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## Just Fee Shifting

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# FLORIDA STATE UNIVERSITY LAW REVIEW



JUST FEE SHIFTING

*Issachar Rosen-Zui*

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# JUST FEE SHIFTING

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## ABSTRACT

*Equal justice in present-day America is a myth. Millions are essentially blocked from accessing the civil justice system. A central factor in this predicament is the fees charged by attorneys, whose prohibitive rates prevent many Americans from asserting their legal rights. In order to ensure equal justice, it is, therefore, essential that measures be devised to counteract the effect of attorney fees on access to justice for low- and average-income individuals. While the civil justice system offers a variety of mechanisms designed to offset the effect of wealth disparities on access to justice (such as legal aid, fee-shifting statutes, and contingency fee arrangements), even when taken together, they are far from a sufficient remedy for the system's ills.*

*This Article presents a novel solution to this problem. It proposes to replace the rule currently used for allocating attorney fees—the American Rule—with a progressive one-way fee-shifting rule as a means of equalizing justice in civil litigation and assisting people of modest means in financing litigation against wealthy adversaries. The proposed rule combines features from both the American Rule (whereby each party is responsible for its own attorney fees) and the English Rule (under which the loser pays the winner's fees) in a way that takes into account resource disparities between the litigating parties. Accordingly, in litigation between unbalanced parties, the rule would direct courts to award attorney fees to the winner when the poor litigants prevail against their moneyed opponents (whether private corporations or governmental agencies), whereas each party would pay its own fees whenever the rich party prevails.*

*The Article argues that the progressive fee-shifting rule should appeal not only to people seeking a more egalitarian society, but also to those who care only about efficiency. By restoring the balance of power between the parties, the proposed rule resolves the inefficiencies that characterize the current system of civil justice. The most noteworthy and laudable probable effect of the rule would be the expansion of the legal services market to cover currently excluded types of claims. Like the contingency fee, the proposed rule would tap the forces of the legal services market by providing high quality lawyers economic incentive to accept less wealthy clients on a no-win, no-fee basis. At the same time, the proposed rule overcomes the two most serious drawbacks of contingency fees. First, in contrast to the contingency fee market, which can only function if there are damages from which lawyers can collect fees, the proposed rule would bring into the legal services market a wide array of cases not suited to the contingency arrangement, such as small meritorious claims, nonmonetary claims, and cases in which the defendant is the poor party. Second, under the contingency fee system, poor plaintiffs are left undercompensated because a large proportion of the recovery is siphoned off as attorney fees. By shifting payment of the fees to the wealthy party, the proposed rule would ensure that the poor party is compensated for its entire loss.*

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## I. INTRODUCTION

Equal justice in present-day America is nothing more than a myth. For millions of people, access to the civil justice system is virtually blocked.<sup>1</sup> And while many others are formally able to access the system, their prospects of success in litigation are somewhere between slim and nonexistent.<sup>2</sup> This is true not only for the indigent, but also for middle-class Americans who struggle to bear the rising costs of litigation.<sup>3</sup> Over the years, funding legal services has become a daunting task, and those unable to shoulder it are by and large left to fend for themselves, usually unsuccessfully. Thus, we tolerate a system of justice in which money talks and, all too often, it speaks much louder than merit.<sup>4</sup>

Contributing to this dismal state of affairs is the adversarial nature of adjudication. The adversarial model is premised upon the idea that the best method for dispute resolution is reliance on the parties to produce the facts and present legal arguments.<sup>5</sup> The rationale underlying this model is that competition between opposing parties

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1. Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1785 (2001).

2. See Alan Wertheimer, *The Equalization of Legal Resources*, 17 *PHIL. & PUB. AFF.* 303, 304 (1988); see also Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 97 (1974).

3. See DEBORAH L. RHODE, *ACCESS TO JUSTICE* 3 (2004) ("According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet."); see also Albert W. Alschuler, *Mediation with a Mudder: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 *HARV. L. REV.* 1808, 1811-17 (1986) (criticizing the increase in attorney fees and exploring the unmet legal needs of the less well-to-do); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 *CAL. L. REV.* 209, 213 (2003) (arguing that "95% of low-income people's legal needs remain unaddressed").

4. Rhode, *supra* note 1, at 1786; see generally Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 *U. PA. L. REV.* 2119 (2000) (arguing that there is a need for increased regulation and guidance for judges when awarding attorney fees in mass tort litigation to ensure equitable justice and equal access to the courts for low-income litigants).

5. William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *CARDOZO L. REV.* 1865, 1873 (2002).

leads to the triumph of truth.<sup>6</sup> However, a fundamental prerequisite for such a system to function properly is that the competition take place between *fairly matched* adversaries<sup>7</sup>—parties that are somewhat equally capable of collecting evidence, examining witnesses, summoning experts, and the like. Thus, the accuracy of the judicial outcome is contingent on the absence of an a priori structural bias in favor of one of the parties.<sup>8</sup> “If, due to a lack of resources, one party is unable to uncover evidence or is less skilled in developing legal arguments, the outcome might be skewed in favor of her better-equipped adversary.”<sup>9</sup> This sums up the reality of the American civil justice system. Those with greater resources often win at trial not on merit, but because they can afford greater amounts of high quality legal assistance, which significantly impacts the persuasiveness of their cases.<sup>10</sup> Therefore, it is essential for the administration of justice to neutralize, to whatever extent possible, resource disparities between parties and create a relatively level playing field between them. Otherwise, the justice system is plainly unjust.<sup>11</sup>

But a legal system that fails to provide equal access to justice does not only pay the price of impairment of justice; it also pays in the hard currency of inefficiency, suboptimal deterrence, and diminished overall legitimacy and acceptability.<sup>12</sup> A system that prevents or discourages civil litigants from pursuing meritorious claims due to a lack of resources is not only unfair but also deficient from a social welfare perspective. First of all, it provides distorted incentives for large private firms and governmental agencies to take inadequate precautions against the many risks they create<sup>13</sup> and to engage in un-

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6. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382-85 (1978).

7. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 513 (1986).

8. See Rubenstein, *supra* note 5, at 1874 (arguing that equality is important because, among other things, it contributes to accurate dispute resolution). For an exploration of the importance of accuracy for the effectiveness of the civil justice system, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307-08 (1994) (“Accuracy is a central concern with regard to a wide range of legal rules. One might go so far as to say that a large portion of the rules of civil . . . procedure and rules of evidence involve an effort to strike a balance between accuracy and legal costs.”).

9. Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 91 (2008).

10. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 258 (2004) (“Given that the quality of representation depends on the ability to pay, current civil procedure doctrine would seem to provide a systemic distribution of the risk of error in favor of those who have the greatest share of social resources.”).

11. Luban, *supra* note 3, at 209, 220-21. For a philosophical exploration of the notion “justice” in the adversary system and its relationship to equality, see Wertheimer, *supra* note 2.

12. For that reason, the aspiration for equality in litigation exists even in systems that, and among people who, “condone[] gross disparities of wealth and . . . [are] resistant to redistributive financial policies . . . .” Rubenstein, *supra* note 5, at 1874-75.

13. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 397 (2004); see also Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income*

lawful conduct that is beneficial to them but harmful to society at large.<sup>14</sup> Moreover, since law is a public good, a suit that ends in a judicial resolution often not only serves the litigants at hand but also spills over to many other parties.<sup>15</sup> These benefits are lost in a system that virtually blocks access to justice for a growing segment of the population. What is more, a legal regime that does not guarantee to all individuals that their claims of injustice will be heard sends a message of disrespect and reinforces their sense of unworthiness.<sup>16</sup> As a consequence, the unequal access to justice yields a loss of legitimacy for the entire civil justice system and diminishes the acceptability of its adjudicative outcomes.<sup>17</sup>

The factor that contributes the most to this inequality in access is the prohibitively high attorney fees, which continue to increase yearly.<sup>18</sup> This financial burden prevents more and more Americans from realizing their legal rights. Either they cannot afford to access the

*Litigants*, 101 HARV. L. REV. 1231, 1234 (1988) (asserting that it is impossible for a legal system to provide adequate levels of deterrence unless potential injurers are faced with the prospect of liability for the expected costs of their conduct).

14. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 585 (6th ed. 2003) (“The likelier a suit is, the greater is the deterrence effect . . . and hence the less likely are potential defendants to engage in the forbidden conduct that would create a right to sue.”); Alschuler, *supra* note 3, at 1813 (arguing that “as potential wrongdoers gain confidence that their potential victims will not seek legal redress, the economic disincentive to the violation of rights fades and disappears”); see also Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2058-69 (1993) (arguing that due to insurmountable obstacles to litigation standing in the way of the less affluent, the current system of civil justice fails to deter public and private actors from engaging in wrongdoings).

15. Such a suit could, for example, set a precedent that enables similar disputes to be resolved without resort to a full trial, thus saving society considerable resources. For example, a consumer might not contest a small erroneous or unlawful charge imposed by a financial institution due to the high litigation costs she would have to bear. Not only is the result unfair, it has detrimental external effects as well because many other consumers of that same institution might have gained from a judicial determination that the charge was unlawful or erroneous. See RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 131-32 (1985) (discussing the value of information produced by a lawsuit, which enables other disputants to settle their disputes without litigation); cf. POSNER, *supra* note 14, at 553-54 (discussing the body of precedents as a capital stock).

16. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I*, 1973 DUKE L.J. 1153, 1172 (arguing that the opportunity to litigate promotes self respect and a sense of having your voice heard); Alschuler, *supra* note 3, at 1810 (arguing that by enabling litigation, courts reinforce a sense of individual self-worth and entitlement); RHODE, *supra* note 3, at 9 (arguing that access to justice “affirms a respect for human dignity and procedural fairness that are core democratic ideals”).

17. See RHODE, *supra* note 3, at 59 (quoting REGINALD HEBER SMITH, JUSTICE AND THE POOR (1919), who argued that “injustice leads directly to contempt for law, [and] disloyalty to the government, and plants the seeds of anarchy”).

18. According to the Statistical Abstracts of the United States, in 2005, legal services amounted to approximately 1.45% of gross domestic production. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, at 430-31 tbls. 647 & 648 (127th ed. 2007), available at <http://www.census.gov/prod/2007pubs/08abstract/income.pdf>. In comparison, twenty-five years earlier, in 1980, legal services accounted for approximately 0.85% of the GDP. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 426 tbl. 691 (110th ed. 1990), available at <http://www2.census.gov/prod2/statcomp/documents/1990-01.pdf>.

system at all or the gross imbalances in the quality and quantity of legal representation significantly increase the risk of erroneous deprivation of the poor party's substantive rights.<sup>19</sup> Therefore, to restore equal justice, it is essential that measures be taken to counteract the effect of attorney fees on the ability of low- and middle-income individuals to access the civil justice system and enable them to participate in litigation on equal terms with the more well-to-do.

The civil justice system offers a range of mechanisms for neutralizing the effect of gross societal wealth disparities on the ability of the underprivileged to access justice. The best known of these is legal aid.<sup>20</sup> Both the federal and state governments supply legal assistance to qualified poor people through different publicly funded programs, the biggest and most important being the Legal Services Corporation.<sup>21</sup> Fee-shifting statutes, also known as Equal Access to Justice Acts, are another means by which government assists the poor in funding meritorious suits.<sup>22</sup> Most of these statutes employ a one-way fee shift, under which plaintiffs that successfully sue a governmental agency or a large corporation can recover their attorney fees.<sup>23</sup> There are also market-based mechanisms designed to assist the poor in financing litigation. One such mechanism is a "no-win, no-pay" fee arrangement, of which the contingency fee is the most commonly applied.<sup>24</sup> Another market mechanism, which is used extensively in the United Kingdom and Continental Europe and to a much lesser extent in the United States, is legal expenses insurance.<sup>25</sup> Under this mechanism, parties are insured for the costs of bringing or defending against legal actions.<sup>26</sup>

Unfortunately, none of these mechanisms constitutes a satisfactory solution to the problem. The overall impact of all the publicly-

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19. Solum, *supra* note 10, at 258.

20. For a detailed discussion of legal aid, see *infra* Part II.A.

21. Luban, *supra* note 3, at 220; see generally Legal Services Corporation Act, 42 U.S.C. § 2996 (2006).

22. For a detailed discussion of these fee-shifting statutes, see *infra* Part II.C.

23. See generally HENRY COHEN, CRS REPORT FOR CONGRESS: AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (updated June 20, 2008), available at <http://www.fas.org/sgp/crs/misc/94-970.pdf> (discussing how awards of attorney fees are "designed to help to equalize contests between private individual plaintiffs and corporate or governmental defendants"); see also Susan M. Olson, *How Much Access to Justice From State "Equal Access to Justice Acts"?*, 71 CHI.-KENT L. REV. 547, 550 (1995).

24. For a detailed discussion of contingency fees, see *infra* Part II.B.; Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1974-78 (2002).

25. Richard Able, *Forecasting Civil Litigation*, 58 DEPAUL L. REV. 425, 447 (2009).

26. Due to its negligible presence in the United States, this measure will not be discussed in Part II of the Article but will be explored at some length in Part IV. There are also a host of mechanisms designed to aggregate claims such as multidistrict litigation and class actions. The Article does not deal with such mechanisms at all but focuses only on the many cases that cannot be aggregated and thus are handled individually.

funded programs and fee-shifting statutes on access to justice has been limited at best, while “the strength of our societal commitment to them has been underwhelming.”<sup>27</sup> Adding insult to injury, legal aid programs are under constant, vicious attack.<sup>28</sup> In fact, history has taught us two important lessons: first, programs that rely on public funds and the good will of the government are doomed to chronic underfunding. There are always, allegedly, better uses for that money than to “throw it away” on helping the poor to litigate.<sup>29</sup> Second, the best way to help the disadvantaged is to harness market forces and channel them to the poor’s advantage.<sup>30</sup> Thus, it is imperative to design a market-driven mechanism that does not depend on public funds and provides for direct transfer of wealth between the litigating parties. The contingency fees represent one such mechanism, relying on the market rather than on the government for its operation. Yet, as will be demonstrated below, this particular arrangement, which has proven to be by far the most successful available device for broadening access to justice, has solved the problem only partially and at a very high cost to low-income people.<sup>31</sup>

This Article proposes an innovative arrangement for ensuring equal justice and assisting those with modest means to finance litigation against wealthier and more powerful adversaries: a general, progressive one-way fee-shifting rule. The general progressive rule, a combination of the American and English Rules, is a mechanism for attorney fees allocation that takes into account resource disparities between parties to litigation. Under the American Rule, each party is responsible for its own attorney fees, regardless of the outcome, whereas the English Rule instructs the losing party to pay the winner’s entire legal costs, including attorney fees.<sup>32</sup> Under the proposed general progressive rule, the arrangement governing attorney fee recovery in any given case would be contingent on the relative economic power of the litigating parties. Based on their economic wherewithal, plaintiffs and defendants would be classified under the categories of “poor” and “rich.”<sup>33</sup> In cases where both parties belong to the same category—either both “rich” or both “poor”—the American Rule would govern the fee award and each party would be responsible for its own attorney fees. The same rule would apply when only one of

27. Rubenstein, *supra* note 5, at 1878.

28. Luban, *supra* note 3, at 209; *see also* RHODE, *supra* note 3, at 10 (reviewing the reasons for political opposition to legal services).

29. *See* RHODE, *supra* note 3, at 10.

30. Two such legal mechanisms are contingency fees, which will be discussed at length below, and class actions. *See generally* Resnik, *supra* note 4, at 2144-47.

31. *See infra* discussion at Part II.B; *see also* Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOYOLA L.A. L. REV. 691, 709 (2006).

32. Olson, *supra* note 23, at 549.

33. “Poor” and “rich” would be defined based on a formula discussed *infra* Part III.B.



the parties is classified as “rich” (whether plaintiff or defendant) and that party prevails in the litigation. When, however, the poor party prevails, the English Rule would apply and the rich party would be instructed to pay its opponent’s attorney fees.<sup>34</sup>

This proposal can be deemed a progressive measure because it is socially and economically egalitarian.<sup>35</sup> It is designed, first and foremost, to place low- and average-income earners on equal footing with the more well-to-do in litigation. However, it should also appeal to those who condone wealth disparities and resist redistributive policies. By restoring the balance of power between litigating parties, the proposed mechanism resolves the inefficiencies that characterize the current system of civil justice, brings deterrence to its optimal level, and restores the system’s overall legitimacy. This is achieved by expanding the market in legal services to cover many types of cases that are currently left outside the bounds of the economy of justice. The fee-shifting rule proposed here encourages high quality (and, therefore, expensive) lawyers to take on the meritorious claims of the nonwealthy, who cannot afford to pay their fees, on a no-win, no-fee basis. Even when there is no prospect of a cash award at the end of the trial, the attorneys know that if they win, the wealthy opponent will pay their fees. Frivolous claims, on the other hand, would not increase in number, since few lawyers would agree to bring such low-probability claims to court and put their own resources on the line. In fact, the same logic underlying the contingency fee lies at the foundation of the proposed rule, only it has two important advantages: one is that the proposed rule works in many cases where the contingency mechanism fails, such as when the weak party is the defendant and when the suit is nonmonetizable or only a small monetary award is at stake. The other is that the proposed rule leaves much more money in the pockets of poorer litigants and thereby promotes distributive justice.

The Article proceeds in three parts. Part II describes the different mechanisms, both publicly-funded and market-based, that are currently employed to facilitate access to justice for low-income people. It explores legal aid programs, contingency fee arrangements, and fee-shifting statutes and shows that although to some extent these mechanisms do, indeed, improve access, they far from guarantee equal access to justice. Therefore, a more comprehensive solution is called for. This challenge is taken up in Part III, where a general progressive one-way fee-shifting rule is proposed as a way to ensure equal justice and assist individuals with modest means to finance litigation against wealthy adversaries. It presents the many compo-

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34. For a comprehensive discussion of the general progressive one-way fee-shifting rule proposed here, see *infra* Part III.

35. Luban, *supra* note 3, at 210 n.1.

nents of the rule and explains its mode of administration as well as the lawyer's compensation formula that would be adopted under it. Part IV then evaluates the proposed rule in light of its expected impact on the various aspects of litigation as well as on ex ante substantive behavior. The effects of the rule are compared to those produced by the two existing ideal-type fee regimes—the American Rule and the English Rule—demonstrating the proposed rule's superiority to both. This is followed by a discussion of the expected impact of the general progressive rule on the incidence of frivolous claims, overall litigation rate, and the probability of settlements. Lastly, this Part defends the proposed rule from possible criticism from the fairness perspective. Some closing remarks conclude the Article.

## II. THE CURRENT STATE OF EQUAL JUSTICE IN THE CIVIL SYSTEM

The fact that growing segments of the population have a need for some type of legal assistance in order to enforce their rights has not been entirely lost on federal and state decisionmakers. Indeed, certain measures have been instituted aimed at guaranteeing universal access to justice. In the following section, I survey and expose the flaws and inadequacies of three such central measures: legal aid, contingency fee arrangements, and fee-shifting statutes. All of these mechanisms were designed with the purpose of facilitating access to the civil justice system for low-income people, but as I shall demonstrate below, each one presents serious problems.

### A. Legal Aid

Legal aid programs are the main scheme through which the federal and state governments sponsor and promote access to justice. There is no right to legal assistance in civil matters in the United States.<sup>36</sup> As a result, both the existence and scope of public legal aid programs are dependent on the goodwill of federal and state governments. Government-subsidized legal assistance for the poor began only quite recently, in 1965, when the federal government first made public funds available for legal services through the Office of Economic Opportunity (OEO).<sup>37</sup> By 1968, legal aid programs were operating in almost every state, with the OEO funding full service local providers serving specific geographic areas in order to ensure univer-

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36. Rhode, *supra* note 1, at 1787-88. The Due Process Clause requires courts to appoint an attorney to litigants who cannot afford one, but this requirement has been construed so narrowly that, in fact, counsel is almost never required in civil cases. See *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 26-27 (1981) (holding that due process did not require state-appointed counsel to represent a mother in a termination of parental rights proceeding).

37. ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 7 (2007), available at [http://www.clasp.org/publications/legal\\_aid\\_history\\_2007.pdf](http://www.clasp.org/publications/legal_aid_history_2007.pdf).

sal access to the legal system.<sup>38</sup> In 1974, Congress passed the Legal Services Corporation (LSC) Act, which created an independent legal services entity funded by Congress<sup>39</sup> and entrusted with the dual mission of promoting equal access to justice and providing high quality civil legal assistance to low-income Americans.<sup>40</sup> The LSC took over the OEO legal aid programs in 1975, leaving the delivery and support structure fundamentally unchanged but expanding the programs to every county in the United States.<sup>41</sup>

While civil legal aid programs have improved the lives of the poor through sustained legal services advocacy, they have not come close to meeting the mounting legal needs of individuals in or near the economic margins. Indeed, recent studies have found that less than 15% of these needs are being met in some states.<sup>42</sup> Moreover, inadequate access to legal aid is a problem affecting not only the poor, but also many middle-income Americans who are being “similarly priced out of the legal process.”<sup>43</sup> The reason for what has been called the “justice gap” can be traced primarily to grossly inadequate funding.<sup>44</sup> A major obstacle impeding the programs’ ability to provide quality legal assistance to the disadvantaged is insufficient resources.<sup>45</sup> Government legal aid budgets are ludicrous, and rather than expanding, they have been significantly reduced; when adjusted for inflation, they currently stand at roughly half their 1980 levels.<sup>46</sup> In the United

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38. *Id.* at 11.

39. *Id.* at 22. The LSC is a private nonprofit corporation governed by a bipartisan board appointed by the President and confirmed by the Senate. Each fiscal year, as part of the budget process, Congress appropriates money for the LSC and the LSC distributes grants to legal aid programs in all fifty states. LSC, What is LSC?, <http://www.lsc.gov/about/lsc.php> (last visited July 30, 2010).

40. Legal Services Corporation Act, 42 U.S.C. § 2996 (2006).

41. See HOUSEMAN & PERLE, *supra* note 37, at 22. According to the Project to Expand Resources for Legal Services (PERLS) of the ABA Standing Committee on Legal Aid and Indigent Defendants, the largest element of the legal aid system constitutes “the 138 programs that are funded and monitored by [the] LSC.” ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007, 2 (2007), available at <http://www.clasp.org/admin/site/publications/files/0373.pdf>.

42. TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY 25 (2003), available at <http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf> (“Low-income people face more than 85 percent of their legal problems without help from an attorney.”); see also HOUSEMAN, *supra* note 37, at 8-9 (reporting the findings of nine state studies conducted by the LSC between 2000 and 2005 on low-income Americans).

43. RHODE, *supra* note 3, at 103.

44. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1-2 (2005), available at [http://www.lsc.gov/press/documents/LSC%20Justice%20Gap\\_Final\\_1001.pdf](http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_Final_1001.pdf).

45. HOUSEMAN, *supra* note 41, at 9.

46. RHODE, *supra* note 3, at 106. For fiscal year 2010, Congress provided \$420 million to the LSC. LSC, LSC Sends Fiscal Year 2011 Budget Request to Congress, (Feb. 4, 2010), [http://www.lsc.gov/press/updates\\_2010\\_detail\\_T259\\_R2.php](http://www.lsc.gov/press/updates_2010_detail_T259_R2.php). For fiscal year 1981, the LSC received \$321 million. HOUSEMAN & PERLE, *supra* note 37, at 30. Accounting for inflation using an online inflation calculator from the Bureau of Labor Statistics, the value of the

States, only about \$2.25 per capita in public funds are expended on civil legal assistance, which is utterly inadequate for the task.<sup>47</sup> As a result, “legal services offices can handle less than a fifth of the needs of eligible clients and often are able to offer only brief advice, not the full range of assistance that is necessary.”<sup>48</sup>

To add to this, Congress imposed draconian restrictions on publicly funded legal aid programs that have significantly curtailed their effectiveness. Restrictions on the use of federal funds have existed since the inception of government funded legal services. From the outset, Congress prohibited the channeling of federal funds to such sensitive political matters as military service, abortion, and school desegregation.<sup>49</sup> Later on, it passed regulations further restricting legal services.<sup>50</sup> Federally funded legal aid programs are thus precluded from engaging in advocacy and representation before legislative bodies as well as in administrative rulemaking proceedings.<sup>51</sup> They may not initiate, participate, or engage in any class action or seek attorney fees that are otherwise statutorily authorized.<sup>52</sup> In addition, recipients of federal funds must reveal the identities of their clients as well as the facts of their cases in statements that are made available to various federal departments and agencies that monitor or audit the LSC’s activities.<sup>53</sup> The regulation that has likely been to the greatest detriment of these programs is “Congress’s prohibition on LSC recipients using their nonfederal funds for these prohibited activities.”<sup>54</sup> Since many of the legal activities Congress prohibits are those most likely to help the poor, these restrictions have greatly debilitated legal aid programs.<sup>55</sup>

This discussion clearly illustrates the dismal state of civil legal aid. And though lately things have improved slightly, “the United States has a very long way to go in order to enable low-income persons to access a system of civil legal assistance that will address their

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1981 budget today would be approximately \$835 million. Bureau of Labor Statistics, Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited July 30, 2010).

47. See RHODE, *supra* note 3, at 106. According to the most recent census, law is a \$181 billion per year industry. Statistical Abstract of the United States: 2008, *supra* note 18. Of that amount, less than \$1 billion a year are dedicated to delivering legal services to low-income people. Luban, *supra* note 3, at 211; HOUSEMAN, *supra* note 41, at 1-2.

48. RHODE, *supra* note 3, at 13.

49. Luban, *supra* note 3, at 221; RHODE, *supra* note 3, at 105.

50. Luban, *supra* note 3, at 221.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*; see also Alan W. Houseman, *Future Changes and Prospects for Legal Aid and Public Defender Organizations*, 24 QUINNIPIAC L. REV. 557, 558-59 (2006); see also RHODE, *supra* note 3, at 105; Luban, *supra* note 3, at 221-22.

55. See RHODE, *supra* note 3, at 105.

legal needs effectively.”<sup>56</sup> Moreover, the public nature of government funded legal services makes them exceptionally vulnerable to adverse political pressure. These programs have amassed many highly influential opponents during their decades of operation, putting them in constant threat of being further restricted or even dried up. It would be, therefore, imprudent to rely on legal aid as the sole method for assisting the poor.

### B. Contingency Fee Arrangements

A second mechanism that assists low- and middle-income people in accessing the civil justice system is contingency fee agreements. As a lawyer’s billing practice, this is a market-based mechanism and, thus, seemingly unconnected to the government. This is misleading, however, as the government played a central role in laying the legal foundations that enabled the creation of the contingency fee. In fact, up until the nineteenth century, contingency fee agreements were forbidden under the common law doctrine of champerty.<sup>57</sup> Champerty occurs when someone who is not a party to a lawsuit (including the plaintiff’s attorney) supports a litigant in return for a share in the proceeds of a successful claim.<sup>58</sup> This practice was (and still is) barred in England and the United States as contrary to public policy.<sup>59</sup> It was said to jeopardize the objectivity and impartiality of attorneys by putting them in a conflict of interest between their own interests and their clients’ interests, thus undermining the integrity of the administration of justice.<sup>60</sup> Secondly, it was criticized for stirring up useless and unjust litigation.<sup>61</sup>

While these concerns about conflicts of interest and frivolous litigation were by no means unfounded,<sup>62</sup> in the early nineteenth cen-

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56. ALAN W. HOUSEMAN, THE FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES (2005), available at [http://www.clasp.org/publications/future\\_legal\\_aid.pdf](http://www.clasp.org/publications/future_legal_aid.pdf).

57. See PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 191-92 (1997).

58. Richard Moorhead, *Conditional Fee Arrangements, Legal Aid and Access to Justice*, 33 U. BRIT. COLUM. L. REV. 471, 476-77 (2000).

59. *Id.* at 477.

60. Geoffrey Woodroffe, *Loser Pays and Conditional Fees—An English Solution?*, 37 WASHBURN L.J. 345, 350 (1998). In England, as well as in many other European countries, contingency fee agreements are still forbidden by law. For a discussion of the development in England, see *infra* note 150.

61. KARSTEN, *supra* note 57, at 192.

62. I will discuss some of the criticisms of contingency fees that are applicable to my proposal later in the Article. For a critique of contingency fees, see, e.g., Kritzer, *supra* note 24, at 1975 (describing the potential conflicts of interest between lawyers and clients that are inherent in contingency fee arrangements). See also LESTER BRICKMAN, MICHAEL HOROWITZ & JEFFREY O’CONNELL, RETHINKING CONTINGENCY FEES 28, 58, 80-81 (1994) (arguing that in order to prevent potential conflicts of interest and ensure that lawyers accept settlements that are beneficial to their clients, when a defendant makes an early settlement offer that is rejected by the plaintiff, the plaintiff’s lawyer would be permitted to

tury, American courts and legislatures started to permit contingency fee arrangements, and by 1850, the practice was permissible in most states.<sup>63</sup> What accounted for this striking change of heart? How is it that a practice denounced for centuries as abusive, strife promoting, and against public policy became an acceptable, even laudable, practice within a few short decades? Peter Karsten argues that American judges and legislators consciously resolved to sanction contingency fee arrangements “in order to help a poor man to ‘sue for his right.’”<sup>64</sup> Stephen Yeazell, in contrast, is more skeptical. He asserts that the transformation was not the product of “thoughtfully devised programs,” but rather should be attributed to “self-interest . . . combined with deregulation.”<sup>65</sup> Whatever the case may be, it is undisputed that the endorsement of the contingency fee mechanism opened the doors of justice to indigent and lower-class plaintiffs who otherwise would have been unable to obtain legal services, let alone quality legal aid. Indeed, this legal innovation is aptly praised as “the individual’s key to the courthouse.”<sup>66</sup>

The success of the contingency fee is, to a large extent, due to its ability to channel market forces to the advantage of the average person.<sup>67</sup> To understand this mechanism, it is essential to understand its economics.<sup>68</sup> When attorneys take a case on a contingency-fee basis, they are acting as businesspeople. They assume the financing of the litigation, which could be quite costly both in time and resources, in return for a piece of the pie in the event that they win in court. However, attorneys risk losing their entire investment if they suffer defeat.<sup>69</sup> Some cases are certainly a priori riskier than others, but there is always some uncertainty in every legal case; therefore, like any good investor, contingency fee lawyers tend to diversify their prac-

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charge only an hourly rate on work done before the settlement offer plus a percentage of any recovery in excess of the offer).

63. KARSTEN, *supra* note 57, at 195-96. In fact, by that time, state and county officials were regularly employing lawyers on a contingency fee basis. *Id.* at 196.

64. *Id.* at 197.

65. Yeazell, *supra* note 31, at 704.

66. Philip H. Corboy, *Contingency Fees: The Individual’s Key to the Courthouse Door*, LITIG., Summer 1976, at 27.

67. *Id.* at 29 (explaining that “the contingent fee offers to the client an opportunity to pool his resources with other plaintiffs represented by the same attorney”). In fact, legal rules sanctioning contingency fee arrangements were a necessary but insufficient condition for their success; it was the interaction of the new legal rules with developments in the business and financial organization of the legal practice that was responsible for the ascendancy and expansion of the contingency fee. Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 186 (2001). Yeazell points to the massive expansion of consumer credit and insurance that created a large pool of solvent defendants as an important factor in the explosion of the usage of contingency fee arrangements. *Id.* at 186-87.

68. See Yeazell, *supra* note 31, at 709-13. For an explanation of the economics of contingency fee arrangements, see, e.g., POSNER, *supra* note 14, at 584-85; Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259 (1997).

69. POSNER, *supra* note 14, at 584.

tice. As observed by Herbert Kritzer, “[t]he work of the contingency fee lawyer can best be viewed as the management of a *portfolio* of cases.”<sup>70</sup> While aspiring to win each and every case and thus achieve a positive return on every individual investment, realistically they seek a positive return on the portfolio as a whole.<sup>71</sup> The risk contingency fee lawyers bear in taking on cases on this basis creates a strong incentive for them to screen cases and turn down the riskier ones that are unlikely to generate any profit.<sup>72</sup> This screening practice, which exists for the sole selfish purpose of making profit, nonetheless results in the weeding out of meritless claims from the system and thus serves social welfare.<sup>73</sup> The genius of the contingency fee is that it yields better access to justice, a more level playing field, and even increased efficiency without spending one penny of public funds, simply by altering the market for legal services.<sup>74</sup>

Despite its undeniable effectiveness as a litigation-enabling mechanism for the poor, the contingency fee still suffers from two significant shortcomings. The first is the high price tag contingency fee lawyers put on their services, which averages around one-third of the award but can get as high as 50%.<sup>75</sup> There is no small amount of controversy around whether the sizeable returns contingency fee lawyers reap when they win are a justified reward for their willingness to bear the risk of absorbing the litigation expenses or an undeserved windfall.<sup>76</sup> Whatever the case may be, the end result is the same: a

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70. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 11 (2004).

71. *Id.*; see also Yeazell, *supra* note 31, at 704-05 (“By pooling the fortunes of plaintiff-clients, contingent fee lawyers aggregate their risks and justify investment of their time and various out-of-pocket expenditures.”).

72. According to a survey of contingency fee lawyers in Wisconsin, they decline to assume representation in about half the cases brought to them. Moreover, for certain types of cases, such as medical malpractice, the vast majority are turned away. See Kritzer, *supra* note 24, at 1976.

73. The screening of cases is not without flaws. In some cases, contingency fee lawyers still undertake frivolous claims in the hope of forcing the defendant to agree to an early settlement so as to avoid paying litigation expenses. *Id.* at 1975. I will discuss the risk of frivolous litigation as it applies to my proposal as well at *infra* Part IV.A.2.

74. Yeazell, *supra* note 31, at 707.

75. See, e.g., BRICKMAN, HOROWITZ & O’CONNELL, *supra* note 62, at 13-14 (arguing that contingency fees “seldom amount to less than one third” of recovery and that many lawyers get standard fees up to 50% for cases settled before trial); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 248 (1996) (arguing that one-third or more is the standard contingency fee figure); In a comprehensive survey, Herbert Kritzer found that in about 60% of the cases sampled, the contingency fee was one-third of the recovery. In about 31% of the cases, the fee structure employed was a variable percentage, which usually amounted to 20% to 43% of the recovery in cases that involved a lawsuit but not a trial and 25% to 50% for those getting to trial. KRITZER, *supra* note 70, at 39-40.

76. Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 426 (1998).

large portion of the recovery—often compensation for inflicted damages—goes into the lawyer’s pocket instead of the plaintiff’s. Thus, while poor plaintiffs are better off in a system that sanctions contingency fees than in a system that does not, they are still inadequately compensated.<sup>77</sup> The second limitation is that “[t]he contingent fee market only functions if there are damages from which attorneys can collect fees. If no money changes hands, nothing drives the market.”<sup>78</sup> Excluded from the market, therefore, are many types of cases that are unsuited to this fee structure. Cases in which the defendant is poor comprise one such category. Defendants are unable to enjoy the benefits of the contingency fee scheme because there is never any expectation of a cash payment at the end of the trial: they either lose and pay damages or win and pay nothing.<sup>79</sup> A second category is nonmonetary claims. Not all lawsuits result in money changing hands; many of them conclude in an order or injunction, such as cases involving divorce, custody adjudication, income maintenance, and housing disputes.<sup>80</sup> In such nonmonetizable claims, a litigant who lacks economic resources will not be able to hire a lawyer on a contingency fee basis. Lastly, the contingency fee scheme is not suited to small meritorious claims. One-third of the award or recovery would be insufficient to attract a contingent fee lawyer if the sum of money at stake is too small, even when the claim is clearly meritorious.<sup>81</sup> Indeed, very few lawyers (and no high quality attorney) would accept a case on a contingency fee basis if the potential recovery were limited to \$2000 or even \$5000 because the maximum benefit they could reap would not be worth their while.

In sum, although the contingency fee system has clearly benefited low- and middle-income litigants, and thus the civil justice system as a whole, it is no panacea. Many categories of cases are unsuitable for this fee structure, and for cases that do fit, the contingency fee comes at a high price for the disadvantaged. It is essential, therefore, to

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77. *But see* Shari Seidman Diamond, Michael J. Saks & Stephan Landsman, *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301 (1998) (arguing that jurors take wealth disparities into consideration when awarding damages).

78. Yeazell, *supra* note 31, at 709.

79. Some types of contingency fee arrangements can be used by defense lawyers, but they all involve defendants paying out of their own pockets and are therefore irrelevant for low-income defendants. An example of such a fee arrangement would be agreeing on some target result for the litigation, with the lawyer receiving a percentage of any amount below that target that the defendant would have to pay to resolve the case. KRITZER, *supra* note 70, at 10; *see also* Robert E. Litan & Steven C. Salop, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods*, 77 JUDICATURE 191, 195-96 (1994).

80. These types of cases are by no means insignificant in number. Note, *supra* note 13, at 1235 (asserting that in 1981 housing and income maintenance disputes amounted to almost 36% of all cases handled by LSC lawyers).

81. *See* Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL’Y REV. 458, 496 (1993).



seek a mechanism that will bridge the “justice gap” unmediated by this arrangement.

### C. *Equal Access to Justice Acts*

Fee shifting is the third mechanism that enables the poor to access the civil justice system. Various federal and state statutes authorize courts to award attorney fees to private parties who prevail in litigation against federal and state agencies and, in certain cases, also against corporate defendants. The general rule governing attorney fees in the United States is that each of the parties is liable for its own attorney fees. Under the American Rule, the prevailing party is ordinarily not entitled to collect attorney’s fee from the loser.<sup>82</sup> There are, however, several statutory exceptions to this, under which federal and state courts may order the losing party, in specific issues and under certain conditions, to pay the winning party’s fees and expenses. These statutes are collectively known as Equal Access to Justice Acts (“EAJAs”).<sup>83</sup>

The first comprehensive and best known fee-shifting statute was the Federal Equal Access to Justice Act of 1980,<sup>84</sup> which marked a departure from the almost exclusive reign of the American Rule in civil litigation.<sup>85</sup> The 1980 Act authorized federal courts to award

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82. Olson, *supra* note 23, at 549; *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-15 (1994).

83. See Olson, *supra* note 23, at 548, 555 n.37.

84. Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980). The EAJA was reenacted in 1985, Pub. L. No. 99-80, 99 Stat. 183 (codified as amended at 28 U.S.C. § 2412 (2006) and 5 U.S.C. § 504 (2006)). For a complete legislative history, see Krent, *supra* note 81, at 458 nn.2, 3.

85. Prior to the enactment of the EAJAs, there were only two common law exceptions to the American Rule. One was the common benefit doctrine, under which

the federal courts have authority to award attorneys’ fees from a fund to a party who, having a common interest with other persons, maintains a suit for the common benefit and at his own expense, resulting in the creation or preservation of a fund, in which all those having the common interest share.

*Vaughan v. Atkinson*, 8 L.Ed.2d 894, 905 (1963). This exception, however, does not shift attorney fees to the losing party, but rather to the beneficiaries of the fund. The other common law exception to the American Rule is the bad faith exception, under which federal courts “may award counsel fees to a successful party when his opponent has acted ‘in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Hall v. Cole*, 412 U.S. 1, 5 (1973). It should be noted, however, that these exceptions did not apply in cases against the United States due to the doctrine of sovereign immunity, under which “the United States may not be sued, nor its funds expended, without its consent.” CRS REPORT, *supra* note 23, at 6. Another exception that existed, the Private Attorney General exception, provided that plaintiffs are entitled to attorney fees if they effectuated a strong Congressional policy to the benefit of a large class of people. It was abolished by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Congress responded to *Alyeska* by legislating the Civil Rights Attorney’s Fees Award Act of 1976, 42 U.S.C. § 1988(b), authorizing federal courts to shift reasonable attorney fees from a losing party to a prevailing party, other than the United States, in actions to enforce certain enumerated

reasonable attorney fees to certain prevailing private parties in all non-tort and non-tax civil litigation brought by or against the federal government, unless the government proves that its position was “substantially justified.”<sup>86</sup> Numerous other statutes, at both the federal and state levels, followed suit, authorizing courts under circumstances specified in the statutes to instruct the government to reimburse the attorney fees of private parties prevailing in litigation against them. Congress also enacted a number of such one-way fee-shifting statutes applying to the conduct of private businesses, including the Truth in Savings Act,<sup>87</sup> the Unfair Competition Act,<sup>88</sup> the Clayton Act,<sup>89</sup> and Title VII.<sup>90</sup> While it is hard to know precisely just how many fee-shifting provisions exist, as they are scattered throughout the books attached to pieces of substantive legislation, their numbers are estimated to be in the hundreds at the federal level and in the thousands at the state level.<sup>91</sup>

Ironically enough, the legislative history of the Federal Equal Access to Justice Act, as well as that of various state EAJAs, reveals that when enacting these statutes into law, Congress and state legislatures did not have the welfare of low-income individuals in mind. The principal intended beneficiaries were, in fact, small businesses: “it was a product of the deregulatory climate of the early 1980s, passed largely at the instigation of small businesses to help them defend themselves against allegedly unreasonable government regulation.”<sup>92</sup> This explains the seemingly peculiar fact that the ACLU, the Committee for Civil Rights under Law, and the Council for Public Interest Law, along with other liberal interest groups advocating for the poor and the disadvantaged, initially opposed the 1980 federal Equal Access to Justice

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provisions protecting civil rights. However, Congress has never reversed *Alyeska*, and as a result, courts are authorized to award attorney fees only under specific statutes explicitly granting them this power and have no general authority to award attorney fees in cases brought under statutes that do not expressly provide for fee shifting.

86. 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).

87. 12 U.S.C. § 4310(a)(3), *repealed by* Omnibus Consolidated Appropriations Act 1997, Pub. L. No. 104-208, 110 Stat. 3009-470 (1996).

88. 15 U.S.C. § 72, *repealed by* Miscellaneous Trade and Technical Corrections Act of 2004, P. L. No. 108-249, 118 Stat. 2434 (2004).

89. 15 U.S.C. § 15(a).

90. 42 U.S.C. § 2000e-5(k).

91. For an updated list of the federal statutes that authorize awards of attorney fees, see CRS REPORT, *supra* note 23, at 64-114. At the state level, a survey conducted by Susan Olson in 1993 estimated that the number of state fee-shifting statutes stood at about 4000. Olson, *supra* note 23, at 552. A different study estimates the number of fee-shifting statutes at more than 200 at the federal level and close to 2000 at the state level. David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT’L & COMP. L. REV. 583, 588 (2005).

92. Olson, *supra* note 23, at 555; *see also* Root, *supra* note 91, at 549. In fact, some of the State EAJAs allow only businesses to make claims and not individual claimants. *Id.* at 555-58; *see also* Susan Gluck Mezey & Susan M. Olson, *Fee Shifting and Public Policy: The Equal Access to Justice Act*, 77 JUDICATURE 13, 15 (1993); Krent, *supra* note 14, at 2042-43 n.22.

Act fearing that it would have a detrimental effect on the functioning of the regulatory state. By 1985, however, these groups all joined small businesses in support of the legislation with the understanding that, notwithstanding the agenda that had led Congress to pass the Act, it could still be used to benefit the disadvantaged.<sup>93</sup>

The public policy rationales underlying the EAJAs have been subject to debate. Harold Krent has suggested three central objectives that Congress may have sought. The first was minimizing the costs of monitoring the conduct of governmental agencies and private businesses by providing incentives to individuals and small businesses to challenge inappropriate behavior on the part of these entities, when such a challenge would not occur absent such incentives. The second possible goal was to deter subsequent wrongdoings by such bodies due to both improved judicial review and the increase in the cost of litigation that results from the obligation to pay the opposing party's attorney fees. Third, proposed Krent, Congress sought to ensure "more complete compensation for parties injured by government wrongdoing or by the failure of private entities to comply with governmental directives."<sup>94</sup> Yet Krent acknowledged that these rationales could not fully account for the specific form the fee-shifting mechanism took in the EAJAs. It is unlikely, for instance, that compensation for injured parties is a central objective of the Federal Act, due to both its narrow scope, which excludes all tort actions, and the fact that compensation extends only to individuals and businesses that meet certain eligibility standards. Under these standards, wealthy individuals and big businesses are never eligible to collect their attorney fees even when they prevail and the government's position is not substantially justified.<sup>95</sup> It is clear, therefore, that the EAJAs are in fact concerned with still another matter: facilitating the access of low-income people to the civil justice system and instituting a balance of power between the parties to the litigation<sup>96</sup>—in other words, promoting distributive justice.<sup>97</sup> One-way fee shifting not only increases the likelihood of challenges to inappropriate conduct by governmental agencies and big businesses, but it also gives such challenges teeth. By counterbalancing some of the advantages that big

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93. Olson, *supra* note 23, at 555-56.

94. Krent, *supra* note 14, at 2044-45; *see also* Krent, *supra* note 81, at 458.

95. *See* Krent, *supra* note 81, at 477-78. According to Susan Olson's study, most State EAJAs place some limits on eligibility. Restrictions based on the wealth of individuals range from a ceiling of only \$50,000 in net worth in New York to \$2 million in net worth in Missouri. For businesses, the ceilings on eligibility range from \$1 million in annual gross receipts and no more than 20 employees in Iowa to as high as \$7 million in net worth and 500 employees in Missouri. Olson, *supra* note 23, at 561-62.

96. *See* Krent, *supra* note 81, at 462-67; *see also* Olson, *supra* note 23, at 548 (arguing that "EAJAs potentially make more equal the litigation resources of private parties and the government").

97. *See* Krent, *supra* note 14, at 2074.

institutional entities enjoy in litigating against private parties and small businesses,<sup>98</sup> one-way fee shifting enables the latter to engage in expensive protracted litigation that they could otherwise not afford.<sup>99</sup> These mechanisms are particularly beneficial for people of modest means in small meritorious claims and in nonmonetizable claims, for which contingency fees are not feasible.<sup>100</sup> In these types of cases, “[p]arties with strong claims can use the prospect of the fee award to attract counsel to represent them.”<sup>101</sup>

Unfortunately, however, both the Federal and state EAJAs have had, at best, only limited success in meeting the goal of equal access to justice.<sup>102</sup> Empirical studies confirm that “EAJAs have produced a rather modest degree of redistribution of resources from the government to private parties.”<sup>103</sup> The reason for this failure is twofold. First, as currently formulated with the variety of conditions and restrictions on fee recovery, EAJAs are ill-suited to redress the gross resource disparities between the government and big business and their smaller adversaries.<sup>104</sup> Second, despite their seeming abundance, the current fee-shifting statutes are not a sufficient means for providing the poor with meaningful access to justice—they are but a drop in the bucket.

### 1. *The Debilitating Conditions and Restrictions in the EAJAs*

The EAJAs were essentially stripped of their redistributive potential by the many restrictions and conditions written into them. This was arguably an attempt to strike a balance between antigovernment and antilitigation ideologies.<sup>105</sup> The recovery of attorney fees under the majority of the EAJAs is not automatic. In order to collect the fees, private parties and small businesses must meet conditions that go beyond merely winning in court and are subject to numerous restrictions. These conditions and restrictions relate to many matters,

98. See generally Galanter, *supra* note 2, at 97 (arguing that the basic architecture of the American adversarial legal system accords institutional entities, such as big businesses and governmental agencies that frequent the civil justice system (“repeat players”), substantial advantages that enable them to fare much better in litigation than individuals and small businesses (“one-shotters”).

99. Krent, *supra* note 14, at 2062.

100. Krent, *supra* note 81, at 465-66. Krent identifies three categories of claims in particular that could potentially benefit from one-way fee shifting. One is small meritorious claims, in which the high cost of litigation outweighs the amount that could be won, even when the chances of winning are very high. Second is claims that cannot be monetized, and third is targets of government enforcement efforts that should be encouraged to devote greater resources to litigation.

101. Krent, *supra* note 14, at 2050.

102. Krent, *supra* note 81, at 466-67.

103. Olson, *supra* note 23, at 549; see also Mezey & Olson, *supra* note 92, at 13-14.

104. See Krent, *supra* note 81, at 478 (arguing that the Federal EAJA’s attempt to equalize the strength of the parties to the litigation succeeds only at the margins).

105. Olson, *supra* note 23, at 549, 581.

including the standard for recovery, its mandatory or discretionary nature, the identities of the parties eligible to make claims, the amount of fees recoverable, and the type of legal actions covered.

One commonplace condition that is most detrimental from a redistributive standpoint is the “substantial justification” standard. Under many Federal and state EAJAs, parties cannot recover attorney fees unless they can show that the government’s position was not “substantially justified” or lacked “a reasonable basis.”<sup>106</sup> A few statutes apply even more stringent standards, such as bad faith, frivolousness, or groundlessness.<sup>107</sup> The substantial justification standard requires the parties to engage in another round of onerous litigation, which becomes a repeat of the original underlying dispute. Prevailing parties who are eligible for the fee award must demonstrate that the government’s position was not only wrong, but that it was not grounded in either fact or law.<sup>108</sup> To this end, they are forced to analyze, yet again, all of the factual and legal questions of the original case. This is a burdensome and costly procedure that entails the risk that they will eventually have to bear these additional costs themselves if the court finds the government’s position substantially justified. The prevalence of this standard, in one form or another, in almost every state and Federal EAJA has substantially diminished the overall redistributive effect of this legislation.<sup>109</sup> Furthermore, many EAJAs do not simply mandate fee shifting whenever a party prevails in litigation against government or big business; rather, they authorize judges to award fees whenever they deem this appropriate.<sup>110</sup> Such absolute discretion makes fee recovery much more tenuous and limits significantly the effectiveness of the EAJAs applying the mechanism.

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106. Krent, *supra* note 81, at 478; Olson, *supra* note 23, at 565. In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Supreme Court deemed the two standards equivalent; thus, I will refer from now on only to the “substantially justified” standard.

107. *See, e.g.*, MONT. CODE ANN. § 25-10-711(1)(b) (1994); TEX. GOV’T CODE ANN. §§ 2006.011(1), 2006.013(a)(3) (West 1995).

108. Krent, *supra* note 81, at 481. Under some of the statutes, the government bears the burden of proof to show that its conduct was substantially justified. Olson, *supra* note 23, at 566.

109. Olson, *supra* note 23, at 581. The empirical research reveals that Arizona, one of the only states that does not condition fee recovery on a showing that the government’s position was not substantially justified or on any other similar standard, has far more fee award claims than any other state. This finding indicates that the substantial justification standard plays an important role in a party’s decision to claim attorney fees under the EAJAs. *Id.* at 567-68.

110. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7607(f) (“In any judicial proceeding under this section, the court may award costs of litigation . . . whenever it determines that such an award is appropriate.”); *see also* Olson, *supra* note 23, at 553 (reporting a survey she conducted of all State EAJAs, according to which 54% of the fee-shifting provisions were mandatory, while 42% were discretionary and 4% unclear).

Moreover, most EAJAs include some kind of limitation on eligibility to claim attorney fees, with many setting stringent restrictions. California, Louisiana, and Minnesota, for instance, exclude individuals as claimants under their fee-shifting statutes.<sup>111</sup> In Tennessee, only businesses (not individuals) with thirty employees or fewer are eligible for fee awards.<sup>112</sup> Similarly, in Florida, eligibility is limited to businesses with no more than twenty-five employees and a net worth of two million dollars or less.<sup>113</sup>

Another condition for fee recovery is the “prevailing party” stipulation, which the Supreme Court has interpreted in a way that thwarts the egalitarian potential of the EAJAs.<sup>114</sup> Under the various fee-shifting statutes, only the prevailing party is entitled to recover its attorney fees.<sup>115</sup> The way courts construe success in litigation is therefore crucial to the scope and effectiveness of the statutes. In the beginning, the Court’s interpretation was quite promising. In *Maher v. Gagne*,<sup>116</sup> the Court concluded that prevailing in litigation is not limited to entry of a final judgment following a full trial on the merits; rather, it also includes a favorable settlement. The Court asserted that “[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees.”<sup>117</sup> Subsequent decisions, however, greatly weakened the redistributive impact of fee-shifting statutes. In *Buckhannon*,<sup>118</sup> for example, the Supreme Court held that a party is not considered a “prevailing party” under the federal fee-shifting statutes without a judgment on the merits or a settlement approved by the court, even if the defendant voluntarily gives the plaintiff the sought-after relief.<sup>119</sup> The result of this unfortunate ruling has been that the statutory fee-shifting mechanisms are now very easily manipulated. When facing defeat in litigation, all the government or a big business has to do to circumvent liability for attorney fees (which could be considerable) is unilaterally

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111. Olson, *supra* note 23, at 568.

112. *Id.*

113. *Id.*

114. See, e.g., Lawrence D. Rosenthal, *Adding Insult to No Injury: The Denial of Attorney’s Fees to “Victorious” Employment Discrimination and Other Civil Rights Plaintiffs*, 37 FLA. ST. U. L. REV. 49, 53-57 (2009) (discussing the Supreme Court’s decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), and explaining how “[m]ost courts follow this rule and deny fee requests to [civil rights] plaintiffs who, despite being able to establish prevailing party status are awarded only nominal damages”).

115. See *supra* notes 86-90 and accompanying text.

116. 448 U.S. 122 (1980).

117. *Id.* at 129.

118. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001).

119. *Id.* at 605. Prior to *Buckhannon*, federal courts regularly awarded attorney fees in such cases under a principal known as the “catalyst theory,” according to which litigants are entitled to attorney fees if it was determined that their litigation was the catalyst for the sought-after relief. See CRS Report, *supra* note 23, at 15.

change its position and “voluntarily” give in to the opposing party’s demands in a way that makes the case moot.<sup>120</sup>

Another restriction that undermines the ability of some EAJAs to level the litigating strength of the parties is a cap on the amount of fees that can be recovered under the statutes. Some of the statutes provide for the payment of “reasonable” attorney fees,<sup>121</sup> with the court determining the exact amount, but place no extrinsic limit on them. Others, however, set a cap on either the hourly rate or the total recoverable amount. The Federal Equal Access to Justice Act, for instance, prescribes a cap of \$125 for the maximum hourly rate small parties can collect from the government.<sup>122</sup> Many state EAJAs follow the federal lead and cap the amount of fees recoverable, which is below the going market rate in most cases.<sup>123</sup>

In short, as currently structured, the Federal and state EAJAs “are by no means redistributive mechanisms . . . .”<sup>124</sup> “With all these restrictions that reduce the ability of many prevailing parties to qualify for an award of attorney fees, it is not surprising that most of the laws have not been heavily used.”<sup>125</sup> If we truly wish to use the EAJAs as a framework for counteracting the imbalances in litigation resources, some fundamental modifications are imperative.<sup>126</sup>

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120. See Luban, *supra* note 3, at 243. Yet another problematic Supreme Court decision, primarily affecting public interest lawyers, was *Evans v. Jeff D.*, 475 U.S. 717 (1986). The case revolved around the lawfulness of a tactic called “sacrifice offer,” whereby the defendant offers a settlement granting the plaintiff full relief provided that the plaintiff waives his or her right to statutory attorney fees. Luban, *supra* note 3, at 241. In the *Evans* case, the legal aid lawyers representing the plaintiff advised him to accept the offer but later moved to have the fee waiver set aside as exploitation of their ethical obligation towards their clients and as undermining Congress’ intention to legislate fee-shifting statutes. The Court refused to set aside the waiver, reasoning that the plaintiff’s lawyers could fulfill their ethical obligation by foregoing their statutory fees. *Id.* While private lawyers can thwart such sacrifice offers by writing into the retainer agreement an undertaking on the part of the client to pay the attorney fees if he or she accepts such an offer, legal aid lawyers would risk their tax exempt status were they to do so. *Id.* at 242; *Evans*, 475 U.S. at 756-57 n.10 (Brennan, J., dissenting).

121. The “reasonable” attorney fees standard raises many convoluted questions. See, e.g., Rosenthal, *supra* note 114, at 53-55; Gregory C. Sisk, *A Primer on Awards of Attorney’s Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733 (1993).

122. The cap was originally set at \$75 per hour but was increased in March 29, 1996, to \$125 per hour. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, §§ 231-33, 110 Stat. 862-64.

123. Olson, *supra* note 23, at 564-65.

124. *Id.* at 579-80.

125. *Id.* at 566.

126. Such modifications would include: rescinding the various restrictions on fee recovery, such as the “substantial justification” standard; making recovery automatic upon prevailing in litigation and subjecting it to only limited judicial review; extending “prevailing party” to cases in which the sought-after relief is granted “voluntarily” without any court order or consent decree; and increasing the recoverable fees to match market rates.

## 2. *But a Drop in the Ocean...*

Even absent these conditions and restrictions, the EAJAs would not succeed at restoring equal justice. As noted above, there are over 150 statutes containing a fee-shifting mechanism of some sort at the federal level and thousands of such statutes at the state level.<sup>127</sup> This may sound like a lot, but as Susan Olson correctly asserted, “simply knowing how many statutes are on the books does not tell much about the amount of fee shifting actually occurring.”<sup>128</sup> Indeed, the amount of fee shifting actually occurring under the EAJAs has proven to be negligible for several reasons.<sup>129</sup> First, the statutes were not enacted with a well thought-out plan in mind. On the contrary, Congress and state legislatures adopted these statutes on an issue-by-issue basis in response to political pressure and successful lobbying on the part of various interest groups.<sup>130</sup> Consequently, while the substantive issues covered by the statutes range over a wide spectrum of matters,<sup>131</sup> many are quite esoteric and serve the interests of only a small segment of the population; they are therefore applied very infrequently. For example, Utah’s Motor Fuel Marketing Act<sup>132</sup> allows the court to award fees to parties injured by sale of gas below cost. Minnesota provides for a mandatory fee shift in litigation over unfair dairy trade practices,<sup>133</sup> and New York has a fee-shifting provision relating to disputes over fraudulent jewelry appraisals.<sup>134</sup> Yet a great many issues are left uncovered by this body of legislation.<sup>135</sup> Second, the vast majority of the EAJAs authorize fee awards against the government, while only a small proportion allows parties to collect from corporations.<sup>136</sup> The government is, indisputably, a Leviathan, but there are many private corporate entities (including financial institutions, insurance companies, and large corporations) whose

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127. See *supra* text accompanying note 91. Not all the fee-shifting mechanisms are one-way in favor of the weaker party. According to a survey conducted by Susan Olson in the mid-1990s, 52.5% of the statutes incorporate a one-way pro-plaintiff fee-shifting mechanism, 7.9% a one-way pro-defendant fee-shifting mechanism, and 37.6% a two-way fee-shifting. Olson, *supra* note 23, at 553.

128. *Id.* at 552.

129. This is, of course, in addition to the debilitating restrictions and conditions discussed above, which also affect the overall impact of the fee-shifting statutes.

130. See Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 205 (1984).

131. *Id.*

132. UTAH CODE ANN. § 13-16-7 (2001).

133. MINN. STAT. ANN. § 32.74 (West 2009).

134. N.Y. GEN. BUS. LAW § 239-c (McKinney 1982).

135. Fee-shifting statutes can be divided into four main categories based on the substantive claims that can be made under them: civil right suits, consumer protection suits, employment suits, and environmental protection suits. Ruth Bader Ginsburg, *Access to Justice: The Social Responsibility of Lawyers*, 7 WASH. U. J.L. & POL’Y 1, 8 (2001).

136. See generally CRS Report, *supra* note 23; Olson, *supra* note 23, at 550.



litigation resources dwarf those of the average American to the same extent as those of the government, if not more so.<sup>137</sup>

It is vital, therefore, to supplement the valuable mechanisms discussed above with a more comprehensive legal mechanism that will enable the nonwealthy to access the civil justice system on equal footing with more powerful individuals and institutions. The next Part of the Article puts forth just such a device.

### III. GENERAL PROGRESSIVE ONE-WAY FEE SHIFTING—A PROPOSAL

In this Part, a general progressive one-way fee-shifting rule is proposed as a means for restoring equal justice and assisting people of modest means in financing litigation against wealthy adversaries. Under the proposed rule, courts would be directed to award attorney fees to low- and middle-income litigants who prevail in civil litigation against moneyed litigants, whether private corporations or governmental agencies. However, the courts would order each party to pay its own fees when the wealthy party prevails. This rule is “general” in that it covers all civil actions regardless of the specific substantive issue underlying the litigation or the nature and size of the sought-after relief. It is also “progressive” as it applies only to actions in which the financial resources of the parties to the litigation are sufficiently disparate. Lastly, it is unidirectional in mandating a one-way transfer of wealth from the haves to the have-nots, never vice-versa.<sup>138</sup>

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137. For an illuminating analysis, see Galanter, *supra* note 2. Subsequent empirical studies of trial and appellate courts have confirmed Galanter’s basic findings. These studies indicate that classes of litigants with the greatest resources and the lowest relative risks in litigation enjoy the highest rates of success in both trial and appellate courts. Rosen-Zvi & Fisher, *supra* note 9, at 103-04 nn.82-83.

138. In a 1981 paper, Phyllis Monroe proposes one-way fee shift in favor of disadvantaged litigants (whether plaintiff or defendant), but her proposal is very different from the one proposed herein. According to her proposal “[f]ollowing a pre-trial judicial determination that a litigant lacks the financial means to afford counsel, such litigant shall be entitled to recover reasonable attorney fees if he or she is the prevailing party in the subsequent civil action or proceeding.” It is also proposed that the court would have discretion to refuse to award attorney fees to an otherwise eligible litigant “when recovery of attorney fees would work an undue financial hardship on the losing party or upon a finding that such litigant acted in bad faith.” Phyllis A. Monroe, Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148, 167 (1981). This proposal, while commendable, would fall short of solving the access to justice problem it was designed to solve. First, fee shifting is effected only when the litigant cannot afford counsel. Thus, only the very indigent would be entitled to collect attorney fees, as most people can afford to hire an attorney—perhaps not the best attorney on the market, but an affordable attorney. As argued above, the real problem is much broader. Under the current system, the imbalance in economic resources is reflected not only in the inability to have access to legal assistance, but also in the quality of such legal assistance. Those with greater resources often win at trial not on the merits but because they can afford higher-quality legal assistance, which significantly impacts the persuasiveness of their cases. It is, therefore, essential for the administration of justice to neutralize, to whatever extent possible, resource disparities between parties and create a relatively level playing field between them. Second, Monroe’s proposed mechanism leaves many issues

This general and progressive rule combines features from the American and English Rules, fusing them into a single mechanism that realizes the best of both worlds. As previously discussed, under the American Rule, which governs the majority of civil litigation in the United States, each party is responsible for its own attorney fees, regardless of the outcome of the litigation. The English Rule, also known as the “loser pays rule,” which reigns in the rest of the industrialized world, asserts that the loser must pay the winner’s legal costs.<sup>139</sup> Each of these rules has built-in features that impair equal access to justice.<sup>140</sup> The English Rule adversely affects lower- and middle-class litigants who could potentially lose a great deal if unsuccessful at court. Not only would they have to pay their own fees, but also their adversary’s.<sup>141</sup> This could be quite substantial. Low- and average-income individuals, who tend to be risk-averse to begin with,<sup>142</sup> will thus refrain from bringing lawsuits even if they have a valid claim unless they are quite confident they will win.<sup>143</sup> Even when they do sue, they are induced to accept settlements for much less than what they could expect to win at trial due to the high financial risk they bear if the trial is taken to its end.<sup>144</sup>

The American Rule counteracts this particular risk by exempting the losing party from paying the winner’s attorney fees. Unfortunately, from an access to justice perspective, this rule is at least as flawed as

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which are crucial for its success unattended to, such as how to define “prevailing party,” and what would constitute “an undue financial hardship” on the opposing party. Third, and most importantly, Monroe’s proposed mechanism would not work because it leaves lawyers undercompensated for the risk they assume in taking on the case on a no-win, no-fee basis. Lawyers would take such cases only if their expected income is positive, and Monroe’s scheme leaves lawyers with a negative expected income in (almost) all cases. Only those cases in which success is guaranteed would have a positive expected value; such cases do not exist in the real world. As a result, no lawyer would agree to represent a poor litigant even if they were entitled to collect their fees from the losing party. As I shall demonstrate below, the mechanism proposed in this Article provides a comprehensive, just, and efficient solution to all of these problems.

139. Olson, *supra* note 23, at 549; see generally W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the “Odd Man Out” in How It Pays Its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361, 384-85 (1999) (discussing how “the loser also has to pay the modest attorney fees for the winner in these nations”); see also Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 139 (1984) (“The United States is virtually alone among the industrialized democracies in having as its basic rule that each side pays its own lawyer, win or lose.”).

140. In this Part, I mention only the shortcomings related to access to justice. For a comprehensive discussion of the advantages and disadvantages of each of the rules for the system as a whole, including their effect on overall litigation, frivolous claims, settlements, and legal expenses, see *infra* Part IV.

141. Davis, *supra* note 139, at 384-85.

142. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 54-55, 59 n.32 (3d ed. 2003) (arguing that “the higher a person’s wealth, the less averse he is to a given size risk”); Krent, *supra* note 14, at 2062.

143. POSNER, *supra* note 14, at 587; Root, *supra* note 91, at 607-08.

144. Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 LAW & CONTEMP. PROBS. 125, 136 (1984).

the English Rule. A fundamental concern with the American Rule is that it forces people to spend substantial sums of money on legal fees in order to protect their rights, but it denies them compensation for that expense even when vindicated by a court ruling or favorable settlement.<sup>145</sup> For low- and middle-income individuals, this is a critical problem that often means they are barred from pursuing their rights. In a large number of cases, the American Rule makes it impossible for people with modest means to retain a lawyer, let alone high quality counsel. As defendants, they lack the resources to pay their fees; as plaintiffs with nonmonetizable claims or claims with a too small an expected payoff, they fail to attract contingency fee lawyers. Moreover, even when the potential recovery is large enough to attract a lawyer, a big chunk goes to cover fees, leading to undercompensation of the plaintiff's losses. Either way, the poor are at a great disadvantage.<sup>146</sup> The government and the market's big guns exploit this predicament to deter low- and average-income people from suing them, as well as to force them into accepting low settlements. They do this by threatening to draw out the litigation indefinitely, which would force their poorer adversaries to spend huge sums of money (that they do not have) without any prospect of return on the horizon.<sup>147</sup>

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145. See Root, *supra* note 91, at 597-98.

146. See James H. Cheek III, Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1216 (1967) (arguing that "the poor will never have completely free access to the courts unless the American rule that each litigant must bear the burden of paying his own attorney's fees is changed").

147. Unfortunately, this is the reality of the American civil justice system. In his well-known article, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992), Bob Rabin looked at the adversarial techniques employed by the tobacco industry in suits brought against it by individuals and their families who had contracted smoke-related illnesses (a paradigmatic case of one-shotters versus repeat players). The tobacco companies retained counsel from the most prestigious law firms and spared no cost in their attempt to exhaust their adversaries' resources short of the courthouse doors. As Townsley & Hanks described, they took thorough advantage of the large arsenal of easily manipulated procedural mechanisms that our adversarial system offers:

They have done this by resisting all discovery aimed at them, thus requiring a court hearing and order before plaintiffs can obtain even the most rudimentary discovery. They have done it by getting confidentiality orders attached to the discovery materials they finally produce, thus preventing plaintiffs' counsel from sharing the fruits of discovery and forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering, through written deposition, every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the dilemma of taking numerous expensive depositions or else not knowing what the witness intends to testify to at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.

William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 277 (1989) (internal

The general progressive one-way fee-shifting rule I propose here would be a successful antidote to these shortcomings. The proposed rule borrows features from both the American and the English rules and incorporates them into a hybrid regime that takes into account the parties' economic means. Under this model, in any given case, the relative economic power of the parties to the litigation would determine which rule governs attorney fees recovery. Based on their resources, plaintiffs and defendants would be classified into one of two categories—"poor" or "rich" (as defined according to a formula discussed below).<sup>148</sup>

In cases where both adversaries are equally economically equipped (or ill-equipped) and thus fall into the same category of litigants, the current American Rule would govern the fee award. Thus, each party would be responsible for its respective attorney fees. However, when one party (be it plaintiff or defendant) is rich and the other poor, if the poor party wins, the English Rule would apply and the rich party would have to pay the poor party's actual legal fees. On the other hand, if the rich party wins, the American Rule would apply and each party would bear its own attorney fees.<sup>149</sup> The crucial point of this combined rule is that it is sensitive to power disparities between the parties, and when such a disparity is identified, the rule levels the imbalance through one-way fee shifting in favor of the disadvantaged party.

TABLE 1  
The General Progressive One-Way Fee-Shifting Rule

	Poor Defendant		Rich Defendant	
Poor Plaintiff	American Rule		<i>P Loses</i> American Rule	<i>P Wins</i> English Rule
Rich Plaintiff	<i>D Loses</i> American Rule	<i>D Wins</i> English Rule	American Rule	

citations omitted); see also Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992).

148. See *infra* discussion at Part III.B.

149. When there is more than one plaintiff or defendant who are not themselves adversaries (namely, they either claim the same relief as the plaintiffs or are being sued for the same relief as the defendants), the financial assessment and the classification as "poor" or "rich" will be based on their accumulated economic resources. For example, if there is one plaintiff whose net worth is \$3 million and 10 defendants who have individual net worths of \$300,000 each, the latter will be considered, for our purposes, as one individual with a total net worth of \$3 million; the adversaries will then be considered as balanced in power, and the American Rule will apply to the litigation.

Furthermore, to make the fee structure attractive to high quality lawyers, I propose taking from the English system yet another feature, the conditional fee, which is the English counterpart to the contingency fee.<sup>150</sup> Conditional fees enable lawyers to take cases on a no-win, no-fee basis without violating the prohibition on maintenance and champerty. Under conditional fee agreements, a lawyer acts on the understanding that if the case is lost, she will be paid nothing for the work she has done. If, instead, the case is won, in addition to her standard fees she will be entitled to a premium, called a “success fee” or “uplift,” to compensate her for the risk she undertook in taking the case on this basis.<sup>151</sup> The success fee is not linked to the amount of recovery (as it is in contingency fee) but rather calculated as a percentage of the lawyer’s standard fee, varying by the level of risk she bore in taking on the case. The stronger the case was a priori, the lower the success fee, and vice versa.<sup>152</sup> The success fee is not, however, without limit. There is a statutory cap on what can be charged as a success fee set at 100% of the lawyer’s standard fee.<sup>153</sup> Under the English Rule, both the lawyer’s standard fees and the success fee are

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150. In England, contingency fees are prohibited based on the champerty and maintenance doctrines under which lawyers are forbidden to support the litigation of their clients in return for a share in the proceeds if the claim meets with success. *See, e.g.*, *In re Trepcia Mines Ltd. (No. 2)*, [1963] Ch. 199, at 219-20; *Trendtex Trading Corp. v. Credit Suisse*, [1980] Q.B. 629, 654. Until the 1980s, this prohibition on contingency fees had no significant effect on the ability of low- and average-income people to access the civil justice system due to the expansive legal aid system covering about 70% of families in England and Wales. *See* Woodroffe, *supra* note 60, at 348. By the end of the 1980s, however, the political atmosphere had changed radically. Following an all-out attack on legal aid led by Thatcher’s Conservative government, public funding for legal aid was slashed repeatedly, and gradually the proportion of the population entitled to the aid shrunk dramatically. *See* Richard L. Abel, *An American Hamburger Stand in St. Paul’s Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation*, 51 DEPAUL L. REV. 253, 268-70 (2001); Woodroffe, *supra* note 60, at 348. Consequently, legal aid programs had no recourse but to lower the cut-off levels of income and capital for the purpose of assistance. Augmented by the considerable increase in legal costs, which had accelerated during the economic boom of the mid-1980s, the effect was that only the wealthy or destitute had access to justice. *See* Woodroffe, *supra* note 60, at 349. Parliament reacted to this predicament by passing into law the Courts and Legal Services Act of 1990 (U.K.), 1990, c.41, authorizing Conditional Fee Agreements (“CFAs”) in specified proceedings to be declared in orders issued by the Lord Chancellor. The Conditional Fee Agreements Order of 1995 permitted parties to enter into CFAs in personal injury, bankruptcy, insolvency, or administration, and some human rights proceedings. Subsequent legislation greatly expanded the range of proceedings in which conditional fees are permissible, and as of July 1998, parties could enter into CFAs in all civil cases, except for a range of family and crime-related proceedings. Moorhead, *supra* note 58, at 477.

151. ACCESS TO JUSTICE WITH CONDITIONAL FEES: A LORD CHANCELLOR’S DEPARTMENT CONSULTATION PAPER § 2.1 (Mar. 1998); *see also* Moorhead, *supra* note 58, at 475.

152. ACCESS TO JUSTICE WITH CONDITIONAL FEES, *supra* note 151.

153. Moorhead, *supra* note 58, at 477. The English Law Society has recommended an additional cap on the success fee to no more than 25% of recovery. This cap would, however, be voluntary. *Id.* at 477-78.

recoverable from the losing party.<sup>154</sup> As we shall see shortly, using the conditional fee instead of the contingency fee as a mechanism to incentivize lawyers to take the case on a no-win, no-fee basis would solve many of the access to justice problems that afflict the current civil justice system.

#### A. Who is a “Prevailing Party”?

Under the general progressive rule, fees would be awarded to the poor party automatically upon prevailing in litigation. The question remains, however, as to how “prevailing party” should be defined. For the proposed fee-shifting regime to be an effective distributive justice tool, the concept of “prevailing party” must be delineated more broadly than its scope under current EAJA jurisprudence.<sup>155</sup> To begin with, a poor plaintiff who is awarded nominal damages (for instance, one dollar in a case where the sought-after relief was \$17 million) should be considered a “prevailing party” for attorney fees purposes.<sup>156</sup> Moreover, a declaratory judgment or an injunction should constitute relief that entitles poor plaintiffs to a fee award, regardless of whether it ultimately affected the rich defendant’s behavior.<sup>157</sup> Furthermore, as held by the Supreme Court, prevailing in litigation should not be limited to entry of a final judgment but should also include a favorable settlement.<sup>158</sup> In contrast to the approach in current jurisprudence,<sup>159</sup> however, the “catalyst theory”<sup>160</sup> should be adopted and a

154. See PAUL FENN ET AL., THE FUNDING OF PERSONAL INJURY LITIGATION: COMPARISONS OVER TIME AND ACROSS JURISDICTIONS iv (2005) (discussing how the “claimant solicitor’s own cost risk premium [is] now paid by the losing defendant”). Initially, success fees were not recoverable and were therefore paid by the lawyer’s client. Pursuant to the 1999 Access to Justice Act, however, the success fee as well as insurance premiums became recoverable items. PAUL FENN ET AL., THE IMPACT OF CONDITIONAL FEES ON THE SELECTION, HANDLING AND OUTCOMES OF PERSONAL INJURY CASES (2002).

155. See *supra* text accompanying notes 116-20.

156. See the actual case of *Farrar v. Hobby*, 506 U.S. 103 (1992), where the plaintiff was awarded nominal damages in the amount of one dollar when he had sought \$17 million. The Court refused to award him attorney fees under the Civil Rights Attorney’s Fees Award Act of 1976, 42 U.S.C. § 1988(b), despite the fact that he had established a violation of his right to procedural due process, because he could not prove actual injury. *Id.* at 115-16; see also Rosenthal, *supra* note 114, at 53-57.

157. See, e.g., *Rhodes v. Stewart*, 488 U.S. 1 (1988). Here, the Supreme Court held that a declaratory judgment constitutes relief that entitles the plaintiff to a fee award under the Civil Rights Attorney’s Fees Award Act of 1976, 42 U.S.C. § 1988(b), only if it affects the behavior of the defendant towards the plaintiff. *Id.* at 4. In *Rhodes*, two prisoners had filed a suit against prison officials for refusing to allow them to subscribe to a certain magazine. They won a declaratory judgment but only after one had died and the other was released from prison. *Id.* at 2-3. Therefore, they were denied a fee award. *Id.* at 4.

158. See *Maher v. Gagne*, 448 U.S. 122, 132 (1980) (finding that prevailing in litigation is not limited to a final judgment but also includes favorable settlements). Favorable settlement should be construed broadly to include all settlements that are not nuisance settlements.

159. See, e.g., *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001) (“The ‘catalyst theory’ is not a permissible basis for the award of attorney’s fees under the FHAA and ADA.”).

poor party considered a “prevailing party” even when she has not secured a judgment on the merits or court-ordered consent decree but has succeeded in attaining the sought-after relief in that the lawsuit led to a voluntary change in her adversary’s conduct. Lastly, if there is more than one claim in a lawsuit, a poor plaintiff need only succeed on some of the claims in order to be considered a “prevailing party” for attorney fees purposes. However, “[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.”<sup>161</sup>

### B. *The Matter of Administration*

As described above, under the proposed general progressive one-way fee-shifting regime, the applicable attorney fee rule would depend on how the parties are categorized—rich or poor.<sup>162</sup> Without a simple and effective method of classification, however, this scheme cannot work. Indeed, excessive costs of administration could undermine the viability of the proposed regime.<sup>163</sup> There are a number of different ways in which the rule could be administered, each with its advantages and disadvantages. Three such possible methods are particularly applicable—one generalized, the second particularized, and the third gradational.

The generalized method of administration would use a party’s *type* classification as proxy for its economic power. Under this system, the entire universe of litigants would be categorized as either individuals or institutional entities (the latter comprising private entities, such as corporations, financial institutions, and insurance companies, as well as public entities, such as the federal and state governments and governmental agencies).<sup>164</sup> For fee award purposes, all individuals

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160. See *supra* note 119 and accompanying text.

161. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). This is also the law in England. See *Johnsey Estates (1990) Ltd. v. Sec’y of State for the Env’t, Transp. & the Regions*, [2001] All Eng. Rep. (D) 135 (Apr) (“[T]he judge may make different orders for costs in relation to discrete issues—and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation . . .”).

162. See discussion in *supra* text accompanying notes 148-49.

163. See Wertheimer, *supra* note 2, at 321-22.

164. Treating governmental “public” entities and large institutional “private” entities identically can be justified both empirically and theoretically. From the empirical perspective, it has been established that the appropriate distinction to be made is between repeat players and one-shotters, rather than public versus private litigants. Galanter, *supra* note 2, at 97. Indeed, the features that give a litigating party a relative advantage at trial are not unique to the government and are shared by private corporate entities too.

Economies of scale are [also] characteristic of financial institutions and large corporations; they can build a record, are able to “play the odds,” and are well

would be categorized as “poor,” while institutional entities would be deemed “rich.” The justification for such a generalized method is twofold: first, since, on average, individuals are weaker and possess fewer resources than institutional entities, the rule thus administered would have a progressive effect in total. Second, institutional entities are much better positioned than individuals to both prevent and spread the costs of litigation (especially when legal expenses insurance is available).<sup>165</sup> It is, therefore, justified from both efficiency and fairness standpoints to subject them to a different and more stringent fee standard. In order to prevent gross injustices, the generalized method could be refined by providing small incorporated businesses the opportunity to prove that they should be treated as individuals for fee award purposes. To obtain favorable treatment, such businesses would file their tax records for the three years preceding the lawsuit with the court together with the complaint or answer; if the average net worth for that period did not exceed a certain ceiling (\$500,000, for example), the entity would be treated as an individual for fee-shifting purposes.

The main advantage of this method of administration is its simplicity. Under this system, the proposed fee-shifting rule would be almost self-executing, since identifying the category to which each of the parties belongs would be, in most cases, fairly uncomplicated. The disadvantage of this method, however, is both its over- and under-inclusiveness, which would inevitably lead to possibly regressive outcomes in specific cases, as opposed to the rule’s overall progressive distributive effect. In fact, any egalitarian-oriented rule that is not case-specific produces regressive results in particular cases.<sup>166</sup> It is indisputable that not all individuals are poor; indeed, some are actually quite wealthy. Hence, defining all individuals categorically as “poor” for fee award purposes would, in certain instances, unavoidably yield regressive, and therefore unjust, outcomes. The tradeoff is

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positioned to play for the rules of the game and to forego immediate gains. It should, therefore, come as no shock that their success rate in litigation is comparable to that of governmental bodies. From a theoretical perspective, the dichotomy between private and public entities, which organizes legal doctrine, has been heavily criticized. Government agencies and corporations are both bureaucratic entities and share many common features.

Rosen-Zvi & Fisher, *supra* note 9, at 137-38. (internal citations omitted). Thus, using the public/private distinction to favor certain organizations (private) over others (public) is unmerited and untenable. For an analogy between corporate law and administrative law as two bodies of legal doctrine devoted to justifying bureaucracy, see generally Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984). For an excellent critique of the private/public distinction, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1128-41 (1980).

165. Cf. HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 37-85 (2004).

166. See TSACHI KEREN-PAZ, *TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE* 12-13 (2007).



clear: the more general the rule, the easier it is to administer, but the more likely it is to miss the mark in particular cases.

Whereas the generalized method would sacrifice accuracy for simplicity, the particularized method would take the opposite path: tailoring the application of the fee award rule to the actual (or lack of) disparity in wealth between the litigating parties. At the commencement of the trial, litigants—other than the government and its agencies, which would invariably be classified as “rich”—would file (together with the complaint and the answer) their tax records for the three years preceding the litigation.<sup>167</sup> If the disparity between their average net worths (including both annual income and assets) did not exceed a certain set percentage (for example, 500%), the court would declare the wealthier party “rich” and the other party “poor” and apply the fee-shifting rule accordingly.<sup>168</sup> The particularized method should, however, include a floor and ceiling, below and beyond which the American Rule would apply, regardless of the disparity between the parties’ net worths. The floor would prevent situations where one low-income party would be forced to pay the attorney fees of another low-income party. If, for instance, the net worth of Party A is \$10,000 and Party B’s net worth is \$51,000, it would be unjust to declare Party B “rich” and make him liable for Party A’s fees if he loses his case, despite the over-500% disparity in the parties’ net worths. A ceiling is required because above a certain income level, the concern of unequal access to justice which the general progressive rule is designed to remedy is not implicated. If, for example, Corporation A with an average net worth of \$50 million sues Corporation B whose average net worth is \$1 billion, there is no need to intervene in the name of equal justice as both parties are equally able to fend for themselves.<sup>169</sup>

The advantage of the particularized method is, of course, its precision and ability to contend with equal justice issues on a case-by-case basis. Any criticism would undoubtedly focus on the complexity and costs of this method of administration, which may seem excessive. However, such concerns would be unfounded. Income tax records are readily available and could certainly be produced along with the com-

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167. The three years rule is designed to prevent both intentional manipulations of the rule and injustices that could transpire due to a one time upside or downside fluctuation in a party’s income that affects its net worth. In order to protect parties’ privacy, the filed tax records would not become public record and would be returned to the parties upon a judicial decision as to which rule will govern the fee award.

168. In order to ensure that corporations do not channel all litigation to subsidiaries with net worths that are low or even in the red, the consolidated tax records of a parent corporation and all its affiliated subsidiaries would be the required records for filing.

169. To enable parties to protect their privacy, they would be allowed to choose not to submit their tax records, with the outcome being that they would automatically be declared “rich” for fee award purposes; in such circumstances, unless the opposing litigant’s net worth exceeded the ceiling or the opposing litigant also declined to file tax records, the one-way fee-shifting rule would be applied against the nonfiling party.

plaint and the answer. In fact, like methods are already in operation without much apparent problem; for example, in many states “punitive damages are already a function of the defendant’s wealth.”<sup>170</sup> Moreover, a quick glance at the current fee-shifting practice under the EA-JAs would also show the excessive cost criticism to be meritless. These statutes, in both their federal and state versions, generally contain eligibility restrictions based on wealth and size of the parties.<sup>171</sup> If these restrictions are administrable, then there are no grounds for questioning the feasibility of the proposed particularized method.<sup>172</sup>

A third possible method would be to adopt a graduated rather than binary scheme. Instead of only having two categories, rich and poor, and always awarding the full amount of attorney fees to poor parties when they prevail in litigation against rich parties, there would be a graduated scheme linking the size of the recovery to the disparity in wealth between the parties. For example, if there was a 250% disparity in the net worth of the parties, only 50% of the fees would be awarded to the victor at trial; a 500% disparity, however, would lead to a full shifting of fees to the rich party. The distributive appeal of such a method might, however, be outweighed in this case by the complexity and high costs of operation it entails.<sup>173</sup>

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170. Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1030 (2001).

171. See, e.g., Olson, *supra* note 23, at 561-62. The Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B), defines the parties eligible to claim attorney fees under the statute as follows:

“[P]arty” means (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed[.]

172. It should also be noted that even though the particularized method ties the parties’ income levels to the rule governing the fees, it still does not trigger the so-called double-distortion problem. See Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 822-25 (2000) (discussing the distortion of work incentives argument). For an excellent and concise account of the double-distortion argument, see Sanchirico, *supra* note 170, at 1014-16. This is so because the matter of which rule would apply to a specific case is determined not based on the absolute income level of either the plaintiff or the defendant, but rather on their *relative* wealth. And since it is impossible to know in advance who would be the adversary in any future litigation, work incentive is minimally affected by the proposed rule.

173. According to George Shepherd, while a gradual fee award scheme is operated in Continental Europe, it is concerned not with the relative wealth of the parties but to what extent the winner prevailed in litigation. The size of the fee award shifted to the prevailing party is determined by the ratio of the plaintiff’s actual recovery to the amount that the plaintiff sought in her complaint. George B. Shepherd, *The Impacts of the European Rule for Fee-Shifting on Litigation Behavior*, in BALANCING OF INTERESTS: LIBER AMICORUM PETER HAY ZUM 70, 381, 383 (Hans-Eric Rasmussen-Bonne, Richard Freer, Wolfgang Luke & Wolfgang Weitnauer eds., 2005).

### C. Attorney Compensation Formula

Another central issue that could greatly affect the success or failure of the proposed fee-shifting rule is the formula used to compute the attorney fees. Since the general progressive rule is a market-based mechanism, the fee structure it incorporates is crucial to its success. Ideally, the compensation formula should serve several goals simultaneously. First, it should provide high quality lawyers with an incentive to represent low- and average-income individuals on a no-win, no-fee basis. Second, it should induce lawyers to diligently investigate the claims of potential clients and agree to take on only those with merit (i.e., cases with over 50% chance of success), making lawyers potent and effective gatekeepers. Third, the formula should align the interests of lawyers and their clients, thereby avoiding potential conflicts of interest. Fourth, it should forestall the moral hazard problem that can arise anytime a party can shift all of its costs to another party. Lastly, it should entail minimal judicial involvement in order to prevent long and expensive satellite litigation over the amount of the fee award. Unfortunately, in reality, no fee arrangement can fully realize all of these goals at once. Hence, hard choices must be made when constructing the compensation formula—choices that reflect the underlying theoretical justification for fee shifting.<sup>174</sup>

This Section outlines one such compensation formula that attempts to serve as many of the positive goals described above as possible. I propose using the lawyer's standard hourly rate, which can be deduced from her historical billing rates,<sup>175</sup> multiplied by the number of hours spent on the case (the "basic charge"). This basic charge would be supplemented by a success fee, reflecting the extent of risk the lawyer assumed in taking the case on a no-win, no-fee basis. Minor risk would entitle the lawyer to a success fee ranging between 10% and 20% of the basic charge, whereas riskier cases would entitle her to a much higher percentage. The success fee would be capped at 100% of the basic charge, a maximum that would be warranted only

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174. See Marshall J. Breger, *Compensation Formulas for Court Awarded Attorney Fees*, 47 LAW & CONTEMP. PROBS. 249, 268 (1984) (arguing that "procedural tools for implementing fee shifting by court award will operate differently depending on the theoretical justification for fee shifting which is deemed legitimate by Congress and the courts").

175. In the unlikely case that a lawyer has no historical billing rate, because, for instance, she is new to the profession or has worked only on a contingency fee basis thus far, the fee would be computed based on the so-termed lodestar method. The lodestar figure is derived from the prevailing rates charged in the community for similar work, which means a reasonable hourly rate in the relevant market. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 3d § 2675.1, 376 (1998). Yet, the matters of identifying the relevant market and the rates that prevail in that market are both quite problematic and hard to administer; they should therefore be avoided whenever possible. See Breger, *supra* note 174, at 261-62; William B. Rubenstein, *The Expert's Corner: Why the Percentage Method?*, CLASS ACTION ATTORNEY FEE DIGEST, Mar. 2008, at 93 (arguing for the percentage method and against the lodestar method).

when the case was exceptionally risky (but still meritorious). And of course, both the basic charge and success fee would be shifted to the rich party whenever a poor adversary prevails.

By allowing lawyers to charge their standard fees plus a generous premium, this fee structure would ensure that high quality lawyers would not shy away from representing low-income clients. Shifting the fees to the rich party would offer these lawyers peace of mind in knowing that they will have a perfectly solvent party to collect from if they win in court.<sup>176</sup> The hourly-rate formula would incentivize lawyers to optimize the amount of time they devote to their clients' cases, thereby aligning their interests.<sup>177</sup> Yet, the risk of losing and receiving no payment for their time and resources would minimize the likelihood of lawyers driving up the bill by spending needless hours on cases.<sup>178</sup> Under the no-win, no-fee compensation structure, lawyers have ample incentive to screen out frivolous claims so as to prevent wasted opportunity cost in the form of unpaid-for time and resources.<sup>179</sup> This corresponds with the reason for capping the success fee at 100% of the lawyer's basic charge. This cap is designed to discourage risk-loving lawyers from taking on low-probability lawsuits with a less than 50% chance of success.<sup>180</sup> For even such a risk-loving lawyer, assuming she acts rationally, would refrain from litigating a case with only a 33% chance of success if the maximum amount she could expect to collect in fees would be twice her basic charge, which would leave her with a negative expected income.<sup>181</sup>

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176. Cf. Yeazell, *supra* note 67, at 186-90 (arguing that changes in the structure of the market that include an increase in house ownership, the availability of automobile and liability insurance, and a large expansion in consumer credit contributed to the rising of the plaintiff bar by creating a vast pool of solvent defendants).

177. See Kritzer, *supra* note 24, at 1966-67. Another compensation formula that achieves a similar result is the percentage method, essentially a variation on the contingency fee in that it awards counsel a fee in relation to the benefits achieved for the party. The proposed compensation formula is, however, superior to the percentage method because, just like contingency fees, the percentage method could work only when the sought-after relief is a large monetary amount. It is completely unworkable in many cases that implicate access to justice problems, such as nonmonetizable claims, small meritorious claims, and claims in which the poor party is the defendant rather than plaintiff. See discussion and text accompanying *supra* notes 76-81.

178. John Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439, 452 (1986).

179. Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 207 (2000).

180. For a different point of view, see Woodroffe, *supra* note 60, at 356-57:

There may be a case for introducing an uplift even greater than one hundred percent for cases where the chances of success are less than fifty-fifty. It is difficult to see why, from an ethical standpoint, an uplift of two hundred percent should not be allowed where a case has a one-third chance of success.

181. If she has only a 33% chance of success, she will need to charge a success fee that is at least 200% of the basic charge to arrive at a positive expected income.

Again, the ideal compensation formula would be self-executing, as judicial involvement inevitably would generate protracted and expensive satellite litigation over the fee award, which at times would eclipse the primary litigation.<sup>182</sup> Regrettably, it is impossible to avoid judicial involvement completely, due to the moral hazard problem entailed by any fee-shifting scheme. Moral hazard refers to the prospect of a party insulated from risk behaving differently from how it would behave were it fully exposed to that risk.<sup>183</sup> The proposed general progressive one-way fee-shifting rule gives rise to an acute moral hazard problem because the party negotiating the fees would not bear the risk of paying them. The poor party would sign the retainer agreement, but her rich adversary would be the one to eventually pay the bill. It would, therefore, be advantageous to both the poor party and her attorney to set in the retainer agreement both an inflated hourly rate and the maximum success fee allowed under law for all cases, regardless of the actual risk involved in the particular case.

The first part of the problem—the inflated hourly rate—can, for the most part, be remedied by prohibiting lawyers from charging a fee that exceeds their standard hourly rate (as ascertained from historical billing records). However, the second part of the problem—the exaggerated success fee—is harder to verify as it is more subjective and, therefore, difficult to measure and monitor. Consequently, there is no escaping limited ex post supervision of attorney compensation by a judicial officer. One possibility already raised is that the fees would be subject to a reasonableness test in the framework of a fee petition filed by the losing party to contest the fee request. Fee petitions would be heard not by a judge, but by a special magistrate sitting as a taxing officer, whose authority would be limited to ascertaining the following items: (1) that the fees charged in the fee request are no higher than the standard fee the same lawyer charges paying clients; (2) that the billing hours have not been inflated; and, most importantly, (3) that the size of the success fee reasonably reflects the risk assumed by the lawyer in taking on the case.

The third item is, of course, the most challenging to verify and would require some degree of expertise on the part of the taxing officer. It would, therefore, be beneficial to refer all fee petitions to tax-

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182. See *Golden Gate Audobon Soc'y, Inc. v. U. S. Army Corps of Eng'rs*, 732 F. Supp. 1014 (N.D. Cal. 1989). In this case, a prevailing plaintiff requested \$43,420 in fees after the court determined that the government had not been substantially justified in refusing to file an environmental impact statement. The government challenged a portion of the fee request, amounting to \$9,408, on various grounds. In litigating the fee petition the government caused the plaintiffs to incur approximately \$31,000 in additional expenses and incurred substantial costs itself (not to mention wasting the court's time), all in order to potentially save less than a \$10,000. *Id.* at 1022 n.12.

183. See Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65, 67-68 (1991) (discussing the moral hazard problem in the insurance context).

ing officers with expertise who could more consistently assess the level of risk involved in different types of claims.<sup>184</sup> The taxing officer's decision would be final. Furthermore, to prevent frivolous fee petitions, she would be authorized to order a petitioner to pay additional costs if the fee petition is found to be unmerited. The taxing officer would also be authorized to penalize an attorney for charging excessive fees (inflating either his billing hours or the success fee) by reducing the fees awarded to him to an amount below what he would have been entitled to had he charged reasonable fees.<sup>185</sup>

An alternative method to the ex post judicial supervision on the reasonableness of the fee request would be to make the poor party liable for a small percentage of her attorney fee (between 5% and 10% of the fee charged, for example). Such a "deductible" would solve the moral hazard problem since it would turn the poor party into a potent supervisor of her attorney's billing practice at a cost of less redistribution and a heavy burden on the indigent.<sup>186</sup>

Part IV now proceeds to elaborate on the effects of the proposed general progressive fee-shifting rule. It demonstrates that the rule does not only serve the egalitarian goals of extending access to justice to a larger segment of the population and facilitating more equitable distribution of resources between parties. Indeed, it also improves the overall efficiency of the civil justice system by fostering the expansion of the market for legal services to encompass types of cases currently excluded from the new economy of justice.

#### IV. EXPANDING THE MARKET FOR LEGAL SERVICES: THE POSITIVE EFFECTS OF THE PROGRESSIVE FEE-SHIFTING RULE

Any proposed fee structure must be evaluated in light of its impact on the various elements of litigation as well as on ex ante substantive behavior. The effects of attorney fee shifting are, however, extremely complex and subject to much controversy. Indeed, it is difficult to ascertain whether fee shifting would encourage or discourage potential plaintiffs to file claims, whether the likelihood of settlement would increase or decrease, and whether there would be more or fewer frivolous claims.<sup>187</sup> These perplexities

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184. See Breger, *supra* note 174, at 268.

185. It is also possible to cap the maximum success fee attorneys would be allowed to charge for certain types of cases which are known to be, in most cases, rather simple. For example, in England and Wales, the amount of success fee in road traffic accident claims is limited to 12.5% of the attorney's base costs. Consultation Paper, *Controlling Costs in Defamation Proceedings: Reducing Conditional Fee Agreement Success Fees*, MINISTRY OF JUSTICE, at 17, (Jan. 19, 2010), available at <http://www.justice.gov.uk/consultations/docs/costs-defamation-proceedings-consultation.pdf>.

186. I thank Dean Hanoach Dagan for this excellent suggestion.

187. See Kritzer, *supra* note 24, at 1948 (concluding that it is difficult to predict the effects of attorney fee-shifting after surveying the theoretical and empirical literature).

lead, in turn, to uncertainty as to the likely impact of fee shifting on compliance with primary substantive norms, such as to what extent adequate precautions against risk would be taken and obligations honored. As Avery Katz has candidly admitted, “the current state of economic knowledge does not enable us reliably to predict whether a move to fuller indemnification would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate.”<sup>188</sup> This important caveat notwithstanding, there is still much to be gained from trying to predict, as much as possible, the likely effects of the proposed fee-shifting rule on litigation as well as substantive behavior, in terms of evaluating the rule’s costs and benefits.

To better understand what is at stake in choosing one fee structure over another, let us return to the American Rule and English Rule, the two ideal-type fee regimes, to discuss briefly their effects on litigation and compare them with the expected effects of the general progressive rule. The English “loser pays” rule, it is maintained, has two positive impacts on litigation: it makes victorious plaintiffs and defendants whole, awarding them the full costs of litigating their correct position,<sup>189</sup> and it improves claim quality by reducing the likelihood of frivolous lawsuits while increasing the likelihood of strong low-value lawsuits. Making a losing plaintiff pay the winning defendant’s legal costs imposes a higher expected cost on frivolous lawsuits, thereby forcing plaintiffs to carefully assess the strength of their cases and refrain from low-probability suits.<sup>190</sup> In contrast, meritorious low-value claims are arguably more likely to be brought, since plaintiffs know that in the likely case that they win, they will be reimbursed for all their costs.<sup>191</sup>

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188. Avery Wiener Katz, *Indemnity of Legal Fees*, in 5 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 63, 64 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000); see also SHAVELL, *supra* note 13, at 432 (“It is not possible to draw general conclusions about the social desirability of fee-shifting, although statements can be made in particular circumstances.”).

189. See Root, *supra* note 91, at 604; see also Woodroffe, *supra* note 60, at 345-46:

From the defendant’s point of view, it seems unfair to have to pay the legal costs incurred in defending an unjustified claim or unwarranted attack that is thrown out by the court. Plaintiffs for their part argue that if they have a good claim against another party who refuses to pay up when he or she should do so, the legal costs of being compelled to sue to enforce their rights should be borne by the defendant, for why should the plaintiffs be out-of-pocket simply because the defendant was recalcitrant and refused to acknowledge his or her liabilities until forced to do so by a judgment of the court?

190. See, e.g., A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 *GEO. L.J.* 397, 402 (1993); Root, *supra* note 91, at 605-06.

191. See, e.g., James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 *J.L. & ECON.* 225, 248-49 (1995).

The English Rule has also been claimed to affect litigation rates,<sup>192</sup> but while some argue that fee shifting should produce an increase in the number of lawsuits,<sup>193</sup> others argue that it in fact lessens the overall litigation incidence.<sup>194</sup> Yet another controversial—and theoretically irresolvable—issue is the effect of fee shifting under the English Rule on settlement.<sup>195</sup>

The biggest disadvantage of the English Rule is its disparate impact on litigants of diverging wealth. As discussed above, the prospect of having to pay the prevailing party's attorney fees in full is a risk for any litigant. Yet, for the government, large corporations, and the wealthy, who tend to be risk-neutral and are often capable of spreading their risks, fee shifting is part of their business calculations and certainly not a deterrent to filing lawsuits.<sup>196</sup> Low- and average-income individuals and small businesses, on the other hand, are likely to be adversely daunted by this risk. Since those parties are usually risk-averse, fee shifting unjustly discourages them from initiating actions. Furthermore, when they do file suits, they are incentivized to settle for much less than they actually deserve given the strength of their claim rather than continue to trial.<sup>197</sup> This offsets any potential the English Rule may have to promote small meritorious claims because, unless the poor plaintiff is certain to prevail (which rarely is the case), the threat of what could be lost outweighs the possible gain.<sup>198</sup>

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192. See, e.g., Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, J.L. ECON. & ORG. 143 (1987); but see POSNER, *supra* note 14, at 590 (“[I]t is unclear whether on balance indemnity raises, lowers, or does not change the litigation rate . . .”).

193. See, e.g., Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 760 (1988) (finding no clear evidence that the availability of fee shifting leads to an increase in the number of cases filed).

194. See, e.g., Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 70 (1982); Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345 (1990). If a comparison of the number of lawsuits filed in England versus the United States is any indication (which is doubtful), then Shavell and Snyder & Hughes are correct, as “America has roughly twenty times the amount of civil lawsuits as England (figure adjusted for population difference).” Root, *supra* note 91, at 605.

195. See Katz, *supra* note 192, at 157-59. See discussion at *infra* Part IV.A.4.

196. In fact, fee shifting could, at times, encourage such parties to hire a more expensive lawyer with the expectation of shifting the cost to their adversary. Hiring a more expensive (and perhaps higher quality) lawyer may improve their chances of prevailing in litigation. Edward F. Sherman, *From “Loser Pays” to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1871 (1998).

197. See *id.* at 1871; Kritzer, *supra* note 24, at 1959; see also Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 329-30 (1998).

198. In economic terms, the expected cost of litigation may exceed the expected benefit. See POSNER, *supra* note 14, at 587. Posner provides the following example (with slight



The American Rule supposedly ameliorates this access to justice problem by prescribing that each party pays its own attorney fees. The cure, however, turns out to be just as bad as the illness, if not worse. First, it is plainly unfair to the winner, whether plaintiff or defendant, as it places her in a position of financial loss. As argued by Werner Pfennigstorf,

[A] claimant who is forced to resort to court action to enforce his claim against a reluctant debtor is entitled to recover the full value of the claim and should not be expected to be satisfied with a lesser amount because of the necessity of suing. Likewise, one who successfully defends himself against an unjustified claim raised by another person should come out of the experience without financial loss.<sup>199</sup>

In addition to being unfair, the American Rule is also inefficient. It impedes the bringing of certain types of suits (such as small meritorious claims and nonmonetary claims) by middle-income plaintiffs who are unable to muster sufficient resources to finance the litigation. As a result, the government and big corporations can engage in unlawful conduct with impunity, knowing that the chances of them being sued are quite slim. Moreover, the American Rule also prevents wrongfully sued defendants with only modest means from adequately defending themselves. Lastly, the high costs of litigation, which defendants cannot recover under the American Rule, increase the likelihood of frivolous litigation.

#### A. *The Argument from Efficiency*

The general progressive one-way fee-shifting rule proposed here retains the advantages of both the English and American Rules, while dispensing with the majority of their disadvantages. In treating disparately equipped litigants differently for fee award purposes, the proposed rule would level the litigation strength of the parties and thus increase the likelihood of meritorious litigation being brought. This, in turn, would bolster deterrence of unlawful conduct on the part of the government and large corporations. Thus, this rule would guarantee the right of nonwealthy plaintiffs and defendants to effectively present their cases before judge or jury. It would ensure that a lack of means does not stand in the way of low- and average-

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modifications): Suppose we have a claim for \$20, the probability of winning the case is 90%, and litigation expenses are \$100 for both plaintiff and defendant. The expected benefit from litigating the case is \$18 ( $\$20 \times 90\%$ ), while the expected cost is \$20 ( $\$100 \times 20\%$ ). The result is that no lawsuit will be filed despite the strength of the claim. *See also* Charles W. Branham, III, *It Couldn't Happen Here: The English Rule—But Not in South Carolina*, 49 S.C. L. REV. 971, 980 (1998) (arguing that “when the potential of bearing the other party’s litigation expenses outweighs the potential gain of a meritorious suit, lower-middle-class plaintiffs may not sue at all”).

199. Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 66-67 (1984).

income individuals bringing meritorious suits against rich and powerful adversaries, even when the claim is of low monetary value, while circumventing the obstacles that thwart such lawsuits under both the English and the American Rules. The proposed rule would also enable poorer defendants to fight unmerited actions brought by powerful adversaries. It would not, however, increase the likelihood of frivolous claims, since the weak party will be subject to the market for legal services, as discussed below. As far as rich parties are concerned, the proposed fee-shifting rule would dilute their excessive power. However, as explained, the risk of reimbursing the attorney fees of winning opponents is purely a business calculation for such parties since they have the resources to pay for high quality legal assistance. Therefore the proposed rule would not hinder them from bringing (large or small) meritorious lawsuits or from defending against unmeritorious claims. It would, however, discourage strong parties from bringing low-probability suits against weaker adversaries in an attempt to intimidate them. It would also encourage strong parties to offer a fair settlement in high-probability suits brought against them. They would know that there is only a slim chance their opponents will cave in and that, if they lose at court, they will have to pay not only their own attorney fees but also those of their adversary.

### 1. *Expansion of the Market for Legal Services*

The most noteworthy and laudable probable effect of the general progressive fee-shifting rule would be the expansion of the legal services market to cover currently excluded types of claims. As discussed above, the advent of the contingency fee dramatically changed the litigation landscape in favor of low-income individuals.<sup>200</sup> Underlying the proposed rule is the same economic logic behind the contingency fee, only it works better and in a much wider range of cases than the contingency fee. Like the contingency fee, the conditional fee arrangement incorporated into the proposed rule would tap the forces of the legal services market by providing high quality lawyers economic incentive to accept less wealthy clients on a no-win, no-fee basis. At the same time, the general progressive rule overcomes the two most serious drawbacks of contingency fees. First, in contrast to the contingency fee market, which “only functions if there are damages from which attorneys can collect fees,”<sup>201</sup> the proposed rule detaches the amount charged in attorney fees from the size of recovery. Thus, it would bring into the legal services market a wide array of cases not suited to the contingency arrangement, such as small meritorious claims, nonmonetary claims, and cases in which the defendant is the

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200. See discussion at *supra* Part II.B.

201. Yeazell, *supra* note 31, at 709.

poor party.<sup>202</sup> Second, under the contingency fee system, poor plaintiffs are left undercompensated because a large proportion of the recovery is siphoned off as attorney fees. By shifting payment of the fees (both the basic charge and success fee) to the wealthy party, the proposed rule would ensure that the poor party is compensated for her entire loss.

Fully compensating prevailing poor parties while leaving rich parties undercompensated when they win is justified from an efficiency perspective for two reasons. First, there is a great deal of consensus amongst law and economics scholars that redistribution of wealth is justified not only on egalitarian grounds but also from an efficiency standpoint, due to the diminishing marginal utility of money. Indeed, “a dollar of income often will raise the utility of some individuals more than that of others. Notably, redistributing income from the rich to the poor will tend to raise social welfare, assuming that the marginal utility of income is greater for the poor than for the rich.”<sup>203</sup> Therefore, the wealth transferring effect of the proposed fee-shifting rule is, at least up to a certain point, welfare-enhancing.<sup>204</sup> The second efficiency justification derives from the availability of legal expenses insurance (“LEI”) for rich parties, which protects the insured against the costs of bringing or defending legal actions.<sup>205</sup> LEI policies enable wealthy individuals and middle-sized corporations, who tend

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202. This is also the reason why one-way fee shifting in favor of plaintiffs will not suffice. John Leubsdorf has proposed awarding fees as damages to prevailing plaintiffs but not to prevailing defendants. Leubsdorf, *supra* note 178, at 440. This proposal is inferior to the general progressive rule presented here from both distributive justice and efficiency perspectives. There are many examples in which the strong party is (or could be) the defendant rather than the plaintiff. A few such examples are bank-client cases, landlord-tenant cases, and subrogated insurance cases. Moreover, the government and large corporations are repeat players, and one of the defining characteristics of repeat players is their ability to structure their next transaction and reorient the market in any direction they want. See Galanter, *supra* note 2, at 98. They can structure transactions so that they will always be the defendant (for instance, by requiring a deposit and then confiscating it in the event of a dispute arising, thereby forcing the other party to the transaction to sue in order to recover her money) or decide to sue and become the plaintiff. Moreover, there is also the problem of the government and large corporations using counterclaims to intimidate their adversaries. Thus, structuring a fee award system that prefers only plaintiffs or only defendants would inevitably serve the interests of wealthy repeat players rather than poor one-shotters.

203. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 30 (2002).

204. See generally Sanchirico, *supra* note 170 (arguing that up to a certain point, redistributive private law rules are efficient).

205. There are two types of LEI—“before-the-event” (“BTE”) and “after-the-event” (“ATE”). With BTE insurance, the policy is bought in advance to cover the consequences of an event that has yet to occur. ATE insurance policies are purchased after the disputed event has already occurred, although the legal expenses resulting from the event have yet to be incurred. From the insurer’s standpoint, “the risk of being forced to indemnify the insured against legal costs is much higher under . . . ATE” insurance, and consequently, ATE premiums are much higher than BTE premiums. Matthias Kilian & Francis Regan, *Legal Expenses Insurance and Legal Aid—Two Sides of the Same Coin? The Experience from Germany and Sweden*, 11 INT’L J. LEGAL PROFESSION 233, 235 (2004).

not to be repeat players and are thus unable to spread risks over a large number of actions, to insure for the risk entailed in litigating under the proposed fee-shifting rule. For various reasons,<sup>206</sup> LEI is much less prevalent in the United States than in England and Continental Europe.<sup>207</sup> It is quite likely, however, that the institution of the general progressive rule suggested here would increase the appeal of such insurance for rich individuals and corporations, and insurance carriers would then begin to offer these policies.<sup>208</sup>

## 2. *The Likelihood of Frivolous Claims*

Frivolous claims are unmeritorious low-probability lawsuits that lead to “wasteful” litigation.<sup>209</sup> In the United States, frivolous lawsuits are often, though not always, “brought with the intention of securing settlement from the defendant since the defendant’s unrecoverable lawyer fees could run higher than the amount the plaintiff will accept to settle the case.”<sup>210</sup> In exempting litigants from paying their opponents’ attorney fees, the American Rule places litigants at a far lower financial risk than the English Rule does; thus, frivolous claims are more likely to be filed under the former than the latter. Extending the same logic, we can argue that the general progressive fee-shifting rule proposed here would encourage poor parties to bring frivolous lawsuits against rich parties, in knowing that even if they lose, they will not have to pay their adversary’s attorney fees and thus are taking only a minimal risk. While, admittedly, this concern is not unfounded, it is not as grave as it may seem upon first glance. To begin with, the overall incidence of frivolous suits in fact would not increase under the proposed rule. If anything, it would be quite

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206. Not the least of which are the availability of contingency fee arrangements and the prohibition on lawyers sharing profits with nonlawyers. See RHODE, *supra* note 3, at 74.

207. *Id.*; see also Robert A. Hershberger, Book Review, 43 J. RISK & INS. 349, 350 (1976) (reviewing WERNER PFENNINGSTORF, LEGAL EXPENSE INSURANCE: THE EUROPEAN EXPERIENCE IN FINANCING LEGAL SERVICES (1975)) (arguing that “[t]he rapid development of legal expense insurance in Europe and its sluggish start in the United States are attributed primarily to the general absence of contingency fee arrangements [in Europe]”).

208. For several reasons, LEI cannot replace legal aid or one-way fee shifting as a mechanism for enabling access to justice for low-income people. One reason is the insurance policy premiums, which are usually quite high and therefore put the insurance out of the reach of people with modest means. Second, all types of insurance policies require the occurrence of an “insured event,” which triggers the rights of the insured under the policy, including her right to consult a lawyer. Many low-income earners, however, are unaware of their legal rights and need general legal advice, which is unavailable under most LEI insurance policies. Another inherent limitation of the effectiveness of LEI as a mechanism that facilitates access to justice is that all types of insurance policies refuse coverage if the insured event is triggered by a willful act on the part of the insured. It is not surprising, therefore, that the empirical data show that “LEI is taken out to a much lesser degree by those with little income.” Kilian & Regan, *supra* note 205, at 241-43.

209. See RHODE, *supra* note 3, at 26.

210. Angela Wennihan, *Let’s Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1658 (1996).

the opposite. Under the American Rule, both parties are equally incentivized to file frivolous lawsuits, whereas under the general progressive fee-shifting rule, only the poor party would have incentive to file such a lawsuit.

More importantly, however, the restructuring of the market in legal services that would follow in the wake of the proposed rule would significantly diminish the likelihood of a proliferation of frivolous claims. The new fee-shifting rule would generally entitle only people of modest means to a fee award—people who cannot self-finance litigation and, therefore, have no alternative to no-win, no-fee arrangements. Since under such arrangements it is lawyers, not their clients, who would bear the majority of the risk entailed by the relevant litigation, lawyers would have ample incentive to screen out frivolous cases and pursue only cases with a high probability of success. With the prospect of a 100% success fee, lawyers would likely accept any case with a 51% or more chance of prevailing in court; anything below that would be too risky. In this way, the actual market structure would assist in weeding out unmeritorious suits.<sup>211</sup>

Lastly, as rightly observed by Deborah Rhode, “what qualifies as a frivolous claim generally depends on the eye of the beholder.”<sup>212</sup> What some may view as extortive, others may see as justified claims. Sexual harassment suits, for instance, were overwhelmingly dismissed in the past as frivolous, whereas the vast majority today are considered meritorious.<sup>213</sup> Similarly, large corporations expend great efforts—with considerable success—to characterize consumer claims as petty and frivolous in an attempt to rally the public against them and convince legislatures to ban them.<sup>214</sup> We should, therefore, proceed with great caution when labeling a suit as frivolous.

However, even if the above analysis is erroneous and the proposed rule would in fact result in a greater volume of frivolous lawsuits, as Herbert Kritzer aptly put it, a balance must be sought: “In the end, the question comes down to the problem of finding a balance between permitting aggrieved parties to have easy access to the courts and deterring

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211. This is even more true given the fact that sophisticated finance has come to ordinary litigation. There are firms and specialized divisions in commercial banks that specialize in the legal services industry. These firms finance litigation based on an assessment of each case. This market will be able to sort the good cases from the bad ones. See Yeazell, *supra* note 67, at 204.

212. RHODE, *supra* note 3, at 28.

213. *Id.*

214. *Id.* at 26-27; see also Leubsdorf, *supra* note 178, at 451 (“Often, doubts about whether a small claim should be litigated reflect critical views of the claim or the litigant who asserts it. No one suggests that a bank wastes the time of the courts when it sues a borrower who did not pay a two-hundred-dollar loan. A tort claimant may be taken less seriously.”).

parties from ‘oversuing’ when their cases are marginal or nonexistent. There is . . . no ‘empirically correct’ answer to this dilemma.”<sup>215</sup>

### 3. *The Hyperlexis Problem*

A related, yet nonetheless distinct, issue is the expected effect of a general progressive one-way fee-shifting rule on the overall probability of litigation. This issue can be considered from two perspectives—empirical and normative. The empirical question is whether the proposed rule would spawn an increase in the lawsuit volume. If we assume it would, then the normative question arises: would this be good or bad? There is no clear unequivocal answer to the first question. Some scholars argue that such a one-way fee-shifting rule would likely increase the overall number of actions filed; small meritorious claims, which are not worth pursuing under the American Rule and are too risky under the English Rule, would be filed under the proposed fee-shifting rule.<sup>216</sup> This common analysis has not, however, gone uncontested. Richard Posner, for instance, has argued that contrary to the conventional view, “one-way indemnity may not even generate more litigation than the American (no-indemnity) rule does.”<sup>217</sup>

Even assuming that Posner is mistaken and the proposed one-way fee-shifting rule would increase the volume of claims filed, this would not necessarily be a negative effect. In fact, the prospect of more litigation is, in all likelihood, actually a blessing. Belying the vociferous grumbling about the so-called “litigation explosion”<sup>218</sup> or hyperlexis (excessive litigation), many studies have found that it is in fact a myth.<sup>219</sup> Indeed, the real problem emerges as quite the opposite—not *enough* litigation—which leads to systematic undercompensation of victims. Some illustrative statistics, collected from a wide range of empirical studies, prove the point:

[O]nly about 10 percent of accident victims file claims and only 2 to 3 percent bring lawsuits. So too a review of some 30,000 New York

215. Kritzer, *supra* note 144, at 138.

216. See, e.g., Leubsdorf, *supra* note 178, at 449.

217. POSNER, *supra* note 14, at 593.

218. See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); see also RHODE, *supra* note 3, at 26-27 (portraying the dominating public discourse concerning the over-litigiousness of American society); Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. Rev. 261, 280-81 (2009) (describing the historical transformation from a concern about access to justice to a concern about the litigation explosion).

219. See generally, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (arguing that the litigation explosion lacks empirical grounding); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5, 37-39 (1986) (using empirical analysis of litigation filing rates to challenge the conception of a litigation explosion).

hospital records disclosed that only about 12 percent of patients who sustained injuries from negligent medical care brought malpractice actions and only half of those received compensation. Other research on medical malpractice cases has found that plaintiffs on average recovered just over half their costs and those with the most severe injuries ended up with only a third. Similar patterns of undercompensation hold for victims of unsafe products and of automobile and airline accidents. The tort liability system reimburses only about 4 percent of victims' direct costs of accidental injuries.<sup>220</sup>

This predicament is not only plainly unfair to victims but also has a negative impact on the system's overall efficiency in that it distorts the substantive behavior incentives for potential tortfeasors and wrongdoers. Under both the American and English Rules, potential wrongdoers (which are often large entities such as government bodies or large corporations) know that the risk of being sued for violations of substantive norms is quite slim. Thus, they have no incentive to refrain from wrongful conduct or take adequate precautions against the risks they create.<sup>221</sup> As explained, the proposed general progressive rule would encourage weak parties to file and aggressively litigate claims (even for small monetary damages and nonmonetary harms) when they have been unjustly wronged, forcing powerful and wealthy parties to internalize the costs of their wrongdoings.

Therefore, the supposed inefficiency of pursuing small meritorious claims, which are worth less than the social cost of litigating them, is an illusion. It is in fact a mistake to compare the costs of litigating a specific claim (which includes both the parties' expenses and what society spends on the judicial proceedings) with the monetary value of that claim. The public benefit of challenging unlawful conduct perpetrated by the government or a large corporation is not manifested solely in the individual stake of one particular litigant. Therefore, the proposed general progressive rule, in increasing the overall feasibility and probability of litigation (particularly of small claims), would not lead to a waste of social resources.<sup>222</sup> Indeed, "[t]he feasibility of such suits would in all likelihood . . . deter[] the defendant from committing the wrongful act in the first place."<sup>223</sup>

#### 4. *Impact on Settlements*

Since most civil cases are settled rather than tried, the potential effect of the general progressive rule on settlement is a crucial component in its assessment. Unfortunately, what effect fee shifting in general has on the likelihood of settlement is rather uncertain and

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220. RHODE, *supra* note 3, at 31.

221. See Katz, *supra* note 188, at 76.

222. See Krent, *supra* note 14, at 2052.

223. POSNER, *supra* note 14, at 587.

subject to debate. The conventional wisdom is that two-way fee shifting leads to a lower settlement rate because it reinforces the effects of differences of opinion between parties to litigation regarding the possible outcome of the trial. People usually pursue litigation because they are overly optimistic about their chances at trial, which causes them to underestimate the chances that they will have to pay their adversary's attorney fees and overestimate their chances of being reimbursed for their own attorney fees. As a result, the likelihood of settlement being reached decreases and the likelihood of going to trial correspondingly increases.<sup>224</sup> Some, however, dispute this conventional wisdom, asserting that fee shifting actually increases the likelihood of the parties reaching a settlement. They reason that the greater expenses parties are likely to incur under the English Rule could counterbalance parties' tendency to prefer litigation as predicted under the optimism model and, therefore, increase the likelihood of settlement.<sup>225</sup> There are also those who turn to the Coase Theorem to demonstrate that the settlement rate is unaffected by fee shifting, remaining identical under both the English and the American Rules.<sup>226</sup> Thus, the only conclusion to be garnered from the scholarly literature is that the effects of fee shifting on the settlement rate are ambiguous at best.<sup>227</sup>

It is important to recall, however, that settlements are not beneficial in and of themselves. They are beneficial only to the extent that they serve the goals underlying the civil justice system, which include not only efficiency but also equality and fairness. In all probability, the implementation of the rule proposed in this Article would serve these goals better than any alternative rule, even if accompanied by a slight decrease in the likelihood of settlement. Under both the American and the English Rules, strong parties such as the government and big business are in a position to force unfairly low (or even no) settlements on average-income legal adversaries. Due to the fact that strong parties possess far greater litigation resources than their weaker adversaries, under the American Rule they are able to

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224. Hughes & Snyder, *supra* note 191, at 231; see also SHAVELL, *supra* note 13, at 456.

225. See, e.g., John C. Hause, *Indemnity, Settlement, and Litigation, or I'll be Suing You*, 18 J. LEGAL STUD. 157, 175-76 (1989); Roger Bowles, *Settlement Range and Cost Allocation Rules*, 3 J.L. ECON. & ORG. 177 (1987); Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161, 169-76 (1988) (finding through empirical studies that the English Rule produces more settlements than the American Rule, suggesting that the higher risk of paying the adversary's costs encourages settlements).

226. See, e.g., John J. Donohue III, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1099 (1991).

227. Katz, *supra* note 188, at 73. The same theoretical uncertainty and ambiguity that surround the effects of the English Rule (namely, two-way fee shifting) on settlement holds also for the likely impact of one-way fee shifting on settlements. See Leubsdorf, *supra* note 178, at 456-58; see also Krent, *supra* note 14, at 2079-82.



wrest settlements favorable to them but unjust to their opponents. They do this by threatening to drag their opponents into expensive protracted litigation, which they would be unable to finance without fee shifting. Weaker parties fare no better under the English Rule. When parties assume full risk of bearing their adversary's fees, stronger parties can safely make a low settlement offer or even refuse to make any offer knowing that their weaker opponent will prefer to accept the offer or withdraw its claim rather than run the risk of a costs award. By minimizing the advantage that the government and large corporations often enjoy in litigation against smaller adversaries, the proposed general progressive rule would bolster the bargaining position of weaker parties and make them far less vulnerable to undue pressure. The weaker party is shielded from the risk of paying its stronger opponent's fees while the latter is exposed to that risk, thereby positioning the weaker party to reject unjustly low settlement offers and credibly threaten its opponent with the prospect of continuing to trial.

#### *B. The Argument from (Horizontal) Fairness*

Having established the desirability of the general progressive rule from both distributive and efficiency perspectives, it must now be addressed from a fairness perspective. Under the fairness argument, randomness and limited participation could be invoked as reasons for rejecting the proposed rule in favor of a more comprehensive redistributive scheme. Advocates of the fairness argument would admit that the poor are entitled to equal access to the civil justice system, just as they deserve a quality education and affordable health care. However, these are all social obligations that should be borne by the state as the representative of society at large. It would be unfair to require only a selection of the broad group of those who should participate in the ideal comprehensive redistributive scheme to bear its costs.<sup>228</sup> Therefore, the argument goes, the rules governing attorney fees should apply to all people equally, irrespective of wealth, and equal access to justice should be guaranteed through overarching governmental schemes such as legal aid and the tax and transfer system.

The fairness argument should not be taken lightly. It has led the majority of federal courts to narrowly interpret the discretion Rule 54(d) of the Federal Rules of Civil Procedure grants to judges to decide whether to award costs (other than attorney fees) to a prevailing

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228. Robert E. Goodin, *Compensation and Redistribution*, in NOMOS XXXIII 143, 162 (John W. Chapman ed., 1991) ("In the same way that redistributivists think it unjust for some people to get rich by sheer luck, so too must they agree that it would be unjust for some but not others to be relieved of their undeserved riches by the sheer bad luck of their being the uncompensated [party] . . .").

party.<sup>229</sup> While the jurisprudence of a small number of these courts encourages judges to consider relative financial status in awarding costs,<sup>230</sup> the majority of the federal courts take the view that this practice should be rejected as “fundamentally unfair to wealthy litigants.”<sup>231</sup> In *Smith v. Southern Pennsylvania Transportation Authority*,<sup>232</sup> for instance, the court rejected the argument that it would be inequitable to award costs to a prevailing party when the losing party is of substantially lesser wealth, holding that “[a]cceptance of this general proposition would mean that large institutions . . . could be denied costs in most cases even when their unsuccessful adversaries could well afford to pay for them. In this instance this would be unfair to those who must ultimately bear the burden of . . . costs . . . .”<sup>233</sup>

Yet, for several reasons, the fairness argument is ultimately unpersuasive. First, in order to seriously challenge the proposed general progressive rule on fairness grounds, it is essential to offer alternatives that are able to achieve similar results, both in terms of efficiency and redistribution, and at the same time be fairer to the rich. In fact, the proposed rule is superior to the alternatives that its potential opponents could present in every aspect. Neither legal aid nor the tax and transfer system can bring about an expansion of the market the way and at the cost that the proposed rule could; indeed, far more public funds would be required to achieve the same results. Moreover, the proposed rule is superior to alternative redistributive schemes from the expressive perspective as well, insofar as the social meaning of the redistribution is concerned. One of the problems of publicly-funded programs such as legal aid and the tax system is that they are often depicted as acts of charity by the productive towards the unproductive.<sup>234</sup> In contrast, the general progressive fee-shifting rule is based on a notion of entitlement, not charity. Therefore, this rule would be likely to empower the disadvantaged, assist them in attaining such objective goods as self-respect, and enhance their ap-

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229. FED. R. CIV. P. 54(d)(1). The Rule creates a presumption of the award of costs to the prevailing party but leaves the final decision to the discretion of the court.

230. See, for example, *National Organization for Women v. Bank of California*, 680 F.2d 1291 (9th Cir. 1982), where the court upheld a district court’s decision not to award costs to a prevailing defendant. The court concluded that the district court had not abused its discretion by considering the plaintiff’s limited budgets. *Id.* at 1294. The Ninth Circuit reaffirmed this position in *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1358 (9th Cir. 1984), holding that “limited financial resources of a plaintiff may be considered when making cost awards.” The Eighth Circuit followed suit, ruling that considering the parties’ financial resources in awarding fees is within the discretion of the court under Rule 54(d) in *Cross v. General Motors Corp.*, 721 F.2d 1152, 1157 (8th Cir. 1983).

231. John M. Blumers, *A Practice in Search of a Policy: Considerations of Relative Financial Standing in Cost Awards under Federal Rule of Civil Procedure 54(d)(1)*, 75 B.U. L. REV. 1541, 1548 (1995); see also Resnik, *supra* note 4, at 2137-38.

232. 47 F.3d 97 (3d Cir. 1995).

233. *Id.* at 99.

234. KEREN-PAZ, *supra* note 166, at 48.

preciation of the money that they have received. At the same time, the rule would decrease the giver's opposition to the redistribution and injury to her welfare.<sup>235</sup>

Second, even assuming *arguendo* that legal aid and the tax system are superior regimes to the proposed rule on all counts (efficiency, distribution, expressivity, and fairness), they are still not enough. A serious critique cannot make do with simply showing the mere existence of hypothetical alternatives. Rather, it is necessary to show some likelihood of these other mechanisms being used.<sup>236</sup> It is quite clear that the chances of the government spending more money on legal aid programs or engaging in a massive redistribution through the tax and transfer system are not just slim but practically nil.<sup>237</sup> Consequently, these are virtual rather than real alternatives.

Third, the problem of limited participation would be a compelling argument only if the proposed rule creates a redistribution that places its rich participants in a worse position than they would have occupied had an ideal redistribution transpired. So long as the rich who do participate in the redistribution do not bear more than their fair share, the fact that not all those who should have participated actually participate does not amount to sufficient reason to relieve the former of their obligation to participate. In other words, partial redistribution is fairer than no redistribution at all.<sup>238</sup> At present, it is patently clear that society is so far removed from an adequate distribution of benefits and burdens that the participation argument fails to absolve the rich from their duty to take part in the redistribution, even if it is far from being comprehensive.

Lastly, but most importantly, the proposed fee-shifting rule would not result in random redistribution, at least not as grossly as it may appear upon first glance. In fact, under the proposed rule, all wealthy entities and many moneyed individuals would participate in the redistribution in one way or another. To begin with, it is hard to imagine any institutional entity that does not engage in litigation on a regular basis. Most such entities (including the government, large private firms, financial institutions, and insurance companies) are repeat players who bring and defend claims on a daily basis. Thus, the proposed rule is not random at all in effect but is in fact quite systematic and progressive. On average, the richer the institutional

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235. *See id.*; *see also* Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326 (2006).

236. KEREN-PAZ, *supra* note 166, at 53.

237. Scott Shapiro & Edward F. McClellan, *Law-and-Economics from a Philosophical Perspective*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 460, 463 (Peter Newman ed., 1998) (arguing that the assumption of law and economics scholars that some state agencies will engage in a rather aggressive form of wealth redistribution is clearly utopian).

238. *See* KEREN-PAZ, *supra* note 166, at 36-38.

entity, the more likely it is to engage in litigation and, thus, to participate in the redistributive scheme. This is less applicable to individuals, but their relative weight in the redistributive scheme is less significant in any event. Second, the availability of legal expenses insurance (LEI) would enable broad participation in the redistributive scheme. As discussed above, one of the outcomes of the proposed rule would be a considerable rise in the demand for LEI among the wealthy. Insurance is a loss-spreading mechanism. Widespread use of this mechanism would mean that, rather than a few entities and individuals suffering great losses, many entities and individuals would incur small and predictable losses over time, which would be reflected in the insurance premiums. Thus, LEI would remedy any problem of partiality or randomness of participation. The costs of the redistribution would be spread equally across the insured, which would likely be the entire class of the rich, and thus result in horizontal equity.<sup>239</sup>

## V. CONCLUSION

Serving more than one master is a daunting task.<sup>240</sup> The proposed general progressive one-way fee-shifting rule, however, could carry this off quite successfully. Indeed, the rule should find appeal with all regardless of ideological bent. Advocates of a more egalitarian society should support the rule for its progressive characteristics and distributional sensitivity. Avowed conservatives, who firmly believe in the free market and minimal state intervention, should also rally behind the rule for its ability to promote overall social welfare and efficiency. While some could see it as a first step in the long journey towards making procedure more redistributive, others could view it as an isolated instance of intervention aimed at correcting specific market failures. All the masters would be satisfied.

The failure of the civil justice system to provide access, let alone equal access, to justice to an ever-growing part of the population has been of great concern for quite some time. Many a solution has been proposed and attempted in the past, with varying degrees of success. If there is one lesson to be learned from past experience, it is that the most successful solutions are those that do not depend on public funds for their operation. Time and again, the government has been called upon to spend more money on legal aid, but to no avail. Looking into the future, it is difficult to imagine that the government will make ensuring adequate representation for the poor in civil litigation a priority.

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239. *See id.* at 35; *see also* Sanchirico, *supra* note 170, at 1052-53.

240. Kudos to CARLO OSVALDO GOLDINI, *THE SERVANT OF TWO MASTERS* (1745).

If we do wish to make equal access to justice a reality, we must rely on the market rather than the government and design market-driven mechanisms to assist the poor. Such mechanisms already exist; one example is the contingency fee, another is class actions. Despite the apparent differences between the two, these mechanisms share one thing in common: they both channel market forces to the benefit of the disadvantaged. They created a market in legal services where none existed before. With this insight in mind, the proposed fee-shifting rule seeks to follow in their footsteps. It identifies a gap in the market, which is covered by neither contingency fees nor class actions, and attempts to fill it. To be sure, the proposed progressive one-way fee-shifting mechanism is not intended to replace contingency fee arrangements. It would be applied only in cases of a gross resource imbalance between the parties. Contingency fees would be retained for cases in which there is no such imbalance to enable access to justice when both parties are equally equipped (or ill-equipped).

Almost a quarter of a century ago, John Leubsdorf made the following optimistic observation: “The message of the [Equal Access to Justice] Act may be that Congress is now willing to award fees to a relatively poor party who prevails [in litigation] against a wealthy institutional litigant.”<sup>241</sup> Thus far, this prediction has yet to materialize. Adopting the proposed general progressive fee-shifting rule, however, could turn this vision into a reality.

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241. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9, 32 (1984).

