

# The Supreme Court on Attorney Fee Awards, 1985 and 1986 Terms: Economics, Ethics, and Ex Ante Analysis

THOMAS D. ROWE, JR.\*

Over the past decade, the Supreme Court has progressed from hearing an occasional case on attorney fee awards<sup>1</sup> to deciding at least a few such cases virtually every Term.<sup>2</sup> When it has found Congressional intent clear, the Court has not engaged in its own policy analysis and has at times upheld approaches quite favorable to the beneficiaries of federal fee shifting statutes. The Court was unanimous, for example, in *Blum v. Stenson*<sup>3</sup> in approving

---

\* Professor of Law, Duke University. B.A. 1964, Yale; M.Phil. 1967, Oxford; J.D. 1970, Harvard. I am grateful to Professors Jerome Culp, John Leubsdorf, and Geoffrey Miller and to participants at a Georgetown University Law Center faculty seminar for suggestions on earlier versions of this comment, and to Chris Arfaa and Eric Liebler of the Duke law class of 1989 for research assistance.

1. See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (standards for fee awards to prevailing defendants in federal civil rights cases); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (disapproving decisional "private attorney general" doctrine for attorney fee awards); *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968) (standards for fee awards to prevailing plaintiffs in federal civil rights cases).

2. Some of the recent cases not discussed in detail in this comment are *Hewitt v. Helms*, 107 S. Ct. 2672 (1987) (plaintiff who obtained favorable statement of law, but no formal relief, is not "prevailing party" entitled to fee award); *North Carolina Dep't of Transp. v. Crest St. Community Council*, 107 S. Ct. 336 (1986) (no fee awards for representation in administrative proceedings not culminating in court action); *Library of Congress v. Shaw*, 106 S. Ct. 2957 (1986) (no increase of fee award against government for delay in payment); *Marek v. Chesny*, 473 U.S. 1 (1985) (effect of offer of judgment under Federal Rule of Civil Procedure 68 on entitlement to statutory fee award); *Webb v. Board of Educ.*, 471 U.S. 234 (1985) (no federal statutory fee award for optional state administrative proceeding); *Smith v. Robinson*, 468 U.S. 992 (1984) (when federal fee award statute applied to one claim in case, plaintiff prevailing on different claim not entitled to fee award); *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (no fee awards to losing parties under federal environmental statutes); *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (fee award calculation for plaintiffs prevailing in part). See also Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 473 n.2 (1981) (seven fee award cases decided during 1979 Term).

Three attorney fee cases are on the Court's argument docket for the 1987 Term: *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 226 (1987) (No. 87-283) (state or federal law as controlling appealability in diversity case when merits decided but fee determinations outstanding); *Pierce v. Underwood*, 107 S. Ct. 2177 (1987) (No. 86-1512) (construction of "substantially justified" standard in Equal Access to Justice Act, 28 U.S.C.A. § 2412 (West Supp. 1987)); *Bowen v. Galbreath*, 107 S. Ct. 1970 (1987) (No. 86-1146) (federal courts' power to order payment of attorney fees from awards of past-due Supplemental Security Income benefits). The Court had granted certiorari in a fourth case, *Haynie v. Ross Gear Div.*, 107 S. Ct. 1624 (1987), which presented the question whether an attorney could be sanctioned under the vexatious proceedings statute, 28 U.S.C. § 1927 (1982), without a finding of recklessness, subjective bad faith, or conscious impropriety. On the parties' joint suggestion of mootness, however, the Court vacated the judgment and remanded the case with a direction to dismiss. 107 S. Ct. 2475 (1987).

3. 465 U.S. 886 (1984).

private market rates of \$95 to \$105 per hour for New York City Legal Aid lawyers, all of whom had under two years' experience in practice when the litigation began.<sup>4</sup> In some of the most significant fee award cases of the 1985 and 1986 Terms, however, close divisions have reflected less certainty about Congressional intent on the issues before the Court; and the Justices' opinions have more often employed reasoning with the flavor of economic analysis.

This comment examines the economic reasoning in these recent fee award opinions, with particular emphasis on the "ex ante" perspective of evaluating the likely impact of rules on future behavior.<sup>5</sup> Economic argument in such cases can be a double-edged sword, sometimes appearing to give more help to plaintiffs and at other times to defendants. Economic reasoning seems to support, for example, the rule of *Christiansburg Garment Co. v. EEOC*,<sup>6</sup> allowing fee awards to prevailing defendants in federal civil rights cases on less than the usual "bad faith" showing.<sup>7</sup> In the cases considered in this comment, it appears that the plaintiffs generally had stronger arguments in economic terms. Yet many of the opinions reflect either weak use of the available arguments or a selectively pro-defendant perspective. After discussing the cases, the comment considers possible reasons for and some implications of this pattern.

My suggestion is not that economic analysis should be the Court's only guide. These cases arise under statutes; if Congressional intent is clear, it controls. Nor am I suggesting that the Court's results have necessarily been wrong or that economic arguments support only one outcome. But this area is one in which economic analyses do seem useful and sometimes indicated by legislative intent. While the Justices have often attempted to bring such approaches to bear, of late their opinions have threatened to belie Judge Easterbrook's tentative optimism about the Court's increasing economic

---

4. See *id.* at 890 n.4 (experience and billing rates of attorneys), *id.* at 892-96 (finding legislative history dispositive in favor of using prevailing local market rate to calculate fee awards, regardless of whether counsel was private or nonprofit).

5. See generally Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 5, 10-12 (1984) (emphasizing importance of taking into account not just "ex post" fairness in case before Court, but also "ex ante" incentives created for future behavior by rules articulated and applied).

6. 434 U.S. 412 (1978).

7. *Id.* at 417 & n.9 (under the American rule, attorney's fees are awarded against a losing party who has acted in bad faith). The fee awards regularly available to prevailing plaintiffs in Federal civil rights litigation encourage both good and bad claims alike. The possibility of fee award liability would deter the bringing and continuation of weak claims, thus achieving a filtering effect.

My point is not that the Court in *Christiansburg* used economic analysis; the opinion drew primarily on Congressional intent. Rather, the situation illustrates how economic reasoning is far from being only a plaintiffs' tool in attorney fee cases. I argue in the rest of this comment that in the past two terms the Justices have either underused economic analysis or failed to deal adequately with the way in which it could cut in plaintiffs' favor.

sophistication.<sup>8</sup>

### I. 1985 AND 1986 TERM DECISIONS

Four of the attorney fee cases in the last two Terms involved issues to which the argument here applies: *City of Riverside v. Rivera*,<sup>9</sup> *Evans v. Jeff D.*,<sup>10</sup> and two separate decisions in *Pennsylvania v. Delaware Valley Citizens' Council*.<sup>11</sup> *Riverside* addressed whether there should be a requirement of proportionality between damages recovered and fees awardable; a divided five Justice majority ruled against such a general requirement. In *Jeff D.*, Justice Stevens wrote for six members of the Court, refusing to invalidate settlement offers that are conditioned upon waiver of a claim to a statutory fee award. In *Delaware Valley I*, Justice White's majority opinion disapproved most "quality" enhancements to the "lodestar" amount for superior attorney performance.<sup>12</sup> In *Delaware Valley II*, shifting 5-4 coalitions, with Justice O'Connor casting the swing vote, upheld the permissibility of "contingency" enhancements for the risk of defeat and no fee award, but found such an enhancement unjustified on the facts of the case.

#### A. CITY OF RIVERSIDE V. RIVERA

*Riverside* was a civil rights suit by several Chicano residents against a city, its police chief, and numerous police officers for their conduct in breaking up a party. The plaintiffs won jury verdicts totaling \$33,350 but sought and received a fee award of almost \$250,000—over seven times the amount of the verdict; the Court of Appeals affirmed.<sup>13</sup> The Supreme Court affirmed without a majority opinion. Justice Brennan wrote for a plurality which included Justices Marshall, Blackmun, and Stevens; Justice Powell concurred in the judgment. Justice Rehnquist wrote the principal dissent for himself and Chief Justice Burger plus Justices White and O'Connor. The Chief Justice delivered a short separate dissent.

A quarter million dollar fee award for winning a recovery in the low five figures at first seems unjustifiably disproportionate, as the dissenters con-

---

8. Easterbrook, *supra* note 6, at 4-5 ("The Justices today are more sophisticated in economic reasoning [than a few decades ago], and they apply it in a more thoroughgoing way, than at any other time in our history.").

9. 477 U.S. 561 (1986).

10. 475 U.S. 717 (1986).

11. 106 S. Ct. 3088 (1986) [hereinafter *Delaware Valley I*]; 107 S. Ct. 3078 (1987) [hereinafter *Delaware Valley II*].

12. 106 S. Ct. at 3099. The "lodestar" figure is "the product of reasonable hours times a reasonable rate." *Id.* at 3098.

13. See *City of Riverside v. Rivera*, 106 S. Ct. 2686, 2689-91 (1986) (plurality opinion).

tended;<sup>14</sup> yet there is a strong economic argument against any general proportionality limit. The plurality opinion, however, fails to make that case. In fact, what is especially striking about *Riverside* is the absence of this economic argument from all the opinions. The dissents unsurprisingly fail to grapple with it, but the relative weakness of the plurality's justifications makes the omission from the dissents all the more understandable. The ex ante argument against a proportionality requirement, in brief, is that the chance of a large fee award for a small recovery is essential to maintain incentives not only for prospective plaintiffs' lawyers to take cases (especially strong small claims) but also to deter unjustified resistance by defendants. The occasional disproportionate fee award is necessary to assure that many other such cases will be pursued but, in all likelihood, also settled at low cost and with desirable deterrent effects on primary behavior.

To state the argument in greater detail, when disproportionate fees are a significant danger, for at least one side it will usually be economically unproductive to litigate to the hilt; the costs rapidly come to dwarf the stakes. Hence, most such cases will not be litigated fully, i.e., to a judgment and (if allowable) a fee award. This result can come about in either of two ways: by plaintiffs' not pursuing even highly meritorious small or medium-sized claims because their inability to recover fees forecloses the chance of a net gain, or by defendants' foregoing resistance to such claims because they are not worth fighting.<sup>15</sup> The first result is especially likely under the general American rule of no fee recovery. A plaintiff's threat to spend much money for a small gain is usually not credible, while a defendant's strategic behavior threatening resistance that will impose unrecoverable costs is at least more credible than under a fee shifting regime. Whatever the virtues of the American rule and the contingent fee for assuring access to justice when plaintiffs have strong, large damage claims, the system does not further the pursuit of meritorious smaller claims,<sup>16</sup> often leaving people with no realistic alternative but to acquiesce in small injustices.

Full shifting of costs necessary to overcome resistance, by contrast, adds credibility to the plaintiff's threat to pursue a strong small claim and reduces a recalcitrant defendant's ability to threaten and inflict unrecoverable ex-

---

14. See, e.g., *id.* at 2701 (Burger, C.J., dissenting) (describing award as an "example of legal nonsense").

15. Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 149 n.47 (Winter 1984).

16. See generally Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 437-38 (1973); Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129, 162 (1974).

pense.<sup>17</sup> Most such cases are then likely to be settled at relatively low cost; the occasional fully litigated case will be the essential, if somewhat unattractive, exception needed to maintain the balance in which most of the strong small claims do get pursued but also settled. Without the occasional and visible disproportionate award, there are likely to be many fewer of the socially useful but much less visible cases in which defendants fold quickly at the threat or filing of a meritorious small claim.<sup>18</sup> In economic jargon, the occasional "disproportionate" award is necessary to assure external benefits, both from easier enforcement in other cases as defendants' unproductive strategic litigation behavior is deterred and—as Judge Posner has pointed out—from the increased likelihood that prospective defendants recognizing a real threat of effective private enforcement will not engage in wrongful primary conduct in the first place.<sup>19</sup>

It is perhaps inadequately recognized that a fee shifting regime with a proportionality limit would be, for practical purposes, like the American rule: to the extent that fees exceed the limit and are therefore unrecoverable, the American rule of paying your own lawyer, win or lose, is reintroduced. Moreover, since in many cases it is not hard to threaten plausible resistance that will run a plaintiff's costs above such a limit, the undesirable incentives under the American practice—making meritorious smaller claims simply not

---

17. Cf. Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439, 451 (1986):

It takes two to litigate. If both parties are so stubborn as to waste resources disputing a small liability, society's interests will be better served by making the defendant who wronged his neighbor and then refused to recompense him pay the resulting legal expenses than by letting his recalcitrance immunize him from paying what he owes.

18. A legitimate concern is whether allowing some disproportionate awards would encourage too many weak or nuisance claims. For several reasons, that appears unlikely. The credibility of a plaintiff's threat to pursue a small claim comes not just from a theoretically possible fee shift but requires a substantial chance of victory. See Leubsdorf, *supra* note 18, at 451. Fee awards obviously should not be allowed for more hours than were reasonable given the level of resistance put up by the defense. Moreover, reverse fee awards against baseless claims, and rules that threaten to cut off plaintiffs' fee entitlements, provide defendants with weapons against abuses. See *Marek v. Chesny*, 473 U.S. 1 (1985) (federal civil rights defendant who makes Rule 68 offer which plaintiff rejects and does not improve on at trial is not liable for plaintiff's post-offer attorney fees); see also *supra* note 8 and accompanying text (summarizing and defending approach of *Christiansburg* case to fee awards for prevailing federal civil rights defendants). Finally, it seems unlikely that without possible large fee awards small civil rights claims will work like small automobile tort claims, for which it appears that victims usually get fairly full compensation. See H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 234 (2d ed. 1980). Insurance is probably much less common in civil rights than in automobile cases, and resistance to a charge of discrimination or intentional brutality more likely than to a claim of ordinary negligence.

19. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 538 (3d ed. 1986). Posner also suggests that a class action would be even more efficient, *id.*, but that was not an alternative available to the Court in *Riverside*. Class treatment of small claims, moreover, will not always be possible depending on the number of claimants and on whether a case satisfies the several technical requisites for class certification.

worth pursuing, thus leaving claimants to "lump it" or resort to extra-legal self-help—return in nearly full force.

These arguments seem appropriate under the Civil Rights Attorney's Fees Awards Act of 1976,<sup>20</sup> the governing statute in *Riverside*. Congress' concerns in passing the Act included the failure of the private market to provide adequate legal services to victims of civil rights violations and the desirability of having "private attorneys general" vindicate important public policies.<sup>21</sup> Yet the *Riverside* plurality opinion focused on the social benefits of the *individual* case, omitting the significance of the general enforcement pattern<sup>22</sup> and failing to develop in any detail the reasons why the proportionality requirement would frustrate Congressional intent to assure access to counsel.<sup>23</sup> This is not to say that the plurality should have written an economic treatise. It is to suggest that the plurality's failure to take a readily available ex ante perspective weakened its argument and kept it from joining issue strongly with the dissent on the crucial point of whether a disproportionate award could be "reasonable."<sup>24</sup>

Justice Powell's narrow concurrence in the judgment insisted on a strong

---

20. 42 U.S.C. § 1988 (1982).

21. See H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1-3 (1976); S. REP. NO. 1011, 94th Cong., 2d Sess. 1-3 (1976). The legislative history includes frequent reference to "suits" to vindicate civil rights, which could provide a basis for arguing that Congress was not concerned about effects on behavior outside actual litigation, and that the breadth of the ex ante argument in text therefore exceeds what is appropriate in carrying out Congress' intent. Putting aside that such a rendering of legislative intent would be rather crabbed, at the very least it remains within bounds to consider the effects a proportionality requirement should have on settlement bargaining in filed cases generally, not just those litigated to a final judgment. *Id.*

22. *Riverside*, 106 S. Ct. at 2694.

23. See *id.* at 2696-97: "In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case. . . . It is highly unlikely that the prospect of a fee equal to a fraction of the damages respondents might recover would have been sufficient to attract competent counsel." Missing from these arguments is any emphasis on the impact of fee award practices on the bargaining positions of both sides. Also absent is any explanation of why that effect in settled cases, as well as the effect of compensation in tried ones, is significant for access to justice.

24. One reason for this omission from the argument in the plurality opinion may be that the briefs on the merits before the Supreme Court did not develop or emphasize it at all. The only hints—and slight ones, at that—that I could find of the importance of disproportionate fees for the general enforcement pattern were passing mentions in two amicus briefs. Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc. at 9, *Riverside*, 477 U.S. 561 (1986) (No. 85-224) ("To the extent that public funds are unduly expended on fee awards, it has been our own experience that this is more often caused by the litigation tactics of government defense attorneys than by the actions of the plaintiffs."); *id.* at 10 ("once [the government] has decided to defend a case to the death, it may not then be heard to complain when it is faced with a reasonable attorney's fee caused by its own litigation tactics"); Brief for the Washington Council of Lawyers, *et al.*, Amici Curiae at 19, *Riverside*, 477 U.S. 561 (1986) (No. 85-224) (plaintiff's counsel "often knows that his opponent will be represented by counsel employed by a governmental entity, and thus will not face the usual financial pressures to resolve a case quickly").

showing of public benefit from the ruling in the particular case.<sup>25</sup> That precisely misses the point of the ex ante perspective that analysis should include the *general* incentive effect on future cases of the rule (with respect to proportionality) that is articulated in the case before the Court.<sup>26</sup> Justice Rehnquist's dissent can be said to have taken an ex ante viewpoint of a sort, with its concern that affirming the award would send the wrong message to attorneys exercising "billing judgment" about how much time to put in on a case.<sup>27</sup> That is, of course, a legitimate ex ante concern; however, the dissent fails to take into account other ex ante considerations that economic reasoning suggests bear on the issue, namely the likely external benefits (inexpensive enforcement in many uncontested disputes) of costly enforcement in a few contested cases.<sup>28</sup>

---

25. See 106 S. Ct. at 2700 & n.3 (Powell, J., concurring in the judgment):

[I]n the special circumstances of this case, the vindication of the asserted . . . right may well have served a public interest, supporting the amount of the fees awarded. . . . It probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case. (emphasis in original).

26. At best, Justice Powell's position can be characterized as one that implicitly takes some limited account of ex ante considerations, but has limitations carrying it a long way back toward ex post reasoning. As Easterbrook wrote:

My point is not that creating incentives for future conduct should be the Court's sole objective in adjudicating legal disputes, but that the Court is bound to send the wrong signals to the economic system unless the Justices appreciate the consequences of legal rules for future behavior.

This may appear obvious. Our legal culture favors utilitarian arguments. Lawyers routinely make "policy" arguments to courts; legislatures invoke instrumental claims to show that their statutes are "rationally related" to some objective that they attain by changing people's incentives. It is nonetheless startling how often these arguments collapse to claims about "fairness," which in the law almost always means some appeal to an equitable division of the gains or losses among existing parties given that certain events have come to pass.

Easterbrook, *supra* note 6, at 11.

27. See *Riverside*, 106 S. Ct. at 2704 (Rehnquist, J., dissenting).

28. See, e.g., Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 483:

It is to avoid loss of [the] public benefits [resulting from civil rights enforcement], *which are in no way measured by the benefit to the individual plaintiff*, that the fee-shifting statutes were enacted. For these reasons, a private client's unwillingness to pay a fee higher than his own personal benefit furnishes no good guide to the appropriate fee. (emphasis added)

Possibly, there is another approach to the proportionality issue for cases litigated after 1983, when the sanctions provisions of Federal Rules of Civil Procedure 11, 16, and 26 were amended. Plaintiffs could use these rules to deal with the problem of recovering fees for unjustified resistance. These rules might indeed be useful in attempting to get around any proportionality limitations on fee recoveries under section 1988 and other federal fee shifting provisions. However, the rather unsettled state of the case law under the amended rules renders uncertain the extent to which they will serve the purposes of the fee award statutes.

## B. EVANS V. JEFF D.

The issue in *Jeff D.* was whether allowing waiver, in an overall settlement, of attorney fee entitlements under section 1988 violated the public policy behind the statute. Justice Stevens wrote for a 6-3 majority, holding that district courts have discretion to approve such waivers.<sup>29</sup> Justice Brennan, joined by Justices Marshall and Blackmun, dissented.

The arguments in the opinions were wide-ranging, and only some of them touch on the themes of this comment. The *Jeff D.* majority raises the same issue of incentives for counsel to take civil rights cases present in *Riverside*, but refuses to give it weight for lack of "reason or documentation" for concern about effects on availability of counsel.<sup>30</sup> Justice Stevens also hints at an idea that becomes explicit shortly afterward in Justice White's majority opinion for the same six Justices in *Delaware Valley I*—an apparently irrebuttable presumption that lawyers will observe their ethical obligations.<sup>31</sup> What follows from this presumption is a disregard for the possibility that courts should take some account of the likely conflict-creating incentive effects of the doctrines they articulate. However defensible the result in *Jeff D.* may be, these positions of the majority overlook or reject basic premises of ex ante economic reasoning.

The *Jeff D.* majority dismisses the possible impact on lawyers' willingness to represent civil rights plaintiffs, argued at length in the dissent,<sup>32</sup> in a footnote:

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. That the "tyranny of small decisions" may operate in this fashion

---

29. However vulnerable some of the Supreme Court's reasoning, see *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 258-67 (1986), the Court's reversal of the Court of Appeals' decision in *Jeff D.* seems to have been inescapable. The Ninth Circuit had divided the parties' settlement in two, approving their agreement on the merits but invalidating the settlement's fee waiver. The effect was to impose on the defendants something which was neither a "settlement" to which they had agreed in full nor a litigated judgment. See 475 U.S. at 724.

Moreover, the conclusion that at least some waivers of section 1988 fee claims in settlements can be valid under the statute appears hard to avoid if simultaneous negotiations on fees and the merits are permissible. And on that point, the Justices were unanimous. See *id.* at 738 n.30 (opinion of the Court); *id.* at 764-65 (Brennan, J., dissenting). Allowing such negotiations suggests that plaintiffs can reduce fees to get a settlement. If so, it is hard to see why they could never reduce them to zero by waiving them. Also, if a waiver comes at plaintiffs' initiative, it would be difficult to find a strong reason to forbid it.

30. 475 U.S. at 741 n.34.

31. *Id.* at 727-28; *Delaware Valley I*, 107 S. Ct. at 3098-99.

32. See *Jeff D.*, 475 U.S. at 754-59 (Brennan, J., dissenting.)



is not to say that 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.<sup>33</sup>

To say that comment on the likely effects of a rule being established in a case is "premature" is to reject a fundamental principle of *ex ante* analysis. Refusing to take such effects into account, after all, has the same impact as concluding that they will not happen. This conclusion could be the *result* of an *ex ante* approach, as the opinion seems implicitly to concede by offering comment after saying any would be premature. Calling for "documentation" is something of an unfair makeweight, given the elusiveness of the effect, and fails to address, if proof rather than reasoning is to be required, the key question of who should bear the burden. Moreover, if economic analysis teaches anything about the treatment of uncertain future events, it is to *discount* for the uncertainty rather than to *disregard* possibilities altogether.<sup>34</sup> The Court's offhand comment about the remoteness of the danger here might be taken as such a discounting, but one warranted only after some effort to evaluate whether the risk is really negligible.

Another part of the majority opinion deals with the chance that fee waiver requests in settlement bargaining, when coupled with a favorable offer on the merits, create an ethical conflict for plaintiffs' counsel:

[A]lthough we recognize [counsel's] conflicting interests between pursuing relief for the class and a fee for [his Legal Aid employer], we do not believe that the "dilemma" was an "ethical" one in the sense that [counsel] had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, [he] 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 trial, [his] decision to recommend acceptance was consistent with the highest standards of our profession.<sup>35</sup>

As a matter of the zeal a lawyer should bring to representation of a client,

---

33. *Id.* at 741 n.34 (citations omitted). A supporting citation to *Moore v. National Ass'n of Sec. Dealers*, 762 F.2d 1093, 1112 n.1 (D.C. Cir. 1985) (Wald, J., concurring in the judgment), discussed lawyer-client prearrangements to avoid conflict problems rather than lawyers' willingness to take cases and was thus not on point.

34. *Cf.*, Schaefer, *Uncertainty and the Law of Damages*, 19 WM. & MARY L. REV. 719 (1978) (advocating reduction in damages for the loss of future earnings when uncertainty exists as to what those future earnings would have been). The *Jeff D.* majority's tone is reminiscent of traditional refusals to allow inflation adjustments in calculating damages for lost future wages, largely because "such predictions were unreliably speculative." *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523, 540 (1983). This difficulty did not detain the unanimous Court, in an opinion also by Justice Stevens, from approving such adjustments in actions under federal law. *See id.* at 532-53.

35. *Jeff D.*, 475 U.S. at 727-28 (footnote omitted) (emphasis in original).

this point is unexceptionable.<sup>36</sup> But conflict of interest principles are not mainly about disregarding other interests to serve the client; a major theme is preventing or avoiding the conflicts in the first place.<sup>37</sup> The Court's discussion omits the possibility that not only lawyers but the courts themselves should take part in preventing conflicts by trying to avoid rules that make conflicts more likely.

Ex ante thinking can assist such efforts—which the Court has readily made in other contexts—at dovetailing of interest and ethics.<sup>38</sup> If the economic incentives are clear and foreseeable, as they are here, one legitimate argument about which rule to choose is that it will reduce conflicts and the likely incidence of violations of the ethical duties owed to clients. Section 1988, which the *Jeff D.* majority regarded as the necessary source for any anti-waiver rule,<sup>39</sup> cannot be taken to exclude arguments to harmonize interest and ethics because the Court accepts that Congress aimed to provide effective representation to civil rights plaintiffs.<sup>40</sup> Whether such an argument should prevail in a given case is, of course, another matter; but it makes little sense to cut the conflict concern out of the picture by simply presuming that lawyers will act ethically. That is precisely what the Court did all the more clearly in *Delaware Valley I*.

### C. DELAWARE VALLEY I

One of the main issues reached in the first *Delaware Valley* decision was the permissibility of enhancing the “lodestar” rate-times-hours figure for attorneys’ superior performance. Justice White’s majority opinion held: “Be-

---

36. See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause . . . .”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (duty of zealous representation).

37. See, e.g., C. WOLFRAM, MODERN LEGAL ETHICS § 7.1.3, at 317 (1986) (footnote omitted) (“the lawyer must be in such a position that all options that might favor the client can be considered free from the likely impairment of any interest other than those of the client”); MODEL RULES Rule 1.7 & comment (1987) (lawyer should not represent client if likely conflict would “materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client”).

38. The Court has been willing in other situations to take into account concerns of reducing conflicts and ethical violations. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 174-75 (1986) (arguing that requiring attorney, under the sixth amendment, “to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct”); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (production of attorney work product materials on mere demand would impair lawyers in performance of their obligations to advance justice and protect clients’ rightful interests, because “[i]nefficiency, unfairness and sharp practices would inevitably develop”). See also *Town of Newton v. Rumery*, 107 S. Ct. 1187, 1202-03 (Stevens, J., dissenting) (arguing against validity of “release-dismissal” agreements, which drop criminal charges in return for release from damage claims, because of conflicts of interest they create for government attorneys).

39. See 475 U.S. at 728-33.

40. See *id.* at 741 n.34.

cause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar . . . ."<sup>41</sup> The majority concluded:

[W]hen an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interest. . . . [T]he lodestar figure includes most, if not all, of the relevant factors comprising [sic] a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.<sup>42</sup>

For any number of reasons, from pride to fear of disrepute or professional sanction, from conscientious adherence to ethical obligations to being adequately paid, attorneys may well perform in full accord with the requirements of zealous and competent representation. For contrary reasons, singly or in combination, they also may fail to do so.<sup>43</sup> And if the "lodestar" is based on generous enough calculations, there may be no danger that attorneys will refuse to take cases or slack off in those they have taken because they are not being paid well enough by fee awards. But the complexities of human motivation make it hard to justify the Court's ostensible presumption that attorneys will conduct themselves as the ethical canons dictate come what may.

The Court's argument implicitly rejects the economic notion of "moral hazard," which exists when a rule creates ex ante incentives for undesirable behavior. Enough is known about ethical problems with lawyers' conduct<sup>44</sup> to make it clear that the hazard in this context is real. Nor does it detract from the importance of legal ethics to consider whether their impact could benefit through reinforcement from economic self-interest. In *Delaware Valley I*, the majority's disregard of the "moral hazard" problem seems to have been of little consequence, because the lodestar amount might provide enough financial incentive for lawyer performance. The reasoning, however, is another example of a pattern—repeated in other opinions—of dealing with

---

41. 106 S. Ct. at 3099. The majority's holding seems defensible, for the reason given in the sentence quoted. The discussion that follows criticizes only one aspect of the opinion's reasoning; the result can stand on independent grounds.

42. *Id.* at 3098-99.

43. For discussion of the impact of economic and other incentives on lawyers' effort, see Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567 (1980-81); Kritzer, Felstiner, Sarat, & Trubek, *The Impact of Fee Arrangement on Lawyer Effort*, 19 LAW & SOC'Y REV. 251 (1985).

44. See O. MARU, RESEARCH ON THE LEGAL PROFESSION: A REVIEW OF WORK DONE 56 (2d ed. 1986) ("Many lawyers at all levels do not follow some canons of the codes of professional ethics, and in large metropolitan communities marginal practitioners frequently disregard ordinary standards of honesty and decency as well." (footnote omitted)).

points on which *ex ante* analysis could profitably be brought to bear yet pursuing it only perfunctorily, rejecting its implications, or simply omitting it altogether.

#### D. DELAWARE VALLEY II

At the end of its opinion in *Delaware Valley I*, the Court took the unusual step of scheduling just part of the case for reargument on the question of "contingency enhancements"—increases beyond the lodestar figure for the risk of losing and collecting no fee at all.<sup>45</sup> The Courts of Appeals had mostly approved such enhancements, normally set in each individual case based on a retrospective assessment of the risk at the outset.<sup>46</sup> The commentary had been predominantly favorable to the general idea of compensation for risk,<sup>47</sup> but a leading article by Professor John Leubsdorf had strongly criticized the setting of enhancement ratios on a case-by-case basis.<sup>48</sup>

The problems of the individual-case approach are many and serious. It is hard to say in hindsight how much of what turned out to be a silk purse really looked like a sow's ear at the start of litigation, and it is at best unseemly for the winners' lawyer to argue that their now successful claim originally appeared doomed to lose. Large enhancements for low initial chances of winning penalize most those defendants who had the strongest-seeming defenses and thus acted most reasonably in resisting, and the incentives created for prospective plaintiffs' counsel to take weak-looking cases can be rather perverse.<sup>49</sup> *Ex ante* analysis suggests a response, first proposed in Professor Leubsdorf's article, to the tension created by the general justification for contingency enhancements and the problems of setting them in each individual case: a *single* ratio set *in advance* for a *class* of cases.<sup>50</sup> That approach would avoid these problems, reduce litigation over fee award amounts, and give attorneys desirable incentives to take cases down to a certain desired

---

45. 106 S. Ct. at 3100.

46. *See Delaware Valley II*, 107 S. Ct. at 3082-83 & n.4.

47. *See, e.g.,* Leubsdorf, *supra* note 2, at 480 (footnote omitted):

A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.

Judge Easterbrook, while a professor, submitted an expert affidavit in support of a sizeable contingency multiplier. Amicus Curiae Brief of Twelve Small Private Civil Rights Firms at 32 & n.5, *Pennsylvania v. Delaware Valley Citizens' Council*, 107 S. Ct. 3078 (1987) (No. 85-5) (citing Affidavit of Prof. Frank H. Easterbrook & Robert A. Sherwin, *In re Burlington Northern Inc. Employment Practices Litigation*, Master File No. MDL 374, No. 78 C 269 (N.D. Ill. Aug. 23, 1984)).

48. Leubsdorf, *supra* note 2, at 482-97.

49. *See Delaware Valley II*, 107 S. Ct. at 3084-85 (plurality opinion).

50. *See* Leubsdorf, *supra* note 2, at 501-04.

level of likely success, which could be reflected in the ratio.<sup>51</sup>

The policy arguments for Leubsdorf's resolution are strong, but the implications of his approach for judicial resolution of the contingency enhancement problem are mixed.<sup>52</sup> A judge accepting the justification for *some* enhancement could still regard the setting of a fixed, general enhancement ratio as a legislative function,<sup>53</sup> and thus either retain the questionable case-by-case approach *faute de mieux* or reject it (allowing no contingency enhancements) in view of all its problems. In light of the many difficulties of contingency enhancements, it is not surprising that the Court split without a majority opinion. Justice White wrote for a plurality including Chief Justice Rehnquist and Justices Powell and Scalia, finding "multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss . . . impermissible under the usual fee shifting statutes."<sup>54</sup> Justice Blackmun, writing for himself and Justices Brennan, Marshall, and Stevens, supported a general allowance "to ensure that lawyers who take cases on contingent bases are properly compensated for the risks inherent in such cases,"<sup>55</sup> and would have remanded for determination of the enhancement. Justice O'Connor agreed with the dissent's general approach but found insufficient support for any enhancement in the record of the case before the Court, thus making a majority to reverse the enhancements awarded below. But the "law of the land," as the dissent was quick to point out,<sup>56</sup> seems to be that contingency enhancements can be appropriate in some cases.

An extensive critique of the economic analysis in these opinions might be pointless, for Professor Leubsdorf and others have developed the basic points in commentary already. What is worth noting is how the plurality opinion makes disingenuous and tendentious use of these points in a way that does not support its conclusions. Leubsdorf had urged that a contingency enhancement was justified, but that case-by-case, after-the-fact setting of the ratio was wrong for several reasons. His conclusion was to keep some enhancement but to set it in advance for entire classes of cases. The plurality uses Leubsdorf's criticisms of *one way* of handling contingency enhance-

---

51. If the idea were that lawyers should have incentives to take cases with at worst a two to one chance of success, for example, the general enhancement ratio would be 1.5, or a fifty percent increase.

52. Of course, ex ante economic analysis is not the only approach to the issue. Again, the intent of Congress is controlling if clear, which the Court's 4-4-1 division in *Delaware Valley II* suggests it was not. A further difficulty is whether contingency enhancements amount to unjustifiable compensation for the risk of loss in *other* cases by raising the awards levied on the defendants before the court. Compare the arguments on this point in the plurality and dissenting opinions in *Delaware Valley II*, 107 S. Ct. at 3083 (plurality opinion), 3100-01 & n.17 (Blackmun, J., dissenting).

53. See Leubsdorf, *supra* note 2, at 505.

54. 107 S. Ct. at 3087.

55. *Id.* at 3101.

56. *Id.* at 3095 & n.7.

ments as grounds for not allowing them *at all*. In the process, the opinion simply ignores the alternative means proposed by Leubsdorf and repeatedly underscored by the dissent.<sup>57</sup>

Even more strikingly, three of the same Justices (White, Rehnquist, and Powell) who had written or joined the presumptions of ethical conduct in *Jeff D.* and *Delaware Valley I*<sup>58</sup> now cite the danger of creating lawyer-client conflicts of interest among their concerns with contingency enhancements.<sup>59</sup> It is common for Justices across the legal spectrum to use selectively the sources available for legal argument.<sup>60</sup> In its selectivity and inconsistency, the *Delaware Valley II* plurality opinion may reflect how economic thinking has arrived as a form of legal discourse, getting twisted just as text, precedent, and history have often been.

## II. WHAT'S GOING ON HERE?

If I am correct that the sophistication of the economic analysis in Supreme Court attorney fee award decisions in the last two Terms has been fairly low (with the principal exceptions of the *Delaware Valley II* concurrence and dissent,<sup>61</sup> which had it handed to them on a platter already), then efforts are in order to figure out why this is so. The reasons that come to my mind are of four types, all of which illustrate the challenges of integrating economic thinking into judicial decisionmaking. The first concerns the nature and quality of advocacy, both from judges' temptation to play the advocate in

---

57. See *id.* at 3097, 3100. The plurality ignores the plausible position that a comprehensive approach, while perhaps better, should not come from the judicial branch. See *supra* text accompanying note 54. The plurality concludes, instead, that contingency enhancements should be "limited to 1/3 of the lodestar" if they are allowed at all. 107 S. Ct. at 3089.

58. See *supra* notes 36-45 and accompanying text.

59. See 107 S. Ct. at 3084 (plurality opinion):

[E]valuation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case, and a defendant's attorney must either concede the strength of the plaintiff's case in order to keep down the fee award, or "allo[w] the fee to be boosted by the contingency bonus [by] insisting that the plaintiff's victory was freakish."

*Id.* (quoting Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 483 (1981)). The conflict danger, although real, can be exaggerated, for if the merits have been settled or a decision on the merits has become final there is usually no danger of the lawyer harming a client's interests.

60. See, e.g., Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89 (criticizing as manipulative Court's treatment of statutory text, legislative history, and precedent in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (attacking partisan "law-office" use of history in several Supreme Court opinions).

61. The *Jeff D.* dissent also developed incentive arguments in considerable detail, drawing on a good deal of existing case law, commentary, and ethical material. See 475 U.S. at 754-59 (Brennan, J., dissenting).

opinions and in what counsel present to courts. Second is the inherent uncertainty of much *ex ante* analysis, and third are some ways in which it is psychologically difficult to get and keep the human mind attuned to such thinking. Finally, in the attorney fee area there arise special concerns relating to perceived high costs of litigation and the desirability of promoting settlements.

Some of the explanation for unsatisfactory economic analyses no doubt lies in felt needs for opinion writing. A result has to be justified, and it should come as no surprise that busy judges experienced in argument, deciding close cases on issues whose importance goes far beyond theory, turn modes of analysis to partisan uses that are subject to academic criticism. The decision may seem satisfactory overall, but a telling point in dissent can call for a reply; an analytically shaky dismissal, rather than a concession with explanations why the result still follows, may be a tempting shortcut for an opinion writer who has the votes. At the extremes, these pressures can lead to lamentable inconsistencies, such as the on-again, off-again presumptions of ethical regularity and concern for creating conflicts of interest.<sup>62</sup>

But tendentiousness in opinion writing, leading to inconsistency and unsatisfactory treatment of inconvenient arguments, cannot be the whole of it, for the *Riverside* plurality failed to make what seems to be a strong economic argument *for* its position.<sup>63</sup> The sample in these few cases is far too small for confident conclusions, but the depth of economic analysis in the advocacy presented to the Court or developed in existing literature may have a significant influence. The economic reasoning in the *Riverside* opinions was especially weak, and the briefs themselves had not taken the analysis very far.<sup>64</sup> The most sure-footed treatments, by contrast, came in the *Jeff D.* dissent and the *Delaware Valley II* concurrence and dissent. There, however, widely noted commentary had already developed the arguments in considerable depth.<sup>65</sup> It should not be surprising that Justices, whose metier is law, not economics, occasionally fail to move on their own to advanced levels in relatively unfamiliar modes of thought.

Further, the friends of economic approaches should be careful not to claim too much. *Ex ante* analysis usually has an ineradicable speculative element. The direction of an incentive may be clear, but its strength and net impact may not be. And given the multiple springs that motivate human conduct, the incentive in question may have little of its expected effect. Just possibly, for example, other factors such as lawyers' willingness to take cases on a full or partial *pro bono* basis might adequately compensate for any reduction in

---

62. See *supra* notes 39, 60 and accompanying text.

63. See *supra* notes 15-25 and accompanying text.

64. See *supra* note 25.

65. See *supra* notes 48-52 and accompanying text.

the availability of counsel caused by the denial of contingency enhancements.<sup>66</sup> The next stage of incorporation of economic analysis into legal decisionmaking, unfortunately a difficult and expensive one, may have to be considerably expanded empirical research to reduce some of the most nagging uncertainties.

Closely related to the problem of uncertainty and speculativeness is the psychological difference between the appeal of the concrete case before a court and that of the abstract possibilities which *ex ante* analysis requires judges to take into account. It is all too easy, when facing the families of present captives and deciding on a ransom policy that encourages potential kidnappers, to think little of the likely but unspecific future hostages and their relatives. Similarly, it is tempting to wax indignant about an apparent abuse, such as a disproportionate fee claim, while ignoring the broader effects that cracking down on the "abuse" is likely to have on other cases in which the abuse is absent.<sup>67</sup> Moreover, *ex ante* analysis—evaluating the future effects of a rule—may seem more like a legislative than a judicial mode of thought, although it appears highly appropriate when courts must make rules rather than simply apply them. These differences in immediacy, rhetorical appeal, and style of thought may also help explain the tendency of judges taking positions supportable by broad *ex ante* arguments to slip into the narrower, *ex post* reasoning of customary legal argument. An example is Justice Powell's concurrence in *Riverside*, insisting on a showing of public benefit from the *particular* litigation to justify a fee award disproportionate to the damages recovered.<sup>68</sup>

Finally, in the attorney fee cases these general difficulties are compounded by more specific "litigation explosion" concerns for the cost and volume of litigation and a perceived need to promote settlements. The *Riverside* dissents stressed "public indignation over the costs of litigation"<sup>69</sup> and the importance of "billing judgment" to keep attorneys from spending "as many

---

66. See Comment, *Nonpayment Risk Multipliers: Incentives or Windfalls?*, 53 U. CHI. L. REV. 1074, 1100-04 (1986) (discussing "hidden incentives to bring civil rights cases": nonmonetary psychic benefits, possible upward bias in lodestar, lawyers working below time capacity); cf. *Delaware Valley II*, 107 S. Ct. at 3086-87 (plurality opinion) (discussing the many reasons why plaintiffs often can obtain representation—sizable damages, legal services programs, and lawyer underemployment).

67. *Ex ante* thinking thus shares a key trait with the first amendment overbreadth doctrine, although it does not involve special standing difficulties from the invocation of rights of hypothetical others not before the court, as overbreadth analysis does. See generally *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Both require judges to think of abstract parties and how they would be affected by the rule the court is considering. Moreover, both can call on a court to rule in favor of some relatively unappealing claimants, or against attractive ones, for the sake of others whose present appeal is inevitably diminished by their lack of concreteness.

68. See *supra* notes 26-27 and accompanying text.

69. 106 S. Ct. at 2701 (Burger, C.J., dissenting).



hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages.”<sup>70</sup> The *Jeff D.* majority opinion discussed at length the desirability of promoting settlements and the probable effects of banning or allowing fee waivers on the likelihood of settlement.<sup>71</sup>

These concerns are undeniably valid,<sup>72</sup> but they sometimes seem to produce a damn-the-torpedoes mind set that leaves countervailing factors overlooked or underemphasized.<sup>73</sup> The emphasis on cost in the individual disproportionality case ignores the inequities and social costs of under-enforcement in other cases. Moreover, focusing on the *fact* of settlement can exclude the impact of permitting fee waivers on the *terms* on which settlements are reached and the resulting implications for civil rights plaintiffs. Taking these other factors into account would not necessarily dictate different results, but a strong sense of need to do something about problems of litigation cost and volume may help account for the limited focus and rather underdeveloped economic analysis in some of these opinions.

### III. . . . AND WHAT DIFFERENCE DOES IT MAKE?

Whatever one thinks of the law and economics movement in general, ex ante economic analysis is especially appropriate in some cases under the federal attorney fee award statutes. Congress’ general goals in this area included the creation of incentives for lawyers and clients. Thus, when Congress has not spoken on a specific point, it seems inescapable for courts to consider the incentive effects of different possible rules. That much appears to be common ground, but of course the choice among approaches can affect how well Congressional goals are fulfilled. The narrow focus of the

---

70. *Id.* at 2704, 2705 (Rehnquist, J., dissenting).

71. 475 U.S. at 732-38.

72. However, the general impression about how much of a volume problem constitutional tort litigation poses for the federal courts may be exaggerated. See S. Schwab & T. Eisenberg, Constitutional Tort Litigation in Three Districts, the Government as Defendant, and Counsel’s Incentives (Stanford Law School Law and Economics Program Working Paper No. 34, 1987) (empirical study indicating that constitutional tort filings are not growing rapidly in relation to rest of federal court docket). If judges think such cases are relatively more numerous and burdensome than they actually are, the temptation may arise to control them by restrictive fee award rulings.

73. See Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 71 (1983):

I have argued that the hyperlexis reading of the dispute landscape displays the weakness of contemporary legal scholarship and policy analysis. . . . Portentous pronouncements were made by established dignitaries and published in learned journals. Could one imagine public health specialists or poultry breeders conjuring up epidemics and cures with such cavalier disregard of the incompleteness of the data and the untested nature of the theory?

*Riverside* plurality and concurrence, while preserving at least for the moment the possibility of fee awards substantially greater than damages recovered, will questionably require a showing of public benefit from a *particular* litigation in order for lower courts to make such awards. Also, the kind of disagreement seen in *Delaware Valley II* over the need for economic incentives to assure the availability of counsel can obviously affect future decisions on such issues as the setting of fee award rates.<sup>74</sup>

When the Court touches on ethical issues, as it did in *Jeff D.* and *Delaware Valley I*, its influence is less direct since it does not enunciate the ethical canons themselves. But if a majority consistently disregards the "moral hazard" that may be created by its decisions under the fee shifting statutes, the consequences are still likely to be serious. Such an approach can intensify conflicts for practicing lawyers, reduce availability of counsel as attorneys foresee conflicts and decline representation to avoid them, and add to rulemaking or enforcement difficulties for ethics committees.<sup>75</sup> It may force changes in state ethics provisions that the states would not have had to consider had the Court, in its interpretation of federal law, shown the same deference to lawyers' professional obligations that it has in other areas.<sup>76</sup> Finally, it may slow progress toward the framing of economic incentives for lawyer behavior to encourage desired professional conduct.<sup>77</sup>

On a more general level, inconsistent and unsophisticated Supreme Court

---

74. See *Pierce v. Underwood*, 107 S. Ct. 2177 (1987) (No. 86-1512) (granting certiorari in case concerning definition of "special factor" justifying rate above general \$75 per hour cap in Equal Access to Justice Act).

75. See, e.g., Goldstein, *Settlement Offers Contingent upon Waiver of Attorney Fees: A Continuing Dilemma After Evans v. Jeff D.*, 20 CLEARINGHOUSE REV. 693 (1986) (discussing the ethical conflicts confronted by plaintiffs' attorneys when defendants seek to negotiate settlements contingent on waiver of attorneys' fees); Comment, *Evans v. Jeff D. and the Proper Scope of State Ethics Decisions*, 73 VA. L. REV. 783 (1987) (discussing the potential conflict between the Supreme Court's allowing settlements contingent on fee waivers and state ethics committees' prohibiting such settlements); Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.*, 87 COLUM. L. REV. 1214 (1987) (arguing that states still can and should restrict fee-waiver demands).

76. See *supra* note 39; see N.Y. City Bar Ass'n Comm. on Prof. & Judic. Ethics Formal Opinion No. 1987-4 (divided opinion withdrawing, in light of *Jeff D.*, previous opinions holding fee-waiver settlement proposals by defense counsel unethical in civil rights fee award cases).

77. See Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978) (advocating hybrid hourly and contingent percentage fee to align interests of attorney and client); Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (considering fee award based on increasing percentage of aggregate recovery, rather than fixed percentage or rate-times-hours lodestar, to reduce problems of collusive settlements benefiting plaintiffs' counsel more than clients); Leubsdorf, *supra* note 2 (suggesting general contingency enhancement factor fixed in advance for several reasons, including reduction of lawyer-client conflicts). See generally Rosenberg, *The Federal Rules After Half a Century*, 36 ME. L. REV. 243, 248 (1984) ("a modern procedural system should try to develop incentives and rewards of positive kinds to encourage lawyers to act in harmony with the system's goals").

uses of economic approaches set a poor example for lower courts and may lessen chances for some small increase in agreement on an often-fractionated Court. Lower courts will not, to be sure, use economic analysis poorly just because the Supreme Court does so. But in addition to being bound by the products of Supreme Court reasoning, good or bad, the lower courts cannot help but be influenced by its general tenor.

Of course, no one should expect economic reasoning to eliminate grounds for disagreement on the Court, even when it is accepted as appropriate for a particular case or issue. The highly political nature of the divisions in the cases examined in this comment should quickly dispel any such notion. Yet those of us who often find economic approaches to be valuable tools rather than ideological straitjackets can still hope that these powerful devices, relatively new to the law, will not simply become additional weapons in the arsenals of existing armies but will contribute to some realignments of the forces.

