at the point of the offer, the case will negotiate in the same way as a conventional tort case, and an *Evans* offer will be futile. Of course, in a good-damages case, the contingent fee will normally exceed the total billings at the point of serious negotiation; indeed, that would be the very calculation that led the lawyer to accept the case in the first place. Finally, in a bad-liability/bad-damages case, there will be no lawyer at all, and thus no *Evans* negotiation will occur.

5. Summary—Two propositions result: (1) that fee-shifting only affects the market for plaintiffs with good-liability/bad-damages cases; and (2) that an *Evans* offer can usually be effective as a defense negotiation strategy only in good-liability/bad-damages cases. What *Evans* does, then, is to reverse the rationale for fee-shifting. It deprives plaintiffs of lawyers in the one category of civil rights cases where fee-shifting is needed to attract lawyers by guaranteeing that lawyers will not be able to make money on those cases. At the same time, it potentially delivers *extra* money in the form of fee awards or higher fee settlements to plaintiffs and their lawyers in cases where the lawyers would have taken the cases even without the added inducement of fee-shifting.[55] *Evans* thus inverts the logic of fee-shifting laws and completely undermines their purpose.

Before *Evans*, if state officials clearly violated a person's constitutional rights, the plaintiffs' bar would step forward to right the wrong, even if the damages were quite low. Today no plaintiffs' lawyer will touch such a case.[56] The litigation costs are too steep.[57] The possibility of an interlocutory appeal (on the issue of qualified

55. If fees are awarded post-verdict, the plaintiff and the lawyer may both recover more in a case the lawyer would have taken on a contingent basis anyway. To the extent that the defendants pay even a small premium in settlement for the risk of having to pay attorney's fees, the settlement is higher than it would otherwise have been in a case where no inducement was needed to recruit the lawyer at the start.

56. Julie Davies's conclusion, based on a more systematic inquiry, was much the same; although the lawyers she talked to did not identify *Evans* as the obstacle to their practice, most assumed that they could not make money on a good-liability/bad-damages case. *See* Davies, *supra* note 34, at 199–200, 217–18. *See also* Nazer, *supra* note 34, at 537.

57. Before *Evans*, a law school clinic like mine could routinely refer good-liability/bad-damages fee-shifting cases to the private bar. After *Evans*, as the fallout from the case became apparent, we were unable to refer cases involving less than $100,000 in damages to the private bar. Today the private bar views an ordinary tort case and a civil rights case the same. Without good damages, the plaintiff will not be able to find a private lawyer to represent him (other than very rare *pro bono publico* representation).

immunity) only ups the ante,[58] because it means that the lawyer might have to litigate in two courts before a settlement offer will be forthcoming. Any private lawyer reviewing such a case knows at once that she cannot make money on it as a pure tort case. But *Evans* means she must make the same calculation in a *civil rights* case: the damages will be far below the lawyer's projected costs and billable hours, and the prospect of an *Evans* offer—granting full but modest damages in return for a waiver or reduction of fees—will be close to certain.

To be blunt, *Evans* changed the calculation of what a case is worth. Before *Evans*, if the damage claim was worth $10,000 and the attorney time was going to be, say, $40,000, then the defense thought of the case as a $50,000 case—that was the true measure of the defendants' exposure. Settlement proceeded accordingly, perhaps with the damage figure discounted for the risk of a "no cause" or a low verdict at trial. But it was hard for defense counsel in negotiations to discount the attorney's fees to the same extent that they discounted the claim on the merits, because even if the plaintiff won only $7,000 instead of $10,000 at trial, the plaintiff's lawyer would still be entitled to the same $40,000 in fees.[59] The only way to curtail the attorney's fees was to settle *early*, before the plaintiff's side had expended many billable hours.

Before *Evans*, the fee-shifting statute therefore had its intended effect *even in negotiation*. Defense counsel had to think of the merits claim and the fee claim in different terms, and had to discount them differently. The defense also had a powerful incentive to settle early, before the plaintiff's fees mounted. After *Evans*, defense lawyers stopped thinking about the value of the fee claim, because the defense could always cut the plaintiff's lawyer out with a good settlement offer conditioned on the waiver of fees. In a post-*Evans* world, a $10,000 claim with a seventy percent chance of success and $40,000 in attorney's fees yields an offer much closer to $7,000 than to $47,000, because defense counsel no longer has to think of the attorney's fees as a realistic exposure. The defense also has no incentive to settle early. To the contrary, the defense incentive after *Evans* is to stall

58. In a civil rights case, defendants are permitted to file an interlocutory appeal on the issue of qualified immunity. *See* Mitchell v. Forsythe, 472 U.S. 511, 530 (1985). Such an appeal can add 18 months and tens of thousands of dollars to the lawyer's litigation costs.

59. *See* City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) (holding that attorney's fees need not be proportional to the amount of damages).

settlement, because the higher the plaintiff's billable hours, the more leverage *the defense* has, as the plaintiff's lawyer becomes desperate to stem the bleeding.[60]

In sum, *Evans* allowed defense counsel to treat civil rights cases the same as other tort cases. And once the mind-set of defense counsel changed, the mind-set of plaintiffs' lawyers changed as well. They internalized the defense message, gradually learning that without high damages they were wasting their time. The defense would always offer a settlement the plaintiff could not refuse, but that would leave the lawyer with little or nothing to show for her work. Congress's efforts to improve the market for legal services for civil rights plaintiffs was undone by *Evans*, because it put civil rights cases on the same footing as conventional tort cases, in which fee-shifting was not available. Justice Brennan was right: even private plaintiffs' lawyers with high ideals have to earn a living, and therefore the long-term effect of *Evans* should have been "embarrassingly obvious,"[61] despite the majority's protestations.[62]

II. EFFORTS TO CONTRACT AROUND *EVANS*

In the years after *Evans*, the Legal Services community spent considerable conference time—and spilled a fair amount of ink—trying to come up with an *Evans*-proof retainer agreement. The problem was caused not by *Evans* alone but by the perceived tension between *Evans* and the ethics rules.[63] Rule 1.7(b) of the Model Rules

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60. Moreover, if the defendants are represented by salaried lawyers from the state attorney general's office, the incentive to stall settlement is even stronger. The plaintiff's costs will keep rising with little prospect of ever being paid, while the defense costs stay flat—really at zero—because the defense lawyers will be paid their salary by the state whether they settle the case or not.

61. Evans v. Jeff D., 475 U.S. 717, 759 (1986) (Brennan, J., dissenting).

62. Other commentators have noted that the real harm from fee waivers is not to the plaintiff in the case in which the fee waiver is offered, but to the

> truly unrepresented class, who are unable to obtain legal representation to bring civil rights claims in the future. The harm is to the general public as well, which suffers not only from lax enforcement of the civil rights laws, but also from the diminishing of the deterrent impact of attorney's fees by the perception that the costs of noncompliance has been freed from the burden of [paying attorney's fees].

Kraus, *supra* note 30, at 625. *See also* Margaret Annabel de Lisser, Note, *Giving Substance to the Bad Faith Exception of* Evans v. Jeff D.*: A Reconciliation of* Evans *with the Civil Rights Attorney's Fees Awards Act of 1976*, 136 U. PA. L. REV. 553, 568 n.89 (1987).

63. *See, e.g.*, Peter H. Woodin, Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After* Evans v. Jeff D., 87 COLUM. L. REV. 1214, 1230 (1987) (arguing that even after *Evans* state ethics boards should have prohibited fee waiver demands, based solely on the ethics rules).

of Professional Conduct says: "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected, and (2) the client consents after consultation."[64] Additionally, Rule 1.2(a) of the Model Rules clarifies that the client, and the client alone, has the authority to settle a case: "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."[65]

Accordingly, when defense lawyers made an *Evans* offer (giving the plaintiff nearly everything on the condition that he waive or reduce his statutory attorney's fees), the plaintiff's lawyer could *recommend* that her client decline the offer, but the lawyer could not veto the client's decision to accept it.[66] Most lawyers and commentators agreed that a retainer agreement could not overtly take away the client's right to accept a settlement—and give that right to the lawyer—without violating Rule 1.2 or creating an impossible conflict of interest under Rule 1.7.[67] Creative plaintiffs' lawyers therefore floated several ideas to protect themselves or their public interest law offices from *Evans* offers.

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64. I will refer only to the Model Rules, because, since their adoption by the ABA in 1983, they have largely supplanted the Model Code of Professional Responsibility that preceded them. As of 2007, nearly all fifty states had replaced ethics codes based on the Model Code with ethics codes based on the Model Rules, and the few exceptions had modified their codes to reflect Model Rules provisions. *See* JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 319 (abridged ed., 2006–2007).

65. MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2002).

66. One can argue that public interest plaintiffs' lawyers cannot even *recommend* against acceptance of such a settlement without creating a conflict of interest. (The Idaho Legal Aid Society lawyer in *Evans* itself was a forceful and eloquent advocate for this position.) Others have disagreed, arguing that public interest plaintiffs' lawyers should not be in any worse position than other plaintiffs' lawyers, and of course private tort lawyers routinely recommend that their clients reject settlements when the lawyers think they can make more money from the case by taking it to trial. *See* Nazer, *supra* note 34, at 520–21; Comm. on Prof'l and Judicial Ethics of the N.Y. City Bar Ass'n, Eth. Op. 1987-4, 5 (1987) (reversing the previous bar on fee waivers in light of *Evans*, but with a strong minority report arguing that public interest plaintiffs' lawyers should not be held to a different ethical standard than private plaintiffs' lawyers).

67. *Compare* Goldstein, *supra* note 35, at 291–95 (arguing for coercive retainer agreements and downplaying their ethical problems) *with* Nazer, *supra* note 34, at 519 (noting that in the 1990s bar ethics opinions from Connecticut, North Dakota, Utah, and the District of Columbia prohibited retainer contracts that limited a client's ability to accept a settlement offer, including a condition that an offer must be rejected if it does not include reasonable fees or preserve the right to seek reasonable fees). California, on the other hand, approved such a retainer contract. *See* State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1994-136 (1994).

A. *The Goldstein Proposal*

In 1986, Steven M. Goldstein proposed a fee contract for LSC lawyers that prohibited the simultaneous negotiation of the merits and the fees of a case and that required judicial review of any settlement that paid less than a reasonable fee.[68] The problem with Goldstein's proposal was that it could not bind the defense attorneys who would be making the *Evans* offer, nor could it bind the court to review such a settlement.[69]

Moreover, Goldstein's proposal did not solve the *Evans* problem because his retainer agreement was unenforceable in practice.[70] If the plaintiff accepted the *Evans* offer and deprived the lawyer of her reasonable fee despite having promised not to do so, the plaintiff's lawyer had little recourse. The lawyer could withdraw from the case,[71] but withdrawing would not get her the money she was owed (and that she had expected to be paid by the defendants pursuant to the fee-shifting law when she agreed to represent the plaintiff).[72]

The plaintiff's lawyer would be left with a contract claim against her own client. Even if she sued, she could recover only whatever remained of the client's small settlement—an amount that by definition (in a good-liability/bad-damages case) would be less than what the lawyer had spent on the case. The lawyer would have the time and expense of a second lawsuit on her hands, against her own uncollectible client. She would have the moral high ground but a boatload of misery.

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68. *See* Steven M. Goldstein, *Settlement Offers Contingent Upon Waiver of Attorney Fees: A Continuing Dilemma after* Evans v. Jeff D., 20 CLEARINGHOUSE REV. 692, 699–701 (Oct. 1986).

69. The fact that *the plaintiff and his lawyer* agreed to negotiate the issues separately, or agreed to get the court's approval after the fact if the lawyer were underpaid, could not control or even influence the defense bar's conduct or the court's actions.

70. *See id.*

71. Under MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2002), attorneys can only withdraw in certain situations. Disagreement about settlement may not be enough to get out of a case, even if the settlement results in the lawyer being paid less than she had hoped to be paid. And once a case is filed, the lawyer may also need the judge's permission to withdraw, which is not always or easily forthcoming. *Id.*

72. The judge hearing the underlying case would be unlikely to referee a contract dispute between the lawyer and her client. And if the lawyer tried to sue for specific performance before the case was over, she would create a conflict that would require her to withdraw. She cannot both represent the client and be the plaintiff in a collection action against the client at the same time. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.9 (2007).

B. The Yelenosky and Silver Proposal

In 1994, Stephen Yelenosky and Charles Silver took another crack at the *Evans* problem.[73] Their retainer agreement made the plaintiff liable for the lawyer's reasonable hourly fees in full, but the lawyer agreed not to collect the debt. Instead the plaintiff assigned the fee claim to his lawyer, so that the lawyer could use the assigned claim to deal with the defendants.[74] The client got a debt but no personal liability; the lawyer got the fee claim but assumed the risk of loss if it bore no fruit.

The Yelenosky and Silver retainer treated all settlement payments as received for the benefit of the client *and* the lawyer, to be distributed between them pursuant to an allocation formula.[75] The interests of the client and the lawyer were thus joined regardless of how the defense characterized the split between damages and fees in their settlement offer.

The sticky part of Yelenosky and Silver's proposal was the formula itself, which sought to yield a fair division of the funds by linking it to the value of the damages *versus* the value of the fees at the point when the offer was made.[76] They came up with a formula that had the virtues of being easy to calculate, consistent, and fair, but its vice was that it was extraordinarily hard to explain to a client—especially to an uneducated or unsophisticated client.[77]

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73. *See* Stephen Yelenosky & Charles Silver, *A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney Fee Provisions*, 28 CLEARINGHOUSE REV. 114 (June 1994). LSC had promulgated a model retainer agreement pursuant to 45 C.F.R. § 1611.8(a) (1993), which required LSC offices and their clients to sign a written retainer agreement. Yelenosky and Silver were critical of the fee provisions of the new model agreement and wrote to offer what they thought was a better alternative. The LSC model agreement drew in part on an agreement proposed for private civil rights lawyers. *Id. See* Jeff Scott Olson, *A New Model Retainer Agreement for Civil Rights Cases: Nailing Things Down on Settled Ground*, *in* 7 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 391, 391–415 (Steven Saltzman & Barbara M. Wolvovitz eds., 1991); discussion *infra* note 76 and accompanying text.

74. Yelenosky & Silver, *supra* note 73, at 118, 135–36.

75. *Id.* at 119–123, 131–32, 135–37.

76. *See* Yelenosky & Silver, *supra* note 73, at 119–20, 131–32. As they put it,

> Because plaintiff's right to a fee award increases defendant's expected loss at trial, it increases the amount a defendant will find it economically rational to pay in settlement of the claim. . . . The size of the settlement is thus attributable partly to a client's entitlement to compensatory relief and partly to a client's entitlement to a fee award. The difficulty is in determining the portion of the payment . . . in a particular case that is attributable to [one or the other].

Id. at 120.

77. The formula read like an algebra textbook and would have been impenetrable to most LSC clients. *See id.* at 131–32.

In addition, the client would never get less than the predicted verdict—the amount the lawyer would expect the client to win at trial, discounted by the odds of winning. That was the client's floor. The floor was needed because federal regulations barred LSC offices from charging a fee at all unless the client was first fully compensated.[78]

The floor may have been required by federal law, but that exception gave skilled defense counsel all the opening needed to force an *Evans* settlement. If defense counsel could assess that number and offer it, the client should accept the offer, effectively cutting the lawyer out of any fee.[79] Accordingly, the Yelenosky and Silver contract could not prevent or counteract *Evans* offers in most cases, because federal regulations required the client to be fully compensated before the lawyer could exact her fee.[80]

Moreover, even without the LSC requirement of a "full compensation" floor, the Yelenosky and Silver proposal did little to ward off *Evans* offers in cases where a defense to the *Evans* offer was most necessary—cases where the lawyers' fees were high but the client's damages were low. In that situation, once the split favored the lawyer, there would be little incentive for the client to reject an early low offer, because over time the lawyer's share would only increase (as the lawyer put more time into the case), while the client's share would remain fixed by the static nature of his damages. With the formula's constant numerator and escalating denominator, the plaintiff would need a much higher offer down the road to improve

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78. At the time, Legal Services Offices labored under a constraint imposed by federal law that programs could not charge clients for their services and could retain moneys as fees only when the fees would not reduce the amount of damages or other relief awarded to the client. Yelenosky & Silver, *supra* note 73, at 120 n.20 (citing 45 C.F.R. §§ 1609.5, 1609.6 (1993); interpretive letters from the LSC General Counsel's Office).

79. For example, if the predicted verdict was $10,000 with a fifty percent chance of winning, the defense would only have to offer $5,000. The client would have no reason not to take it, and the lawyer would get nothing.

80. Another weakness of the proposal was that it required the *lawyer* to set two different variables in the formula: (1) the predicted verdict, expressed as a dollar figure; and (2) the odds of winning, expressed as a percentage. Both variables could have a huge effect on the resulting fees *versus* damages calculation. As the authors acknowledged, neither variable could be set with any accuracy at the start of the case, but late in the case the lawyer would have a powerful self-interest in setting the variables to her own advantage. The formula thus created a risk that the calculation of the split would be slanted against the client and in favor of the lawyer. In the end Yelenosky and Silver conceded that the client would have to rely on the good faith of the lawyer, as is true in most lawyer-client dealings. Given that Legal Aid lawyers are a self-selecting altruistic lot, and that any attorney's fees go to the program and not to the individual lawyer, Yelenosky and Silver thought the risk of a skewed formula was acceptably low. Yelenosky & Silver, *supra* note 73, at 126–27.

his position. The defense would thus still be able to get out of the case cheaply and mostly to the detriment of the plaintiff's counsel.

The Yelenosky and Silver retainer agreement was little tested for two reasons. First, it was so complicated that few LSC lawyers were willing to subject their clients to it. Second, as noted above, by 1996 LSC-funded offices were barred from handling fee-generating cases entirely.[81] As a result, the problem of how to counteract the effect of *Evans* reverted to the private plaintiffs' bar, which until *Evans* had routinely and enthusiastically accepted good-liability/bad-damages cases under section 1983.

C. The Olson Proposal

Yelenosky and Silver had based their contract in part on a model retainer agreement drafted by a private civil rights lawyer in Wisconsin, Jeff Scott Olson.[82] Like Yelenosky and Silver's contract, Olson's model agreement treated any money received as a lump sum for the benefit of the client and the lawyer.[83] But the Olson contract also contained several other provisions designed to prevent defense counsel from being able to make effective *Evans* offers. First, it assigned the fee claim to the lawyer so that the lawyer could pursue collection on her own behalf if necessary. Second, it gave the plaintiff's lawyer a lien on any funds received, to guarantee that the lawyer would be able to deduct her fee from the settlement.[84] Third, it gave the lawyer the right to withdraw from the case if the client made a "fiscally unreasonable decision" with regard to settlement, while protecting the lawyer's right to be paid *by the client for all work done up to the point of withdrawal*.[85] Finally, the contract's hourly rate included a steep contingency enhancement.[86]

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81. *See supra* note 10 and accompanying text.

82. *See* Jeff Scott Olson, *Protection, Persuasion and Proof: Toward a Model Civil Rights Retainer Agreement for the 90s*, *in* 3 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 371, 371–81 (Clark Boardman, Co. 1987). Olsen later modified his model agreement to streamline it and to resolve some of the peripheral issues that had not been addressed in the first draft. *See* Olson, *supra* note 73.

83. Olson credits the idea of "lumping" the damages and the attorney's fees to an ethics opinion that was issued after *Evans* came down. Olson, *supra* note 73, at 399–400 (citing New Mexico Bar Association Ethics Comm., Formal Op. 1985-3 (1985)).

84. *Id.* at 401–02, 408.

85. *Id.* at 405.

86. The contingency enhancement was included to account for the risk, over a series of these cases, that more often than not the lawyer would be underpaid for her services, so that the

Olson's contract, unlike Yelenosky and Silver's, did not have a floor that guaranteed the client *any* level of recovery, because none was compelled.[87] Thus, under Olson's agreement, the lawyer's fee could consume the entire settlement fund. Indeed, in good-liability/bad-damages cases, the lawyer's fee would nearly always do just that. The client's only recourse would be to refuse to settle, thus forcing the lawyer either to renegotiate the split or to take the case to trial against the lawyer's wishes.[88]

Olson understood that in a post-*Evans* world, what the plaintiffs' bar needed was not a remedial hammer for the client's breach of the retainer agreement, but a built-in financial "lock" that would preclude the client from accepting an *Evans* offer in the first place. The Olson contract averted *Evans* offers by the simple expedient of making the client liable for the *full* amount of the attorney's fees if the client tried to cut the lawyer out.[89] At bottom, the Olson contract created an overwhelming economic incentive for the client always to do what his lawyer wanted him to do. The client had no choice but to reject any offer that did not pay the lawyer a reasonable fee for the time she had invested in the case.

The Olson scheme had obvious objections. First, the fee contract itself undermined the purpose of fee-shifting laws.[90] The purpose of such laws is not just to find lawyers for plaintiffs with modest damages (or to deter unwanted conduct), but also to make injured plaintiffs whole. A scheme that benefits plaintiffs' lawyers at the expense of their clients undercuts that goal.[91] Second, plaintiffs' lawyers might justifiably fear that the Olson contract violated state ethics rules on unreasonable fees. In looking at the reasonableness of a fee, a bar

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"normal market rate" was not a true measure of the lawyer's costs over time. *Id.* at 397–98, 407, 413.

87. *See id.* at 400–01.

88. One could argue that the real point of the Olson contract was to force plaintiffs to go to trial in *all* good-liability/bad-damages cases, so that their lawyers would get paid by full-fee awards post-verdict, and not *via* settlement. But few private plaintiffs' counsel have the energy or resources to keep a practice alive in which every case must go to trial in order for the lawyer to be paid. The result would be no different than under the *Evans* regime: plaintiffs' lawyers would soon shun the good-liability/bad-damages cases.

89. *See* Olson, *supra* note 73, at 401, 407–08.

90. This objection was flagged by Goldstein, *supra* note 68, at 694 n.8.

91. No doubt Olson believed that the choice after *Evans* was either no lawyers to represent civil rights plaintiffs (in good-liability/bad-damages cases) or lawyers who could coerce their clients into rejecting settlements that would deprive the lawyers of reasonable fees. For Olson, the fault lay with the Court's decision in *Evans* and what logically flowed from it, not with the plaintiffs' bar.

grievance commission typically does not make its determination in a vacuum, based only on the time and effort the lawyer has expended.[92] Rather, it makes its determination in context, including *the amount* recovered by the plaintiff, or other measures of the success of the litigation. If the fee contract is structured so that, in good-liability/bad-damages cases, the client is certain to come away with very little, and the lawyer is certain to come away with a lot, the lawyer might reasonably fear disciplinary action for charging excessive fees.[93]

D. Reading the Market

One might think that the Olson contract—with its one-sided protections for plaintiffs' counsel—would have resolved the *Evans* problem and kept private plaintiffs' lawyers as eager to litigate good-liability/bad-damages cases after *Evans* as they had been before. But that did not happen.

The plaintiffs' bar's lack of faith in—or distaste for—an *Evans*-proof retainer is best borne out by the market response to *Evans*. Plaintiffs' lawyers did *not* keep taking good-liability/bad-damages cases assuming that they could contract their way around the *Evans* problem.[94] To the contrary, they stopped taking the cases because they had no choice. A straight contingent fee was out of the question. If plaintiffs' lawyers used the Yelenosky and Silver contract, they would still get burned because smart defendants would offer, and smart plaintiffs would accept, early low settlements, and the lawyers would be cut out or underpaid. And if plaintiffs' lawyers went with an Olson-style contract, they would wind up with most or all of the

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92. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5 (2006). This is true even in the context of criminal cases, where there is no possibility of monetary recovery. *See, e.g.*, *In re* Kutner, 399 N.E.2d 963 (Ill. 1979); *In re* Fordham, 668 N.E.2d 816 (Mass. 1996).

93. The Olson model fee contract increased the risk of a Rule 1.2(a) violation because it included a "springing" contingency fee; at the end of the case the lawyer could elect either the agreed-upon hourly rate *or* a contingent fee, whichever was higher. That way the lawyer would be sure to get a share of any jackpot if the case produced an unexpectedly high verdict or settlement. *See also* Philadelphia Bar Assoc'n Ethics Comm., Formal Op. 2001-1 (2002) (holding that a contract that punishes a client financially for settling when the lawyer wishes not to settle or for not settling when the lawyer wishes to settle usurps the client's exclusive right to make the decision on settlement).

94. As Justice Brennan noted in *Evans*, "Of course, none of the parties has seriously suggested that civil rights attorneys can protect themselves through private arrangements. After all, Congress enacted the Fees Act because, after *Alyeska*, it found such arrangements wholly inadequate." Evans v. Jeff D., 475 U.S. 717, 757 n.10 (Brennan, J., dissenting).

settlement money, but with very unhappy clients; or they would have to try every case. They might also face ethics charges, because in any good-liability/bad-damages cases that settled, the lawyers should have known at the start that they would get nearly everything and that the clients would get almost nothing.

The dried-up market strongly suggests that contract-cures for the *Evans* problem were unreliable or unsavory enough that few lawyers wanted to use them.[95] The result was that section 1988 became a dead letter for the one category of cases it was intended to induce private lawyers to take—good-liability/bad-damages cases. In the years after *Evans*, apart from the rare *pro bono* case, private lawyers simply stopped handling good-liability/bad-damages cases.

The only lawyers left who *could* afford to handle such cases were salaried lawyers who did not have to rely on attorney's fees for their livelihood. But lawyers who work for public interest law offices with independent funding normally do not handle *individual* civil rights actions, because the agencies they work for focus on larger social or political issues.[96] Their legal work typically takes the form of class actions challenging unconstitutional state laws or policies in cases seeking equitable relief.

III. THE PROBLEM OF INJUNCTIVE RELIEF

Many good-liability/bad-damages cases are, like *Evans* itself, not damages cases at all. Rather, the plaintiffs seek injunctive relief in the form of a change of governmental policy.[97] In these cases, the state defendants have great leverage. As in *Evans*, they can offer broad and flexible relief in return for a waiver or reduction of attorney's fees.[98]

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95. The issue disappeared from the LSC literature after 1996, when LSC field offices were prohibited from seeking attorney's fees. *See supra* note 10 and accompanying text.

96. To the extent that non-profit legal service providers handle individual civil rights damages claims, the dynamics of settlement under *Evans* are the same as described above. The difference is that a non-profit law office can much more easily agree to a reduced fee because the lawyers do not need the fees to put food on the table. If the health of the agency is jeopardized by a lack of funding, however, then one would expect to see the same thing seen in the private sector: movement away from cases with low or modest damages. *See, e.g.*, Nazer, *supra* note 34, at 535–38.

97. In the following sections, I will refer to the plaintiffs in the plural, because in most injunctive-relief cases the plaintiffs are a class or the caption includes several individual named plaintiffs.

98. Often the costs to the state can be absorbed in ways that are difficult to measure in a vast state budget but that require little immediate outlay of hard dollars.

The bulk of such *injunctive* civil rights work was always done by salaried lawyers, typically at publicly funded Legal Aid offices or at membership-funded organizations like the ACLU or the NAACP Legal Defense Fund.[99] Before *Evans*, however, many private, for-profit plaintiffs' firms took these cases as well; in fact some firms specialized in them. The cases could generate lots of billable hours because, like *Evans*, they tended to be complex and long-lived. Private plaintiffs' lawyers could thus afford to do the work, knowing that if they won or settled they would be paid for all their hours at prevailing market rates. The financial reward could be very high, in addition to the moral reward of forcing the government to obey the law.

Evans drove these firms out of the civil rights legal market, too. The specialty firms could no longer serve as "private attorneys general" to bring injunctive-relief cases, because, like the LSC lawyers in *Evans*, in the end they would not be paid for their time and effort. *Evans* thus destroyed the private bar's important *supplementary* role in these cases. In sum, while *Evans* did not completely drain the pool of available lawyers handling injunctive civil rights cases (as it did with low-damages civil rights actions), it greatly reduced the pool by siphoning off the private bar.

The harm, though less pronounced, was still very real. LSC had offices in all fifty states. But with LSC lawyers barred from handling class actions after 1996,[100] and with private firms out of the civil rights business, plaintiffs seeking injunctive relief were left only with non-profit legal agencies. But such agencies are not easy to find. Many states, especially rural states, have few or none. Therefore, unless the plaintiffs are in a big city, and unless they can find an agency that specializes in their type of claim, *no lawyer will be available*. For purposes of challenging unconstitutional state action, the result is what economists would call a "distribution failure."

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99. The legal arms of these agencies, together with their sponsoring organizations, can assert considerable influence over state law and policy, both through their lobbying efforts and through litigation. For example, the ACLU in California has challenged a host of state laws, policies, and referenda having to do with schools, medical care, welfare, prisons, *etc*.

100. LSC lawyers *could* still bring civil rights cases seeking injunctive relief on behalf of an individual client. But such cases are more susceptible to dismissal on grounds of mootness. The defendants can offer relief to the individual plaintiff without changing the underlying policy. Also, because LSC lawyers are banned from receiving attorney's fees, there is no added financial risk to the defendants of taking the case to trial or delaying settlement as long as possible.

In contrast, the "private attorneys general" who were drawn to civil rights cases by the Fees Act were not geographically limited—they were everywhere. Until *Evans*, the Fees Act created the same useful incentive wherever lawyers practiced law and wherever states infringed upon the constitutional rights of their residents. *Evans* thus not only dried up the legal market for civil rights plaintiffs with meritorious claims but low damages; it also gutted the corps of "private attorneys general" who had served as a useful check on unconstitutional state laws and policies.[101]

IV. TROUBLE SINCE *EVANS*

A. *The* Buckhannon *Problem*

Since *Evans*, things have gotten worse for the private plaintiffs' bar. Under section 1988, to be eligible for a fee award plaintiffs must be "prevailing parties."[102] Until 2001, the "catalyst theory" of fee-shifting held that plaintiffs were eligible for attorney's fees if their lawsuit provoked the change they sought in their complaint. That is, defendants could not avoid liability for fees by capitulating at the last minute. The courts deemed the plaintiffs to be prevailing parties regardless of whether their lawsuit was resolved by a judgment, by a settlement, or even by the unilateral action of the defendants.[103] The catalyst theory had been endorsed by every federal court of appeals

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101. The private attorneys general model had also created within the private bar centers of expertise and networks of collaboration that would not otherwise have existed. *Evans* destroyed these resources, too, when it drove private lawyers out of the civil rights business.

102. 42 U.S.C. § 1988(b) (2007).

103. *See, e.g.*, Paris v. U.S. Dep't of Hous. & Urban Dev., 988 F.2d 236, 241–42 (1st Cir. 1993); Zinn v. Shalala, 35 F.3d 273, 274–76 (7th Cir. 1994); Little Rock Sch. Dist. v. Pulaski County Special Dist. No. 1, 17 F.3d 260, 262–63 (8th Cir. 1994); Stivers v. Pierce, 71 F.3d 732, 751–53 (9th Cir. 1995). At one point, twelve of the thirteen circuits to have considered the issue had adopted the catalyst theory. *See* Deford, *supra* note 3, at 313 (citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 626 n.4 (2001) (Ginsburg, J., dissenting)). Most of the cases relied on *dicta* from *Hewitt v. Helms*, in which Justice Scalia wrote:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e.g.,* a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

482 U.S. 755, 760–61 (1987). *Hewitt* was the logical extension of *Maher v. Gagne*, 448 U.S. 122, 129 (1980), which rejected defense arguments that to be a "prevailing party" a plaintiff must go to trial.

to have considered the issue except the Fourth Circuit, which had disapproved it en banc by a single vote.[104] In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[105] however, the Supreme Court renounced the catalyst theory. It said that to be a prevailing party eligible for a fee award under a fee-shifting statute, a plaintiff had to win a contested judgment, a consent judgment, or a settlement subject to some ongoing court supervision or judicial approval.[106] After *Buckhannon*, simply provoking the defendants to change their position—even as a direct result of the litigation—no longer entitled plaintiffs to prevailing party status under federal law.[107]

Many catalyst theory cases involved a demand for policy changes or other injunctive relief beyond the direct control of the named defendants. *Buckhannon* itself was typical. The plaintiffs complained that a state administrative rule violated due process as applied to them. While the case was pending, the state legislature quietly amended the rule, deleting the offending section.[108] The change effectively mooted the case, since the plaintiffs got all the relief sought in their lawsuit. The Court held that they were ineligible for any attorney's fees, for lack of a judgment or comparable *judicial* relief.[109]

Buckhannon created one more defense to the payment of attorney's fees to successful plaintiffs,[110] and it reduced the defendants' risk that they would have to pay fees, whether they caved in to the plaintiffs' demands or orchestrated the change of policy outside of the settlement process. In *Buckhannon*, as in *Evans*, the

104. *See* S-1 & S-2 v. State Bd. of Educ. of N.C., 21 F.3d 49, 51–52 (4th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 876 (1994).

105. 532 U.S. 598 (2001).

106. *Id.* at 600–10.

107. In practice the catalyst theory had provided a safety net for plaintiffs' lawyers who might otherwise have been deprived of their fees. That is, until *Buckhannon*, if the favorable change occurred outside the settlement process, the plaintiffs could still file a fee petition, and under the catalyst theory they had a good shot at being awarded fees by the court.

108. Presumably the named defendants lacked the power to make the change themselves, else—one must assume—they would have *negotiated* the change, conditioning it on the waiver of the plaintiffs' attorney's fees, *à la Evans*.

109. *Id.* at 600–06.

110. The *added* harm caused by *Buckhannon* is hard to measure. It may have been modest, given that by 2001 so few private lawyers were handling injunctive civil rights actions anyway, other than on a *pro bono* basis. Also, if both sides want to settle, even after *Buckhannon* it is possible to sign an agreement that includes attorney's fees, regardless of whether the plaintiff class could attain "prevailing party" status for lack of a judgment or its equivalent. *See* Deford, *supra* note 3, at 322.

plaintiffs won everything they wanted, while their lawyers gained nothing for their work, which included an appeal all the way to the Supreme Court.[111]

Buckhannon creates perverse incentives of its own. It encourages plaintiffs to rush to summary judgment as quickly as possible, before the defendants can change their illegal conduct or policies sufficient to moot the case. And it encourages defendants to act in bad faith, litigating with vigor until the court signals in some way that they are likely to lose and then capitulating quickly and completely so as to avoid a fee award. Like *Evans*, it rewards defendants who postpone settlement negotiations until the plaintiffs' attorneys have run up their hours (at least in cases where judicial oversight is unnecessary for the plaintiffs to get the relief they seek). *Buckhannon* also encourages the defense to make *Evans* offers in the form of contracts rather than orders or consent decrees, to avoid court supervision of settlements that in the past would have been subject to judicial monitoring.

As a result, the parties, the courts, and the public have lost: (1) the careful, deliberate, and thorough litigation of constitutional issues; (2) negotiated settlements designed to solve present and future problems; (3) early settlements that reduce dockets; (4) court supervision of settlements in some cases where supervision would be appropriate; and (5) "private attorneys general" willing to accept civil rights cases.[112] At bottom, *Buckhannon* provides one more reason for private plaintiffs' lawyers to turn down civil rights cases, further undermining section 1983 as a remedy for plaintiffs seeking equitable relief.[113]

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111. In dissent, Justice Ginsburg noted that the case would "impede access to the court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general." *Buckhannon*, 532 U.S. at 623 (Ginsburg, J., dissenting). She wrote that "Congress enacted § 1988 to ensure that nonaffluent plaintiffs would have 'effective access' to the Nation's courts to enforce civil rights laws." *Id.* at 636. The plaintiffs' lawyers in *Buckhannon* lost some $200,000 in billable hours in the case, despite having succeeded in getting the regulation withdrawn.

112. *See* Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535, 607 (1989/1990) (noting that civil rights lawyers "rarely, if ever . . . recover a fully compensatory fee. As a result, those who formerly specialized in civil rights law are now abandoning the practice in droves" and citing cases documenting the difficulty of finding lawyers in civil rights cases). *Id.* at 538, 539 n.9.

113. After *Buckhannon* was decided, there were high expectations that Congress would swiftly overturn it through amended legislation. This had occurred twice in the previous decade, when the Supreme Court held in *Smith v. Robinson*, 468 U.S. 992, 1020–21 (1984), that

B. Limitations on Fee Waivers by Defendants

Evans left open the question whether a demand for a fee waiver might *ever* be forbidden. On this point, the Court's discussion was brief. Justice Stevens noted that a district court need not "place its stamp of approval on every settlement in which the plaintiffs' attorneys have agreed to a fee waiver."[114] In other words, when and if defense counsel exceed the limit on their conduct, the district court can always police them. But how are the defendants, the plaintiffs, or the courts to know when such a limit has been reached?

In *Evans* the Court suggested three examples, treating them not as ethical constraints but as conduct that could undermine the purposes of the Fees Act and therefore might justify action by a district court. The Court said first that a settlement offer conditioned on the waiver of attorney's fees might be inappropriate if the defendants "had no realistic defense on the merits."[115] But this scenario makes little sense: if the defendants truly had no realistic defense, any *Evans* offer would be *ineffective*. The plaintiffs would reject it out of hand. They would simply file a motion for summary judgment, win, and collect attorney's fees as awarded by the court.[116] Indeed, in no published case from 1986 to today has a court thrown out an *Evans* offer on the

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attorney's fees were not recoverable under the Education of the Handicapped Act, 20 U.S.C. §§ 1400–1400(d)(4), which Congress overturned in the Handicapped Children's Protection Act, 20 U.S.C. § 1415(i)(3)(B) (1986), and after *West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83 (1991), which barred the recovery of expert witness fees, and which Congress overturned by amending Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k) (1991). Some state bar associations even went so far as to pass resolutions urging Congress to overturn *Buckhannon*. *See, e.g.*, Marilyn A. Mahursky, Joseph A. Reinert & O. Whitman Smith, *Erosion of Civil Rights Enforcement: Judicial Constriction of the Civil Rights and Disability Law Bar*, 28 VT. B. J. & L. DIG. 41, 42 (June 2002). But the pessimists of the plaintiffs' bar turned out to be right, as Congress has not acted. *See* Robin Stanley, Note, Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*: To the Prevailing Party Goes the Spoils . . . and the Attorney's Fees*, 36 AKRON L. REV. 363, 408 n.230 (2003) (citing Marcia Coyle, *Fee Change is a Sea-Change But Some Seek Way to Skirt Justices' Limitation on Catalyst Theory Fees*, NAT'L L.J., June 11, 2001, at A1 (reporting skepticism among civil rights lawyers that Congress would act to overturn the case)).

114. Evans v. Jeff D., 475 U.S. 717, 739 (1986).

115. *Id*. at 740.

116. This example also does not square with the majority's logic. If attorney's fees are just another commodity that can be traded to get a better deal or to promote settlement, then it is not clear why the relative strength of the defendants' legal position should matter. The weaker the case, the more likely the defense lawyers are to negotiate, so why take away the defendants' best bargaining chip (the fee waiver) in cases where they are most handicapped by a thin defense?

grounds that the defendants' legal position was so weak that the offer undermined the policies of the Fees Act.

The Court also offered two other examples that addressed the dissent's concerns. A fee waiver might be impermissible (1) if the demand were part of a "systematic practice" by the state never to pay fees; or (2) if the demand were a "vindictive effort . . . to teach [plaintiffs'] counsel that they had better not bring such cases."[117] In *Evans*, neither example had legs because the Court was persuaded that:

> [T]he record in this case does not indicate that Idaho has adopted such a [systematic] . . . policy, or practice. Nor does the record support the narrower proposition that [the state's] request to waive fees was a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits against Idaho . . . , [or to implement] a routine state policy designed to frustrate the objectives of the Fees Act.[118]

In dissent, Justice Brennan did not buy the proposition that judicial enforcement would occur in these situations. (It turns out he was more prescient on this issue as well.) He foresaw that once fee waivers had the approval of the Court, they would become *de rigueur* in any practice where they would be effective.[119] Brennan understood that plaintiffs would be hard-pressed to challenge them, given the rationale for the *Evans* opinion.[120] In fact, after *Evans*, the state bar ethics boards that had previously barred fee waivers or simultaneous negotiation of merits and fees immediately changed their opinions to permit such bargaining.[121] Once *Evans* offers had the approval of the

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117. *Evans*, 475 U.S. at 739–40 (citing Transcript of Oral Argument at 22, *Evans*, 475 U.S. 717 (No. 84-1288)). It is hard to see what other message an *Evans* offer could possibly send, absent some special circumstance unique to the case. An argument over the *amount* of the fees might plausibly be connected to the terms of the negotiation, but a demand for a total fee waiver can have only one effect on lawyers bringing civil rights cases: to drive them away. The Court was unclear as to whether it was concerned with the illicit motive of the defendants, or with the *effects* of the practice of conditioning settlement on the waiver of fees.

118. *Id*. at 740.

119. *Id.* at 757–58 (Brennan, J., dissenting).

120. If attorney's fees are just one of an "arsenal of remedies" that can be freely negotiated away, *id.* at 732, then plaintiffs will always have a high burden to show that the defendants are acting systematically or vindictively—as opposed to simply bargaining hard every time. Justice Brennan made the same point in dissent, noting that the Solicitor General all but conceded that the United States would routinely seek fee waivers in the future. *Id.* at 758 n.12.

121. *See, e.g.*, Comm. on Prof'l & Judicial Ethics of the N.Y. City Bar Ass'n, Op. 1987-4 (1987).

Court *and* the state bar ethics boards, little room was left for district court judges to say that any particular *Evans* offer was impermissible.

In practice, the two examples suggested by the Court—that fee waivers might undermine the Fees Act if done "systematically" or out of "vindictiveness"—have been unavailing.[122] In the late 1980s, a few lawyers tried to use these exceptions to get *Evans* offers overturned. These lawyers were unsuccessful. In *Willard v. City of Los Angeles*[123] and *Panola Land Buying Association v. Clark*,[124] the courts counseled a hands-off approach. The *Willard* court said that in an individual damages action, unlike in a class action, the court had no duty whatsoever to scrutinize the settlement.[125] The *Panola* court said that once a case settles, "the court need not and should not get involved."[126] Moreover, both courts found that the lawyer lacked standing to pursue the fee claim because the claim belonged exclusively to the client.[127]

Since *Willard* and *Panola*, claims of defense violations of the Fees Act have been almost non-existent.[128] No federal court has struck

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122. *See, e.g.*, Note, *Fee as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since* Evans v. Jeff D., 102 HARV. L. REV. 1278, 1284 (1989); de Lisser, *supra* note 62, at 574 (both arguing that courts should enforce the *Evans* "bad faith" exceptions, but noting that no court has shown an inclination to do so). As a practical matter, *Evans* offers are now routinely made by defense counsel without any risk that a district or appellate court will find fault with them.

123. 803 F.2d 526 (9th Cir. 1986).

124. 844 F.2d 1506 (11th Cir. 1988).

125. *Willard*, 803 F.2d at 527–28.

126. *Panola*, 844 F.2d at 1508. One commentator has argued that these two decisions "eviscerate judicial review" of *Evans* offers, noting that only one in a hundred civil rights cases is a class action in which settlement must be approved by the court. Note, *Fee as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since* Evans v. Jeff D., *supra* note 122, at 1287.

127. The problem, of course, is that the lawyer would only be seeking the court's help *because* the client had accepted an offer that deprived the lawyer of her fees and had refused to cooperate in challenging the offer. Standing will operate as a procedural bar in nearly every such case if the lawyer cannot raise the fee issue without the client's cooperation. Nor is it clear how the plaintiff would ever compile a record to support a claim of the systemic or vindictive use of *Evans* offers in a case. To do so would require discovery, at a point where the case is essentially over. Note, *Fee as the Wind Blows: Waiver of Attorney's Fees in Individual Civil Rights Actions Since* Evans v. Jeff D., *supra* note 122, at 1283 (noting that problems of proof would doom such an effort). *See also* Goldstein, *supra* note 35, at 283.

128. The lack of litigation on the issue is unsurprising—especially after *Willard* and *Panola*—for who would bring such a claim? If the plaintiff accepts the *Evans* offer, the lawyer is left on her own, with no standing. If the plaintiff accepts the offer but still agrees to cooperate with the lawyer in her quest for fees, the plaintiff risks losing the offer, because under *Evans* the district court cannot undo the fee agreement but still enforce the settlement on the merits. And if the plaintiff rejects the *Evans* offer, but wants to challenge the fact that the defense *made* the offer, the district court can simply duck the issue, as the court did in *Panola*.

down an *Evans* offer on the grounds of impermissible "systematic" abuse or "vindictiveness."[129] One case, though, bears comment. In *Bernhardt v. Los Angeles County*,[130] an allegedly *pro se* plaintiff[131] filed suit, complaining that the defendants' blanket policy of demanding fee waivers undermined the Fees Act in violation of the Supremacy Clause. She argued that the policy had the long-term effect of preventing her from finding any private civil rights lawyer willing to take her case.[132] The Ninth Circuit reversed the district court's dismissal of her complaint and granted her a limited preliminary injunction, barring the County from making a settlement "that inhibits, interferes with, or prohibits her counsel from applying for attorney's fees under [section 1988]."[133] On remand, the district court dismissed the case, despite the plaintiff's lawyer's ardent efforts to prove that a civil rights plaintiff with a low-damages case could not find a private lawyer to represent her in all of Los Angeles County.[134]

What is most striking about *Bernhardt* is that it cites no other case (apart from *Willard*, decided seventeen years earlier) from any jurisdiction raising the *Evans* exceptions.[135] The *Evans* offer has become an accepted practice in civil rights litigation, exactly as Justice

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129. One rare exception is *Coleman v. Fiore Bros., Inc.*, 552 A.2d 141 (N.J. 1989), where the court held that, for public policy reasons, thenceforth in New Jersey parties must settle the merits of state consumer fraud act cases before the negotiation of statutory claims for fees—but only in cases where the plaintiffs are represented by non-profit public interest lawyers. The court prohibited *Evans* offers in that limited situation. Similarly, in *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 42–46 (D.D.C. 2002), the court distinguished the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482 (2000 & Supp. IV 2004), from section 1988, and found that allegations of "a consistent policy and practice of requiring fee waivers" or "an intentional or vindictive attempt to prevent plaintiffs . . . from recovering fees" could violate the fee provisions of the IDEA.

130. 339 F.3d 920 (9th Cir. 2003).

131. The Court of Appeals seemed appropriately skeptical that the *pro se* plaintiff was in fact bringing the case on her own. Reading between the lines, it appears that private plaintiffs' lawyers were behind the case and were doing all the legal work, in an effort to circumvent the procedural and substantive hurdles that prevented them from raising the issue in their own cases, at the point when the *Evans* offer was made. *Id*. at 924.

132. In an earlier appeal the court had held that even if the plaintiff could not prove actual damages, she "still may be entitled to nominal damages on the basis that the County's policy interfered with her implied federal right to obtain counsel in a civil rights action." *Id*. at 872.

133. *Id*. at 932.

134. *See* Bernhardt v. Los Angeles County, 101 Fed. App'x 244 (9th Cir. June 17, 2004); Appellant's Opening Brief, Bernhardt v. Los Angeles County, 101 Fed. App'x 244 (9th Cir. June 17, 2004) (No. 04-55385), 2004 WL 1125747.

135. The most likely reason why there has been no litigation on this issue is that *there are no litigators*: the private plaintiffs' lawyers who would profit from such a claim no longer handle the cases in which the claim would need to be brought. *See, e.g.*, Sternlight, *supra* note 112, at 539, 607 (arguing that private for-profit plaintiffs civil rights lawyers are a vanishing breed).

Brennan predicted. Smart defendants demand a fee waiver or fee reduction. Smart plaintiffs almost always accept the offer, leaving their lawyer with little or no fee and with no incentive ever to bring a low-damages or injunctive-relief civil rights action again. The limitations on defense conduct suggested by the majority in *Evans* have proven to be illusory. At this point, *Evans* offers are beyond challenge due to procedural bars or practical obstacles, or because no private plaintiffs' lawyers are handling the cases in which such a challenge would be made.[136] The one avenue left open in *Evans* (that might have brought "private attorneys general" back to their forsaken civil rights practices) has proven to be a dead end.

C. A Note on the Data

I have reported the death of section 1983 (for plaintiffs with low-damages cases and for plaintiffs seeking injunctive relief) based on my own experience trying to refer people to the private bar, and based on what is common knowledge within the plaintiffs' bar.[137] But tracing the death of section 1983 for these plaintiffs *statistically* is problematic. The Administrative Office of the U.S. Courts tracks the number of civil cases and civil rights cases filed in the federal district courts each year.[138] The Office further breaks down civil rights cases

136. The unique exception is *Bernhardt*, which required two trips to the Ninth Circuit to get a limited injunction barring an *Evans* offer in a single case for a claim that was ultimately rejected and affirmed on appeal. The plaintiff's attorney presumably recovered no fee for his three trips to the Ninth Circuit.

137. If you have doubts about the validity of my experience or the common knowledge of the plaintiffs' bar, take this challenge: make up a good-liability/bad-damages or injunctive relief civil rights case, and go shopping for a lawyer. You will get lots of free or reduced-fee initial intake interviews, and you will visit a host of small law offices. The good lawyers will tell you the truth—that you have a valid claim but that no good lawyer will ever take it, because she cannot make money on the case. The bad lawyers will hem and haw before saying no, or they will refer you down the food chain. Eventually you may find a *new* or *desperate* lawyer who will say yes, but probably not. Even if you do, you will one day regret it: the lawyer will not be up to the task of handling a civil rights action, or, more likely, as her hours and costs exceed any possible recovery, she will desperately try to get rid of your case. Good lawyers know that without a fee-shifting law that operates as Congress intended, they cannot make money on these cases.

138. *See* Chart, attached as the Appendix. The chart is a compilation of the data supplied by the Administrative Office of the U.S. Courts annually (or in five-year increments) from 1975 to 2006. *See* DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, 1975–2006 ANNUAL REPORTS OF THE DIRECTOR, tbls. C-2 and/or C-2A, Civil Cases Commenced by Basis of Jurisdiction and Nature of Suit (1976–2006) (collected and reported by calendar year), 1997–2006 reports, *available at* http://www.uscourts.gov/judbususc/judbus.html. *See also* OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 1975–2006

into five subcategories, namely voting cases, employment cases, welfare cases, housing cases, and other cases.[139] (Prisoners' civil rights cases are counted separately.)[140]

The government's data are unhelpful for evaluating the effects of *Evans* for several reasons. First, they do not track whether the cases were filed *pro se* or with a lawyer. We therefore cannot measure changes in the levels of *representation* as a result of *Evans* (or any other cases or statutory amendments making civil rights practice more or less attractive to the private plaintiffs' bar). Second, the data do not track whether the cases involved low, medium, or high damages,[141] or if the plaintiffs sought injunctive relief. We therefore cannot chart changes in the levels of representation relative to the amount or type of relief sought.[142]

Third, in three of the four subcategories of civil rights cases—voting, welfare, and housing—the numbers are so low as to be statistically insignificant. Those three subcategories account for only about .03 percent of all civil rights cases—a figure that has been

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FEDERAL JUDICIAL CASELOAD STATISTICS (collected and reported by calendar year), 2001–2007 reports, *available at* http://www.uscourts.gov/caseloadstatistics.html.

139. *See* ADMIN. OFFICE OF THE U.S. COURTS, 1975–2006 ANNUAL REPORTS OF THE DIRECTOR, tbls. C-2 and/or C-2A, CIVIL CASES COMMENCED BY BASIS OF JURISDICTION AND NATURE OF SUIT (1976–2007) (collected and reported by calendar year). The data come from the mandatory cover sheets that must be filed with every federal district court complaint. The statistics are thus based on self-reporting of the most limited kind, taken from what the plaintiff (if *pro se*) or the plaintiff's lawyer writes on the cover sheet form.

140. The issue of prisoners' rights cases is beyond the scope of this Article. *Evans* and *Buckhannon* had the same effect on prisoners' rights cases that they had on every other civil rights practice area, the main difference being that so few lawyers were willing to take prisoners' rights cases even before *Evans*. If there were any private lawyers still handling low-damages or injunctive-relief prisoners' rights cases after *Evans*, Congress put *them* out of business in 1996. The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; and 42 U.S.C. §§ 1997–1997h), modified section 1988 to limit attorney's fees in prison cases to 150 percent of any damages won and to no more than 150 percent of the hourly rate received by court-appointed counsel, effectively reducing the hourly rate to a fraction of the "market rate" allowed in all other civil rights cases. 42 U.S.C. § 1997e(d)(2007). Today, unless a prisoner has died or suffered some egregious injury, no private plaintiffs' lawyer will look at the case. Fee shifting has been taken out of the equation in this setting as well—the one setting where serious constitutional violations are likely to occur with regularity, but produce low or modest damages (because the injured plaintiffs will have neither compensable medical costs nor work-loss claims).

141. Even if the *ad damnum* clause—the amount requested by way of relief—were included in the data, it would be close to meaningless. Plaintiffs have little choice but to plead high damages in all cases either (a) to meet the court's jurisdictional limit, or (b) to avoid being impeached with their pleadings at trial.

142. Because filing *pro se* is no easy matter, for comparative purposes I will treat the data as if all cases were filed by attorneys, every year.

roughly constant over the last thirty years. Plainly, voting rights,[143] welfare,[144] and housing[145] are highly specialized practices; there is no generalized legal "market" for such cases among the private plaintiffs' bar. Fourth, employment cases—which have accounted for close to half of all civil rights cases over the years[146]—are atypical civil rights cases when it comes to tracking the effects of fee-shifting. They tend to be higher-damages cases, and they present other opportunities for the lawyer to be paid, so that arguably fee-shifting plays a different role.[147]

As a result, the most useful statistical category may be the catch-all category of "other" civil rights cases—the mixture of cases that does not fit more comfortably into voting, welfare, housing, or

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143. *See* Appendix, Chart, *supra* note 138. Since 1976, on average only 199 *voting* civil rights cases have been filed a year. The numbers fluctuate somewhat, with the peaks predictably tied to election year cycles. For 2005, 166 voting cases were filed out of more than 36,096 total civil rights cases. *Id.*

144. *Id.* Since 1976, on average only 138 *welfare* civil rights cases have been filed per year. Nearly all of these cases must have been filed by LSC lawyers, whose clients are often on welfare and therefore would be the people affected by state laws or policies (relating to federal assistance programs) that violate federal law. This intuition is supported by the fact that from 1976 to 1996, welfare civil rights case filings averaged 167 cases a year, while after 1996 the average number dropped to sixty-eight cases a year. Recall that 1996 was the year Congress placed restrictions on LSC lawyers' ability to handle so-called "impact litigation." *See supra* note 10.

145. *See* Appendix, Chart, *supra* note 138. Since 1976, an average of 642 *housing* civil rights cases have been filed a year. The housing cases—unlike voting and welfare cases—can include significant damages. The private bar often *can* afford to take these cases, especially if there is evidence of intentional discrimination. In my part of the country, these cases are typically brought with the cooperation of a fair housing center or similar consumer "testing" organization. If testing confirms the plaintiff's account of overt discrimination, private lawyers are willing to take the cases on the theory that they can win on summary judgment or get an early settlement. The number of violations is low enough today that few lawyers are going to build a practice exclusively out of housing civil rights cases, but the nature of the proof and the risk of relatively high damages make it harder for defense counsel to make plausible *Evans* offers in these cases.

146. *See* Appendix, Chart, *supra* note 138.

147. Plaintiffs' employment lawyers are different from plaintiffs' tort lawyers in the way they evaluate a case. In an employment case, the typical plaintiff has been ill-treated in some way on the job: the case presents an issue of hiring, firing, promotion, unfair treatment, or hostile work environment. Successful employment plaintiffs may thus win something—a job, a promotion, or a wage-based judgment—out of which the lawyer can reasonably expect to be paid. In this sense, employment plaintiffs with relatively modest claims are not like tort plaintiffs: they are more likely to find a lawyer to represent them with or without fee-shifting, because the lawyer has a greater chance of making money on the case. *But see* Davies, *supra* note 34, at 234–35 (noting that employment lawyers will not represent blue-collar workers (who are unlikely to be able to pay) absent a good chance of winning punitive damages). And *even* in employment cases, the perception within the plaintiffs' bar is that lawyers are fleeing the specialty because the law has changed enough that they cannot reliably make money on the cases. *See, e.g.*, Sternlight, *supra* note 112, at 538 n.6, 539.

employment. Accordingly, if we look at both total filings and "other" civil rights filings, the results are slightly more revealing. They show a steady increase in cases filed after the passage of the Fees Act in 1976.[148] Indeed, in the decade from 1976 to 1985, the "other" civil rights filings increased by seventy-seven percent, while all civil rights filings increased by fifty-nine percent.[149]

After *Evans* came down in 1986, "other" civil rights claims and total civil rights claims dropped until 1991,[150] when passage of the Civil Rights Act of 1991 brought a flood of new civil rights filings, which peaked five years later in 1997.[151] Since 1997, the "other" civil rights filings have been virtually flat, while the total number of civil rights filings has dropped about seventeen percent.[152]

The available data say little about the effect of *Evans* (or *Buckhannon* or other cases). When new civil rights statutes are passed, lots of new cases are filed for a while, and thereafter lawyers modify their practices in response to their experience. In the two decades since *Evans*, private plaintiffs' lawyers have stopped taking low-damages and injunctive-relief civil rights cases because the lawyers have learned that they cannot make money on them.

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148. Brand, *supra* note 30, at 362 n.416, (quoting Robert A. Diamond, *The Firestorm Over Attorney Fee Awards*, 69 A.B.A. J. 1420 (1983)), reports a sixty-six percent increase in civil rights filings in the five years after passage of the Fees Act. But Diamond was including prisoners' civil rights cases as well. Because prisoners have only limited access to the private bar, it makes little sense to include them for purposes of measuring the effects of *Evans*.

149. *See* Appendix, Chart, *supra* note 138. Of course, the total of all civil filings in all categories of cases went up ninety-five percent, so it is hard to attribute the rise in civil rights cases solely to the passage of the Fees Act.

150. *Id.* Again, all civil filings declined in the same period, so attributing the decline to *Evans* is unreliable.

151. The Administrative Office of the U.S. Courts itself notes that civil rights filings tend to jump in the years following the passage of a new civil rights act (for example, disability law/handicap rights, fair housing, children's rights), but then level off or even decline "as Supreme Court decisions and legislative actions offset the impact of the original legislation." *See* ADMIN. OFFICE OF THE U.S. COURTS, OFFICE OF HUMAN RES. & STATISTICS FEDERAL JUDICIAL CASELOAD: RECENT TRENDS at 10 n.9 (1997–2001), *available at* http://www.uscourts.gov/recenttrends2001/20015yr.pdf. (quoting ADMIN. OFFICE OF THE U.S. COURTS, ANALYTICAL SERVICES OFFICE REPORT TO THE SUBCOMMITTEE ON JUDICIAL STATISTICS ON INCREASES IN CIVIL RIGHTS FILINGS (Feb. 1998)). Lawyers move out of the new practice area as they find it less lucrative than they had expected it to be.

152. *See* Appendix, Chart, *supra* note 138. The decline came mostly from the steep drop in employment cases, which fell by twenty-nine percent from 1997 to 2005. *Id.*

V. THE FIX

Congress can easily revitalize section 1983 by amending the Fees Act to undo *Evans*.[153] Justice Brennan laid out the fix in his dissent: permit limited simultaneous negotiation of merits and fees, but require court review of all settlements (not just in class actions) and prohibit settlements in which the plaintiffs' lawyers do not earn reasonable fees.[154] In this way attorney's fees can still be negotiated across a range of outcomes,[155] but in the end the parties will have to live with the *court's* decision on the reasonableness of the fee, or they will have to withdraw their agreement and try the case. The district court will police settlements using a standard of review based on the underlying policy of the Fees Act: *that reasonable attorney's fees are necessary in every case to ensure that civil rights plaintiffs with meritorious claims can find private lawyers to represent them.*

Regarding *Buckhannon*, as Justice Scalia noted in his concurring opinion,[156] Congress need only change a few words in section 1988 to make it clear that the term "prevailing party" can include any favorable result linked to the filing of the lawsuit. Once the statute specifically adopts the catalyst theory of attorney's fees, the incentive structure will be restored to what it was before 2001, and more private plaintiffs' lawyers will accept civil rights cases seeking only equitable relief (assuming the *Evans* problem is fixed at the same time).[157]

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153. Congress amended the Fees Act in 1991, *see supra* note 113, but it did not overturn *Evans*. *See, e.g.*, Cmty. Care Centers v. Ind. Family and Soc. Servs. Admin., 716 N.E.2d 519, 535 n.26 (Ind. App. 1999) (citing Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 949 n.119 (1993) (noting that although Congress considered overruling *Evans*, that provision did not make it in to the final version of the bill)).

154. Evans v. Jeff D., 475 U.S. 717, 753–54 (1986) (Brennan, J., dissenting).

155. The negotiation could proceed along the lines of what happens currently when the plaintiff wins at trial and submits a formal fee petition: the defense typically challenges the rate, the number of hours, the success on the various claims, duplication of effort by co-counsel, *etc*. The defense could also seek to trade *some* of the fees for better relief. The defense may well be able persuade the court to reduce the requested fees considerably, but at the same time the court will ensure that the prevailing plaintiff is awarded reasonable attorney's fees to fulfill the purposes of the Act—to attract private attorneys general to litigate civil rights cases that otherwise would not be brought if left to the private tort market.

156. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 622 (2001) (Scalia, J., concurring).

157. Justice Scalia would prefer to see a higher standard—"at least a substantial likelihood that the party requesting fees would have prevailed"—to prevent plaintiffs from extorting attorney's fees from defendants in weak cases. *Id.* If the plaintiffs' case is weak, however, then the defendants should have greater leverage in the negotiation, both on the merits and on the

The incentives built in to section 1988 can be quickly and easily restored. Individual plaintiffs with strong civil rights claims but low damages would again be able to get their cases to court, and liable defendants would again have every reason to resolve these cases *early*, thus promoting efficient docket control. The deterrent effect of section 1983 would also be restored, as defendants would have to conform their conduct to the requirements of the law or pay both damages *and* attorney's fees for any breach. Finally, access to justice would not be limited to the lucky few in big cities in populous states but would be equally available everywhere that lawyers hang a shingle.[158]

CONCLUSION

> [I]t does not require a sociological study to see that permitting fee waivers will make it more difficult for civil rights plaintiffs to obtain legal assistance. It requires only common sense.[159]

When *Evans* came down in 1986, its potential to alter existing civil rights practice was clear. The parties addressed it in their briefs, and the Justices debated it in their opinions. The academic reaction was swift and negative. Nevertheless, in the two decades since, the issue of access to the courts has all but dropped off the radar screen.

In my view, the absence of ongoing debate on *Evans* is understandable. The plaintiffs who lost their access to the courts are random civil rights or "constitutional tort" victims. We cannot identify them, and they cannot identify each other. They share nothing beyond the fact of having a claim cognizable under section 1983 for violation of their rights. As a group they have no political power and no means to organize. Without lawyers, no one is going to speak for them, let alone with a strong or unified voice.

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fees (as well as in persuading the district court that a lower fee is reasonable under the circumstances).

158. Other commentators have floated more elaborate or more drastic proposals, but in my view the simplest fix is the best. *See, e.g.*, Elledge, *supra* note 35, at 1034–36; Krulewitch, *supra* note 31, at 128 (both recommending banning fee waivers); Stedman, *supra* note 31, at 1308–19 (advocating a full rewrite of the law); Sternlight, *supra* note 112, at 599–606 (advocating a panoply of amendments, including higher hourly rates, contingency and delay enhancements, fees for administrative work, prohibition of fee waivers, expert witness fees, and fees against intervenors); McCormick, *supra* note 35, at 416 (urging the prohibition of fee waivers).

159. *Evans*, 475 U.S. at 755 (Brennan, J., dissenting).

Likewise, the lawyers who represented them and whose practices *Evans* destroyed were *not* the rich and powerful members of the high-end plaintiffs' personal-injury bar. Rather, they were mostly solo or small-firm practitioners with mixed civil practices, for whom fee-shifting provided a way to widen their services to include low-damages or injunctive-relief civil rights cases. When *Evans* caused the market for civil rights cases to crash, these lawyers simply slid across to other specialties where they could earn a living.

Accordingly, unless something galvanizes Congress to act on its own, as *Alyeska* did in 1975, no constituency exists to advocate for the rights of plaintiffs with strong civil rights claims but low damages, or plaintiffs who need injunctive relief to cure a civil rights violation. Especially in the 1990s, when Congress was doing everything it could to limit access to the courts, the unfairness of *Evans* got little attention. Nor was the state defense bar ever going to raise the issue. In *Evans*, the defense bar won an epic victory for its state-actor clients, blocking injured plaintiffs from ever getting to court. The defense bar knows when to bite its tongue.

On the other hand, the benefits of using "private attorneys general" to enforce civil rights laws are legion, as the sponsors and supporters of the Fees Act were well aware in 1976. First, private lawyers are not geographically limited. Fee-shifting creates the same powerful incentive across the country, in big cities and in small towns, wherever lawyers work. Fee-shifting harnesses their self-interest and turns it to the public good in a ubiquitous market. Second, "private attorneys general" require neither infrastructure nor support. No public funds have to be spent on their recruitment, staffing, training, organization, or oversight. They even tend to establish their own centers of expertise, as they trade information and create networks in the same ways that other legal specialists do.

Third, "private attorneys general" are supremely efficient. Until *Evans*, the Fees Act was a quiet but powerful engine of justice, righting legal wrongs as Congress intended. The engine was fueled by profit, but the profit was modest, at *reasonable* market rates. Congress understood that if defendants could be made to pay the costs of their malfeasance, private lawyers would step forward to do the work, with the exemplary efficiency of any other market. Fourth, "private attorneys general" are self-policing. Because they can only make money on meritorious cases, they tend to filter out the very

cases that Congress would want filtered out—namely nuisance lawsuits and other meritless actions.[160]

Justice Brennan was right: today plaintiffs with low damages or those seeking injunctive relief have no remedy under section 1983, because no lawyers will take their cases to court. *Evans* dismantled the mechanism that funded the "private attorneys general" who gave life and meaning to the Civil Rights Act. The death of section 1983 for these plaintiffs is not an exaggeration, and Congress should take immediate steps to resurrect it by amending the Fees Act.

160. Requiring closer judicial supervision of all fee awards will serve as a further screening device, discouraging lawyers who might otherwise bring weak cases in an effort to "extort" fees from defendants.

APPENDIX

Year	Voting	Employment	Housing	Welfare	Other	Total	All Cases
1975	N/A	N/A	N/A	N/A	N/A	10,392	117,320
1976	176	5,321	531	222	6,079	12,329	130,597
1977	203	5,931	442	219	6,318	13,113	130,567
1978	139	5,504	497	214	6,475	12,829	138,770
1979	145	5,477	434	195	6,917	13,168	154,666
1980	160	5,017	342	212	7,213	12,944	168,789
1981	152	6,245	336	253	8,433	15,419	180,576
1982	170	7,689	237	215	8,727	17,038	206,193
1983	175	9,097	296	229	9,938	19,735	241,842
1984	259	9,748	291	183	10,738	21,219	261,485
1985	281	8,082	253	180	10,757	19,553	273,670
1986	194	9,174	230	164	10,366	20,128	254,828
1987	214	8,993	323	158	10,117	19,805	239,185
1988	347	8,563	322	129	9,962	19,323	239,634
1989	183	9,000	334	122	9,739	19,378	233,529
1990	130	8,413	341	129	9,780	18,793	217,879
1991	247	8,370	452	130	10,693	19,892	210,890
1992*	494	10,771	527	125	12,316	24,233	230,509
1993	213	12,962	590	114	13,776	27,655	229,850
1994	224	15,965	730	122	15,581	32,622	236,391
1995	208	19,059	735	116	16,482	36,600	248,335
1996	229	23,152	932	83	17,611	42,007	269,132
1997	141	23,796	854	91	18,396	43,278	272,027
1998	108	23,735	838	66	17,607	42,354	256,787
1999	102	22,490	1,136	63	17,513	41,304	260,271
2000	167	21,032	1,284	80	18,345	40,908	259,517
2001	195	21,157	1,249	61	18,248	40,910	250,907
2002	234	20,955	1,313	71	17,847	40,420	274,841
2003	147	20,507	1,315	65	18,482	40,516	252,962
2004	173	19,746	1,222	61	19,037	40,239	281,338
2005	166	16,930	885	54	18,061	36,096	253,273
2006**	150	14,353	643	56	17,663	32,865	259,541

Where figures do not match year-to-year, I have used the figures compiled or reported at the latest date. The Administrative Office of the U.S. Courts notes that it adjusts its figures as better data become available, and that the latest figures are the most accurate. Thus, for example, if the 1992 chart also shows the figures for the previous year (1991), I use the figures from the 1992 chart, assuming that they have been updated from the originally reported 1991 figures.

* Current year figures used because current year figures were the only available source

** Incomplete partial-year statistics