March 1, 2009

Restoring Equal Justice: Towards General Progressive Fee Shifting

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Available at: https://works.bepress.com/issachar_rosen_zvi/1/
Equal justice in present-day America is a myth. Millions are essentially blocked from accessing the civil justice system. The central factor in this predicament is the fees charged by attorneys, whose prohibitive rates prevent more and more 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 civil justice for low- and average-income individuals, to enable them to engage in litigation on equal terms with the more well-to-do. 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 puts forward a novel solution to this problem. It proposes to replace the rule currently used for allocating attorney fees – the American Rule – with a general progressive one-way fee-shifting rule, as a means for 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 proposed general progressive fee shifting rule should appeal not only to people seeking a more egalitarian society, but also to those who resist redistributive policies. By restoring the balance of power between the parties, the proposed rule resolves the inefficiencies that characterize the current system of civil justice, elevates deterrence to its optimal level, and bolsters the system’s overall legitimacy.
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. And while many others are formally able to access the system, their prospects of success in litigation are also for middle-class Americans, who struggle to bear the rising costs of litigation. 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, much louder than merit.

3 See DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004) (reporting that “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 Mugger: 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’s 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 addressed”).
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.\(^5\) The rationale underlying this model is that competition between opposing parties leads to the triumph of truth.\(^6\) However, a fundamental prerequisite for such a system to function properly is that the competition take place between *fairly matched* adversaries\(^7\)—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.\(^8\) “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.”\(^9\) 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 great amounts of high-quality legal assistance, which significantly impacts the persuasiveness of their cases.\(^10\) 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. Otherwise, the justice system is plainly unjust.\(^11\)

But the impairment of justice is not the only price paid by a legal system that fails to provide equal access to justice; it also pays in the hard currency of inefficiency, suboptimal deterrence, and diminished overall legitimacy and acceptability.\(^12\) 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

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\(^8\) See Rubinstein, 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.”).


\(^10\) See also Lawrence Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 258 (2004) (“[G]iven 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.”).

\(^11\) See 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…” Rubinstein, supra note 5, at 1874-75.
create and to engage in unlawful conduct that is beneficial to them but harmful to society at large. 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. 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 all individuals that their claims of injustice will be heard sends them a message of disrespect and reinforces their sense of unworthiness. As a consequence, the unequal access to justice yields a loss of legitimacy for the entire civil justice system and diminishes the acceptability for its adjudicative outcomes.

The factor that contributes the most to this inequality in access is the prohibitively high fees charged by attorneys, which continue to increase yearly. This financial burden prevents more and more Americans from realizing their legal rights. For either they cannot afford to access the system at all or else the gross imbalances generated in the quality and quantity of legal representation increase significantly the risk of

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 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 the 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 a whole lot of 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, but 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. Cf. Posner, supra note 14, at 553-54 (discussing the body of precedents as a capital stock). See also 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).

16 See 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 counted); 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 seed of anarchy”).

erroneous deprivation of the poor party’s substantive rights.\(^{19}\) Therefore, to restore equal justice it is essential that measures be taken to counteract the effect of attorney’s 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.\(^{20}\) 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.\(^{21}\) Fee-shifting statutes, also known as Equal Access to Justice Acts, are another means by which the poor are assisted in funding meritorious suits.\(^{22}\) 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.\(^{23}\) There are also market-based mechanisms designed to assist the poor in financing litigation. One such mechanism is “no-win, no-pay” fee arrangements, of which the contingency fee is the most commonly applied.\(^{24}\) Another market mechanism, which is used extensively in the U.K. and Continental Europe and to a much lesser extent in the United States, is legal expenses insurance. Under this mechanism parties are insured for the costs of bringing or defending against legal actions.\(^{25}\)

Unfortunately, none of these mechanisms constitutes a satisfactory solution to the problem. The overall impact of all the publicly-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.”\(^{26}\) And adding insult to injury, legal aid programs are under constant vicious attack.\(^{27}\) In fact, history has taught us two important lessons: The one is that programs that rely on public funds and the goodwill 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. Second, the best way to help the disadvantaged is to harness market forces

\(^{19}\) Solum, supra note 10, at 258.

\(^{20}\) For a discussion, see infra Part II.A.

\(^{21}\) Legal Services Corporation Act, 42 U.S.C. § 2296 (1994). See also Luban, supra note 3, at 220.

\(^{22}\) For a discussion, see infra Part II.C.


\(^{24}\) For a discussion, see infra Part II.B. See generally 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).

\(^{25}\) 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 MDLs 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.

\(^{26}\) Rubinstein, supra note 5, at 1878.

\(^{27}\) See Luban, supra note 3, at 209-13. See also Rhode, supra note 3, at 10 (reviewing the reasons for political opposition to legal services).
and channel them to the poor’s advantage. 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. 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.

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. 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.” 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 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.

This proposal can be deemed a progressive measure because it is socially and economically egalitarian. It is designed, first and foremost, to place low- and average-income earners on equal footing with the more well-to-do in litigation. But it should also appeal to those who condone wealth disparities and resist redistributive policies. For 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 non-wealthy, who cannot afford to pay their fees, on a no-win, no-fee basis, even when there is no prospect of cash award at the end of the trial, since they know that, if they win, their fees will be paid

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


30 “Poor” and “rich” would be defined based on a formula to be discussed below. See infra discussion at Part III.B.

31 For a comprehensive discussion of the General Progressive One-Way Fee-Shifting Rule proposed here, see infra Part III.

32 See Luban, supra note 3, at 210 n.1.
by the wealthy opponent. 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 it works in many cases where the contingency mechanism fails, such as when the weak party is the defendant and when the suit is non-monetizable 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 are far from guaranteeing equal access to justice, and 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 components 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—and demonstrates its 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 uphold their rights has not been entirely lost on federal and state decision-makers. Indeed, certain measures have been instituted aimed at guaranteeing universal access to justice. In was follows, 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.

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, and as a result, both the existence and scope of public legal aid programs are dependent on the good will of federal and

33 See 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 Social Services, 452 U.S. 18, 26-27 (1981).
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"). 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 universal access to the legal system. In 1974, Congress passed the Legal Services Corporation ("LSC") Act, creating an independent legal services entity funded by Congress and entrusted with the dual mission of promoting equal access to justice and providing high-quality civil legal assistance to low-income Americans. 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.

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. 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." The reason for what has been called the "justice gap" can be traced primarily to the grossly inadequate funding. A major obstacle impeding the programs’ ability to provide quality legal assistance to the disadvantaged is insufficient resources. 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. In the United States, only about $2.25 per capita in public funds


35 The LSC is a private, non-profit corporation controlled 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. See http://www.lsc.gov/about/lsc.php.


37 See Houseman & Perle, supra note 34, at 19. 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. See ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007, at 2 (CLASP: Center for Law & Social Pol’y, Aug. 2007).

38 TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY 25 (2003) ("Low-income people face more than 85 percent of their legal problems without help from an attorney."). See also Houseman, id. at 9 (reporting the findings of nine state studies conducted by the LSC between 2000 and 2005 on low-income Americans).

39 Rhode, supra note 2, at 103.


41 See Houseman, supra note 37, at 9.

42 In the Reagan era, the federal legal aid programs came under substantial and unremitting attack. As a result, the LSC’s funding was slashed by 25% from $321 million in FY 1981 to $241 million in FY
are expended on civil legal assistance, which is utterly inadequate for the task. 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.”

To add to this, Congress imposed draconian restrictions on publicly-funded legal aid programs, which has significantly curtailed their effectiveness. Restrictions on the use of federal funding 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, political redistricting, abortion, and school desegregation. Later on it passed regulations further restricting legal services. Federally funded legal aid programs are thus precluded from engaging in advocacy and representation before legislative bodies as well as in administrative rulemaking proceedings. They may not initiate, participate, or engage in any class action or seek attorney fees that are otherwise statutorily authorized. In addition, federal funds recipients 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. But the regulation that has likely been to the greatest detriment of these programs is that prohibiting federal funds grantees from using non-federal funds to carry out the restricted activities. Since many of the legal activities prohibited by Congress are those most likely to help the poor, these restrictions have greatly debilitated legal aid programs.

This discussion clearly illustrates just to what extent civil legal aid is in a dismal state. 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 legal needs effectively.” 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.

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1982. As a result, 12.9% of program staff left, and 12.7% of local legal services offices were closed. In addition, legal aid programs had to cut back on training, litigation support, education, and a host of other projects. See Houseman & Perle, supra note 34, at 29-30.

43 See Rhode, supra note 2, 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 (see Luban, supra note 3, at 211; Housman, supra note 37, at 1-2).

44 Rhode, supra note 2, at 13.

45 See Luban, supra note 3, at 221.


47 See Rhode, supra note 3, at 105.

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 institution of the contingency fee. In fact, up until the nineteenth-century, contingency fee agreements were forbidden under the common-law doctrine of champerty.\footnote{See Peter Karsten, Heart Versus Head: Judge-Made Law in Nineteenth-Century America 191 (1997).} 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.\footnote{See Richard Moorhead, Conditional Fee Arrangements, Legal Aid and Access to Justice, 33 U. Brit. Colum. L. Rev. 471, 476-77 (2000).} This practice was (and still is) barred in England and, subsequently, also in the United States, as contrary to public policy. 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.\footnote{See 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 132.}

Secondly, it was criticized for stirring up useless and unjust litigation.\footnote{See Karsten, supra note 49, at 192.}

While these concerns about conflicts of interest and frivolous litigation were by no means unfounded,\footnote{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 (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 charge only an hourly rate on work done before the settlement offer plus a percentage of any recovery in excess of the offer).} in the early nineteenth century, American courts and legislatures started to sanction contingency fee arrangements, and by 1850 the practice was permissible in most states.\footnote{See Karsten, supra note 49, at 195-96. In fact, by that time, state and county officials were regularly employing lawyers on a contingency fee basis. See id. at 196.} 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, within a few short decades, an acceptable, even laudable, practice? 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’.”\footnote{Id. at 197.} 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.”\footnote{Yeazell, supra note 29, at 580.} 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.”

The success of the contingency fee is, to a large extent, owing to its ability to channel market forces to the advantage of the average person. To understand this mechanism, it is essential to understand its economics. When they take a case on a contingency-fee basis, lawyers 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 at court but risking losing their entire “investment” if they suffer defeat. 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 practice. As observed by Herbert Kritzer, “the work of contingency fee lawyers can best be viewed as the management of a portfolio of cases.” 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. 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, which are unlikely to generate any profit. This screening practice, which exists for the sole selfish purpose of profit-making, nonetheless results in the weeding out of meritless claims from the system and thus serves social welfare. 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.

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58 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. See 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 in the usage of contingency fee arrangements.


60 HERBERT M. KRITZER, RISKS, REPUTATION, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 11 (2004). See also Yeazell, supra note 29, at 580 (“by pooling the fortunes of plaintiff-clients, contingency fee lawyers aggregate their risks and justify investment of time and various out-of-pocket expenditures”).

61 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 vace majority are turned away. See Kritzer, supra note 24, at 1976.

62 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. I will discuss the risk of frivolous litigation as it applies to my proposal as well at infra Part IV.A.2.

63 See Yeazell, supra note 29, at 583.
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 fifty percent.\(^{64}\) 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.\(^{65}\) Whatever the case may be, the end result is the same: a 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.\(^{66}\) 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.”\(^{67}\) 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.\(^{68}\) A second category is non-monetary claims. Not all lawsuits result in money changing hands; many of them conclude in an order or injunction, such as cases of divorce, custody adjudication, income maintenance and housing disputes.\(^{69}\) In such non-monetizable 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 or even fifty-percent of the award or recovery would be insufficient to attract a contingent fee lawyer if the sum of money at stake is too

\(^{64}\) See, e.g., 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); Brikman, Horowitz & O'Connell, supra note 53, at 13 (arguing that contingency fees “seldom amount to less that one third” of recovery). 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 60, at 39-40.


\(^{66}\) But see Shari S. Diamond, Michael J. Saks & Stephan Landsman, Juror Judgment 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).

\(^{67}\) Yeazell, supra note 29, at 585.

\(^{68}\) 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. See Kritzer, supra note 60, 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).

\(^{69}\) These types of cases are by no means insignificant in number. See 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).
small, even when the claim is clearly meritorious. 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 high price for the disadvantaged. It is essential, therefore, to 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 U.S. is that each of the parties to the litigation 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.” 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 have come to be known, collectively, as Equal Access to Justice Acts (“EAJAs”).

The first comprehensive, and best known, fee shifting statute was the federal Equal Access to Justice Act of 1980, which marked a departure from the almost exclusive reign of the American Rule in civil litigation. The 1980 Act authorized federal

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72 See Olson, supra note 23, at 548, 555 fn.37.
74 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 attorney’s fees from a fund to a party who, having common interest with other people, 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. Annotation, 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, according to 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 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
courts to award 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.”

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, the Unfair Competition Act, the Clayton Act, and Title VII. 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.

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.” 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 Act fearing that it would have a detrimental effect on the functioning of the regulatory state. By 1985, however, these groups all joined small business in support of the legislation.

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 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 bought under statutes that do not expressly provide for fee shifting.

80 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 around 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’L INT’L & COMP. L. REV. 583, 588 (2005).
81 Olson, supra note 23, at 555. See also id. 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 G. Mezey & Susan M. Olson, Fee Shifting and Public Policy: The Equal Access to Justice Act, 77 JUDICATURE 13, 15 (19943); Krent, supra note 14, at 2024 fn.22.
with the understanding that, notwithstanding the agenda that had led Congress to pass the Act, it could still be used to the benefit of the disadvantaged.\textsuperscript{82}

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 “complete compensation for parties injured by government wrongdoing or by the failure of private parties to comply with governmental directives.”\textsuperscript{83} 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.\textsuperscript{84} 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\textsuperscript{85}—in other words, promoting distributive justice.\textsuperscript{86} 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 institutional entities enjoy in litigating against private parties and small businesses,\textsuperscript{87} one-way fee shifting enables the latter to engage in expensive protracted litigation that they could otherwise not afford.\textsuperscript{88} These mechanisms are particularly beneficial for people of modest means in small meritorious claims and in non-monetizable claims, for which contingency fees

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  \item \textsuperscript{82} See Olson, supra note 23, at 555-56.
  \item \textsuperscript{83} Krent, supra note 14, at 2044-45; see also Krent, supra note 70, at 458.
  \item \textsuperscript{84} See Krent, supra note 70, 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.
  \item \textsuperscript{85} See Krent, supra note 70, 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”).
  \item \textsuperscript{86} See Krent, supra note 14, at 2074.
  \item \textsuperscript{87} See generally Galanter, supra note 2 (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 Shooters”)).
  \item \textsuperscript{88} See Krent, supra note 14, at 2062.
\end{itemize}
are not feasible. In types of cases, “parties with strong claims can use the prospect of the fee award to attract counsel to represent them.”

Unfortunately, however, both the federal and state EAJAs have had, at best, only limited success in meeting the goal of equal access to justice. Empirical studies confirm that “EAJAs have produced a rather modest degree of redistribution of resources from the government to private parties.” The reason for this failure is twofold: First, as currently formulated, with a 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. Second, the current fee-shifting statutes, despite their seeming abundance, are but a drop in the bucket and far from being a sufficient means for providing the poor with meaningful access to justice.

1. The Debilitating Conditions and Restrictions in the EAJAs

The EAJAs were essentially stripped of their redistributive potential by the many restrictions and conditions that were written into them, arguably in an attempt to strike a balance between antigovernment and anti-litigation ideologies. 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, 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 else lacked “a reasonable basis.” A few statutes apply even more stringent standards, such as bad faith, frivolousness, or groundlessness. 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

89 See Krent, supra note 70, 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.

90 Krent, supra note 14, at 2050.

91 See Krent, supra note 70, at 466-67.

92 Olson, supra note 23, at 549. See also Mezey & Olson, supra note 81.

93 See Krent, supra note 70, at 478 (arguing that the EAJA’s attempt to equalize the strength of the parties to the litigation succeeds only at the margins).

94 See Olson, supra note 23, at 549, 581.

95 See Krent, supra note 70, at 478. See also Olson, supra note 23, at 565. In Pierce v. Underwood, 487 U.S. 522 (1988), the Supreme Court deemed the two standards equivalent; thus, I will refer from now on only to the “substantially justified” standard.

demonstrate that the government’s position was not only wrong, but that it was not grounded in either fact or law.\textsuperscript{97} To this end, they are forced to analyze yet again all the factual and legal questions of the original case, a burdensome and costly procedure, with the risk that they will eventually have to bear these additional costs themselves if the government’s position is found to have been substantially justified. The prevalence of this standard, in one form or another, in almost every EAJA, state and federal, has substantially diminished the overall redistributive effect of this legislation.\textsuperscript{98} Furthermore, many EAJAs do not simply mandate fee shifting whenever a party prevails in litigation against government or big business, but rather authorize judges to award fees whenever they deem this appropriate.\textsuperscript{99} Such absolute discretion makes fee recovery much more tenuous and limits significantly the effectiveness of the EAJAs applying the mechanism.

Moreover, most EAJAs include some kind of limitation on eligibility to claim, with many setting stringent restrictions. California, Louisiana and Minnesota, for instance, exclude individuals as claimants under their fee-shifting statutes. In Tennessee only businesses (and not individuals) with 30 employees or less are eligible for fee award, and in Florida, eligibility in limited to businesses with no more than 25 employees and a net worth of $2 million or less.\textsuperscript{100}

Another condition for fee recovery is the “prevailing party” stipulation, which has been interpreted by the Supreme Court in a way that thwarts the egalitarian potential of the EAJAs. Under the various fee-shifting statutes, only the prevailing party is entitled to recover its attorney fees. The way courts construe success in litigation is therefore crucial to the scope and effectiveness of the statutes. The beginning was quite promising. In \textit{Maher v. Gagne},\textsuperscript{101} 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 includes also a favorable settlement. The Court asserted that “the fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees.”\textsuperscript{102} Subsequent decisions, however, greatly weakened the redistributive impact of fee-shifting statutes. In \textit{Buckhannon},\textsuperscript{103} for example, the Supreme Court held that a party is not considered a “prevailing party” under the federal fee-shifting statutes and therefore not entitled to a fee award if the defendant

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\textsuperscript{97} See Krent, \textit{supra} note 70, at 481. Under some of the statutes, the government bears the burden of proof to show that its conduct was substantially justified. Olson, \textit{supra} note 23, at 566.

\textsuperscript{98} See Olson, \textit{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. See \textit{id.} at 567-68.

\textsuperscript{99} 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, \textit{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).

\textsuperscript{100} See Olson, \textit{supra} note 23, at 568.

\textsuperscript{101} 448 U.S. 122 (1980).

\textsuperscript{102} \textit{Id.} at 129.

\textsuperscript{103} \textit{Buckhannon v. West Virginia Dep’t Health & Human Services}, 532 U.S. 598 (2001).
gives the plaintiff the sought-after relief, before there has been a judgment on the merits or a settlement approved by the court. \textsuperscript{104} The upshot 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 change its position and “voluntarily” give in to the opposing party’s demands, in a way that makes the case moot. \textsuperscript{105}

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, \textsuperscript{106} 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. \textsuperscript{107} Many state EAJAs followed the federal lead and cap the amount of fees recoverable, which is, in most cases, below the going market rate. \textsuperscript{108}

In short, as currently structured, the federal and state EAJAs are by no means redistributive mechanisms. \textsuperscript{109} “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.” \textsuperscript{110} If we truly wish to use the EAJAs as a framework for counteracting the imbalances in litigation resources, some fundamental modifications are imperative. \textsuperscript{111}

\textsuperscript{104} Prior to \textit{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. \textit{See} CRS Report, \textit{supra} note 23, at 15.

\textsuperscript{105} \textit{See} Luban, \textit{supra} note 3, at 243. Yet another problematic Supreme Court decision, primarily affecting public interest lawyers, was \textit{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. In the \textit{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. \textit{See id.} at 241. 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. \textit{See} 475 U.S. at 757 n.10 (Brennan J., dissenting).

\textsuperscript{106} The “reasonable” attorney fees standard raises many convoluted questions. \textit{See}, e.g., Gregory C. Sisak, \textit{A Primer on Awards of Attorney’s Fees Against the Federal Government}, 25 ARIZ. ST. L.J. 733 (1993).

\textsuperscript{107} The cap was originally set at $75 per hour, but in March 29, 1996, was increased to $125 per hour. P.L. 104-21, §§ 231-33.

\textsuperscript{108} \textit{See} Olson, \textit{supra} note 23, at 565.

\textsuperscript{109} \textit{Id.} at 579-80.

\textsuperscript{110} \textit{Id.} at 566.

\textsuperscript{111} 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-
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.\textsuperscript{112} 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.”\textsuperscript{113} And indeed, the amount of fee shifting actually occurring under the EAJAs has proven to be negligible, for several reasons.\textsuperscript{114} 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. Consequently, while the substantive issues covered by the statutes range over a wide spectrum of matters,\textsuperscript{115} 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\textsuperscript{116} mandates a fee award to parties injured by sale of gas below cost. Minnesota provides for a mandatory fee shift in litigation over unfair dairy trade practices,\textsuperscript{117} and New York has a fee-shifting provision relating to disputes over fraudulent jewelry appraisals.\textsuperscript{118} Yet a great many issues are left uncovered by this body of legislation.\textsuperscript{119} Second, the vast majority of the EAJAs authorize fee awards against the government, while only a small proportion allows parties to collect from corporations.\textsuperscript{120} The government is, indisputably, a Leviathan, but there are many private corporate entities (including financial institutions, insurance companies, and large corporations) whose litigation resources dwarf those of the average American, to the same extent as those of the government, if not more so.\textsuperscript{121}

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\textsuperscript{112} See supra note 80. 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.

\textsuperscript{113} Id. at 552.

\textsuperscript{114} This is, of course, in addition to the debilitating restrictions and conditions discussed above, which also affect the overall resort to the fee-shifting statutes.

\textsuperscript{115} See Frances Kahn Zemans, Fee Shifting and the Implementation of Public Policy, 47 LAW & CONTEMP. PROBS. 187, 205 (1984).


\textsuperscript{119} Fee-shifting statutes can be divided into four main categories based on the substantive claims that can be made under them: civil rights suits, consumer protection suits, employment suits, and environmental protection suits. See Ruth Bader Ginsburg, Access to Justice: The Social Responsibility of Lawyers, 7 WASH. U. J. L. & POL’Y 1, 8 (2001).

\textsuperscript{120} See CRS Report, supra note 23; Olson, supra note 23.

\textsuperscript{121} 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
It is vital, therefore, to supplement the valuable mechanisms discussed above with a more comprehensive legal mechanism that will enable the non-wealthy 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 proposal.

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, but to 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,” for 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.

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. 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” and which reigns in the rest of the industrialized world, asserts that “costs follow the event”; thus, the loser must pay the winner’s legal costs. Each of these rules has built-in features that impair equal access to justice. 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, which could be quite substantial. Low- and average-income individuals, who tend to be risk-averse to begin with, will thus refrain from bringing lawsuits even if they have a valid claim, unless they are quite confident of winning. And even when they do sue, they are induced to accept settlements for much less than what they could expect litigants with the greatest resources and the lowest relative risks in litigation enjoy the highest rates of success in both trial and appellate courts. See Rosen-Zvi & Fisher, supra note 9, at 124 nn.82-83.

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122 See 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 (1999). 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.”).

123 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, which include their effect on overall litigation, frivolous claims, settlements, and legal expenses, see infra Part IV.

124 See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 55 (1989); Krent, supra note 14, at 2062 (arguing that "the higher a person's wealth, the less averse he is to a given size risk").

125 See Posner, supra note 14, at 587; Root, supra note 80, at 607-08.
to be awarded at trial, due to the high financial risk they bear if the trial is taken to its end.126

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 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 denies them compensation for that expense even when vindicated by a court ruling or favorable settlement.127 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 good-quality counsel: as defendants, they lack the resources to pay their fees; as plaintiffs in non-monetizable claims or with a too-small 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.128 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 threaten 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.129

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127 See Root, supra note 80, at 597-98.

128 See James H. Cheek III, *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”).

129 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 who had contracted smoke-related illnesses and their families (a paradigmatic case of OS versus RP). 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.

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). 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, and 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 its actual legal fees. If, on the other hand, the rich party wins the American Rule would apply and each party would bear its own attorney fees. 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>
<thead>
<tr>
<th>Rich Plaintiff</th>
<th>Rich Defendant</th>
<th>Poor Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poor Defendant</td>
<td>D Loses American Rule</td>
<td>D Wins English Rule</td>
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</table>

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. Conditional fees enable lawyers to take

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130 See infra discussion at Part III.B.

131 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.

132 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., Re Trepca Mines Ltd. (No. 2), [1963] Ch. 199, at 219; Trendtex Trading Corp. v. Credit Suisse, [1980] Q.B. 629, 654. Up 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 51, 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
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. 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.\(^\text{133}\) 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.\(^\text{134}\) Under the English Rule, both the lawyer’s standard fees and the success fee are recoverable from the losing party.\(^\text{135}\) As we shall see shortly, using the conditional fee, instead of 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 system of civil justice.

A. Who is a “Prevailing Party”?\(^\text{136}\)

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.\(^\text{136}\) To begin with, a poor plaintiff who is awarded nominal damages (for instance, $1 in a case where the

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 (2001); Woodroffe, supra note 51, 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, 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 Agreement Order of 1998 permitted parties to enter into CFAs in personal injury, bankruptcy, insolvency, 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 family and crime-related proceedings. Moorhead, supra note 50, at 477.

\(^\text{133}\) See ACCESS TO JUSTICE WITH CONDITIONAL FEES: A LORD CHANCELLOR’S DEPARTMENT CONSULTATION PAPER § 2.1 (Mar. 1998). See also Moorhead, supra note 50, at 475.

\(^\text{134}\) See Moorhead, supra note 50, 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 478.

\(^\text{135}\) PAUL FENN, ALASTAIR GRAY, NEIL RICKMAN & YASMEEEN MANSUR, THE FUNDING OF PERSONAL INJURY LITIGATION: COMPARISONS OVER TIME AND ACROSS JURISDICTIONS, at iv (2006). 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. See PAUL FENN, ALASTAIR GRAY, NEIL RICKMAN & HOWARD CARRIER, THE IMPACT OF CONDITIONAL FEES ON THE SELECTION, HANDLING AND OUTCOMES OF PERSONAL INJURY CASES (2002).

\(^\text{136}\) See supra text accompanying notes 101-105.
sought-after relief was $17 million) should be considered a “prevailing party” for attorney fees purposes.\textsuperscript{137} 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.\textsuperscript{138} Moreover, as held by the Supreme Court, prevailing in litigation should not be limited to entry of a final judgment, but should include also a favorable settlement.\textsuperscript{139} In contrast to the approach in current jurisprudence,\textsuperscript{140} however, the so-called catalyst theory\textsuperscript{141} should be adopted and a poor party considered a “prevailing party” even when she has not secured a judgment on merit or court-order 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 in some of the claims in order to be considered a prevailing party for attorney fees purposes. However, “where the plaintiff has failed to prevail on a claim that is distinct on all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.”\textsuperscript{142}

B. The Matter of Administration

As described above, under the proposed general progressive one-way fee-shifting regime, the applicable attorney fee rule would rest on how the parties are categorized, rich or poor.\textsuperscript{143} 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.\textsuperscript{144} 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—the 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

\begin{itemize}
  \item \textsuperscript{137} See the actual case of Farrar v. Hobby, 506 U.S. 103 (1992), where the plaintiff was awarded nominal damages in the amount of $1dollar 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.
  \item \textsuperscript{138} 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. In the case at hand, 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, and therefore they were denied a fee award.
  \item \textsuperscript{139} See Maher v. Gagne, 448 U.S. 122 (1980). Favorable settlement should be construed broadly to include all settlements that are not nuisance settlements.
  \item \textsuperscript{140} Buckhannon v. West Virginia Dep’t of Health & Human Services, 532 U.S. 598 (2001).
  \item \textsuperscript{141} See supra note 104.
  \item \textsuperscript{142} Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).
  \item \textsuperscript{143} See discussion in supra text accompanying notes 130-131.
  \item \textsuperscript{144} See Wertheimer, supra note 2, at 321.
\end{itemize}
companies, as well as public entities, such as the federal and state governments and governmental agencies). For fee award purposes, all individuals 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 toto. Second, institutional entities are much better positioned than individuals to both prevent and spread the cost of litigation (especially, but not only, when legal expenses insurance is available). 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 a favorable treatment, such businesses would file with the court, in tandem with the complaint or the answer, their tax records for the three years preceding the lawsuit; if the average net worth for that period did not exceed a certain ceiling (say $500,000), 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 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. 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 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.

145 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 Shooters,” rather than public versus private litigants. 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 positioned to play by the rules of the game and forego immediate gains. It should, therefore, come as no shock that their success rate in litigation is comparable to that of governmental bodies. See Rosen-Zvi & Fisher, supra note 9, at 123-25. From a theoretical viewpoint, 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. See generally CHARLES PERROW, COMPLEX ORGANIZATIONS: A CRITICAL ESSAY (3d ed. 1986). 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 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, 1128-49 (1980).


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. 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 free-shifting rule accordingly. 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’s 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.

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. But such concerns would be unfounded. Income tax records are readily available and could certainly be produced along with the complaint 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 defendants wealth.” Moreover, a quick glance at the current fee-shifting practice under the EAJAs 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. If these restrictions are

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148 The three years rule is designed to prevent both intentional manipulations of the rule and injustices that could transpire due to a one time up-side or down-side 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.

149 In order to ensure that corporations do not channel all litigations to subsidiaries with net worth 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.

150 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 as “rich” for fee award purposes; in such circumstances, unless the opposing litigant’s net worth were to exceed the ceiling or it were to decline to file tax records as well, the one-way fee-shifting rule would be applied against the non-filing party.


152 See, e.g., Olson, supra note 23, at 561-62. See also the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B), which defines the parties eligible to claim attorney fees under the statute as follows:
administrable, then there are no grounds for questioning the feasibility of the proposed particularized method.153

**TABLE 2**

The Particularized Method with a 500% Net-Worth Disparity

<table>
<thead>
<tr>
<th>Party A’s Net Worth</th>
<th>Party B’s Net Worth</th>
<th>The Applied Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>≤ $100,000</td>
<td>≤ $100,000</td>
<td>American Rule</td>
</tr>
<tr>
<td>≤ $50,000</td>
<td>≥ $250,000</td>
<td>OWFS* in favor of Party A</td>
</tr>
<tr>
<td>≤ $100,000</td>
<td>≥ $500,000</td>
<td>OWFS in favor of Party A</td>
</tr>
<tr>
<td>≤ $200,000</td>
<td>≥ $1 Million</td>
<td>OWFS in favor of Party A</td>
</tr>
<tr>
<td>≤ $1 Million</td>
<td>≥ $5 Million</td>
<td>OWFS in favor of Party A</td>
</tr>
<tr>
<td>≤ $5 Million</td>
<td>≥ $25 Million</td>
<td>OWFS in favor of Party A</td>
</tr>
<tr>
<td>≥ $10 Million</td>
<td>≥ $10 Million</td>
<td>American Rule</td>
</tr>
</tbody>
</table>

* One-Way Fee Shifting

A third possible method would be to adopt a gradated rather than binary scheme. Instead of only 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 gradated scheme linking the size of the recovery to the disparity in wealth between the parties. For example, if there were a 250% disparity in the net worths 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. But the distributive appeal of such a method might be outweighed in this case by the complexity and high costs of operation it entails.154

“Party” 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, 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.

153 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 (2000); for an excellent and concise account of the double-distortion argument see Sanchirico, *supra* note 151, 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 based 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.

154 According to George Shepherd, while a gradual fee award scheme is operated in Continental Europe, it is with regard not to 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*
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. One, it should provide high-quality lawyers with incentive to represent low- and average-income individuals on a no-win, no-fee basis. Two, it should induce lawyers to investigate diligently the claims of potential clients and agree to take on only those with merit (i.e., cases with over 50% chance of success), making them potent and effective gatekeepers. Three, the formula should align the interests of lawyers and their clients, thereby avoiding potential conflicts of interest. Four, it should forestall the moral hazard problem that can arise anytime a party can shift all of its costs to another party. And 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.155

This section outlines one such compensation formula which 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,156 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 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

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155 See Marshall J. Berger, 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”).

156 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-called loadstar method. The loadstar figure is derived from the “prevailing rates charged in the community for similar work,” which means, in other words, 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 (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 Berger, supra note 155, at 261-62; William B. Rubenstein, Why the Percentage Method?, The Expert’s Corner, CLASS ACTION ATTORNEY DIGEST, Mar. 2008, at 93 (arguing for the percentage method and against the loadstar method).
lawyers peace of mind in knowing that they will have a perfectly solvent party to collect from if they win at court.\textsuperscript{157} The hourly-rate formula would incentivize lawyers to optimize the amount of time they devote to their clients’ cases, thereby aligning their interests.\textsuperscript{158} Yet, the risk of losing and receiving no payment for their time and resources would minimize the likelihood of lawyers driving up the bill up by spending needless hours on cases.\textsuperscript{159} 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.\textsuperscript{160} 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.\textsuperscript{161} 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.\textsuperscript{162}

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.\textsuperscript{163} 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. The proposed general progressive one-way fee-

\begin{enumerate}
\item[157] Cf. Yeazell, supra note 58, 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).
\item[158] 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, it 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 non-monetizable claims, small meritorious claims, and claims in which the poor party is the defendant rather than plaintiff. See discussion at supra text accompanying notes 65-70.
\item[159] See John Leubsdorf, Recovering Attorney Fees as DAMAGES, 38 RUTGERS L. REV. 439, 452 (1986).
\item[161] For a different point of view, see Woodroffe, supra note 51, at 356-57 (“[T]here 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.”).
\item[162] 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 so as to arrive at a positive expected income.
\item[163] See Golden Gate Audubon Soc., Inc. v. United States Army Corps of Engineers, 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.
\end{enumerate}
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 of benefit to refer all fee petitions to taxing officers with expertise who could more consistently assess the level of risk involved in different types of claims. The taxing officer’s decision would be final, and so as to prevent frivolous fee petitions, she would also be authorized to order a petitioner to pay costs if the fee petition is found to be unmerited.

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 (say between 5% and 10% of the fee charged). 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, with the price being less redistribution and a heavy burden on the indigent.

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 GENERAL PROGRESSIVE 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

\[\text{164} \text{ See Berger, supra note 155, at 268.}\]

\[\text{165} \text{ I thank Dean Hanoch Dagan for this excellent suggestion.}\]
attorney fee-shifting are, however, extremely complex and subject to much controversy. Indeed, it is difficult to ascertain whether fee shifting would encourage potential plaintiffs to file claims or discourage them, whether the likelihood of settlement would increase or decrease, and whether there would be more or less frivolous claims. These perplexities 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.” 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 the 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, 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. 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.

166 See Kritzer, supra note 25, at 1948 (after surveying the theoretical and empirical literature, the author concludes that it is difficult to predict the effects of attorney fee-shifting).

167 Avery W. Katz, Indemnity of Legal Fees, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 64-65 (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.”).

168 See Root, supra note 80, at 604. See also Woodroffe, supra note 51, 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 by the court. Plaintiffs for their part argue that 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 a court?”).

169 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 80, at 605-06.


171 See, e.g., Avery W. Katz, Measuring the Demand for Litigation: Is the English Rule Really Cheaper?, 38 J.L. ECON. & ORG. 143 (1987). But see Posner, supra note 14, at 590 (“it is unclear whether on balance indemnity raises, lowers, or does not change the litigation rate”).
the number of lawsuits,

other argue that it in fact lessens the overall litigation incidence. Yet another controversial—and theoretically irresolvable—issue is the effect of fee shifting under the English Rule on settlement.

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. Low- and average-income individuals and small businesses, on the other hand, are likely to be adversely daunted by this risk. Since they are usually risk-averse, fee shifting unjustly discourages them from initiating actions, and even 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. This offsets any potential the English Rule may have to promote small meritorious claims, since unless the poor plaintiff is certain to prevail (which rarely is the case), the threat of what could be lost outweighs the possible gain.

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,

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172 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) (the authors found no clear evidence that the availability of fee shifting leads to an increase in the number of cases filed).

173 See, e.g., Steven Shavell, Suits, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55 (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 80, at 605.

174 See Katz, supra note 171, at 73-76. See discussion at infra Part IV.A.4.

175 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. Doing so would improve their chances of prevailing in litigation. See 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).

176 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).

177 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 modifications): Suppose we have a claim for $20’ the probability of winning the case is 90%’ litigation expenses are $100 for both plaintiff and defendant. The expected benefit from litigating the case is $18 ($20 × 90%), while the expected cost is $20 ($200 × 10%). 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”).
[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.\(^{178}\)

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 non-monetary 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 non-wealthy 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-income individuals bringing meritorious suits against rich and powerful adversaries, even when it is of low monetary value claim, while circumventing the obstacles that thwart such lawsuits under both the English and the American Rules. The proposed rule also would 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, since, as explained, the risk of reimbursing the attorney fees of winning opponents is purely a business calculation for such parties, on the one hand, and they have the resources to pay for high-quality legal assistance, on the other, 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 the former to offer a fair settlement in high-probability suits brought against them. For 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.

\(^{178}\) Werner Pfennigstorff, The European Experience with Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS. 37, 66-67 (1984).
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 changed dramatically the litigation landscape in favor of low-income individuals.¹⁷⁹ 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 in the former. 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 “can only function if there are damages from which lawyers can collect fees,”¹⁸⁰ 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, non-monetary claims, and cases in which the defendant is the poor party.¹⁸¹ 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 that 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.”¹⁸² Therefore, the wealth transferring effect of the proposed fee-

¹⁷⁹ See discussion at supra Part II.B.
¹⁸⁰ See Yeazell, supra note 29, at 585.
¹⁸¹ This is also the reason why one-way fee shifting in favor of plaintiffs will not suffice. John Leubsdorf, supra note 159 has proposed awarding fees as damages to prevailing plaintiffs but not to prevailing defendants. 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. Few such examples are bank-client cases, landlord-tenant cases, or subrogated insurance cases. Moreover, the government and big 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 defendant (by, for instance, 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 big corporations using counterclaims to intimidate their adversaries. Thus, structuring a fee award system that prefers either only plaintiffs or only defendants would inevitably serve the interests of wealthy repeat players rather than poor one-shotters.
¹⁸² LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 30 (2002).
shifting rule is, at least up to a certain point, welfare-enhancing. 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. LEI would enable wealthy individuals and middle-sized corporations, who tend not to be repeat players and thus unable to spread risks over a large number of action, to insure for the risk entailed in litigating under the proposed fee-shifting rule. For various reasons, LEI is much less prevalent in the United States than in England and Continental Europe. 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 them.

2. The Likelihood of Frivolous Claims

Frivolous claims are unmeritorious low-probability lawsuits that lead to “wasteful” litigation. In the United States they 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 that the amount the plaintiff will accept to settle the case.” 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.

183 See generally Sanchirico, supra note 151 (arguing that, up to a certain point, redistributive private law rules are efficient).

184 There are two types of legal expenses insurance—“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 for her legal costs is much higher under ATE insurance, and consequently, ATE premiums are much higher than BTE premiums. See Matthias Killian & Francis Regan, Legal Expenses Insurance and Legal Aid—Two Side of the Same Coin? The Experience from Germany and Sweden, 11 INT’L J. LEGAL PROFESSION 233, 235 (2004).

185 Not the least of which are the availability of contingency fee arrangements and the prohibition on lawyers sharing profits with non-lawyers.

186 See Rhode, supra note 3, at 74. See also Robert A. Hershberger, Book Review: Legal Expenses Insurance: The European Experience in Financing Legal Services, 43 J. RISK & INSURANCE 349, 350 (1976) (arguing that “the 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).

187 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.” Killian & Regan, supra note 184, at 241-43.

188 See Rhode, supra note 3, at 26.


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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 they are taking only a quite low 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 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 diminish significantly 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 resort other than 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, they 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.190

Lastly, as rightly observed by Deborah Rhode, “what qualifies as a frivolous claim generally depends on the eye of the beholder.”191 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 today they are considered meritorious by the vast majority.192 Similarly, big 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.193 We should, therefore, proceed with great caution when labeling a suit as frivolous.

But 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: “[T]he question comes down to the problem of finding a balance between permitting aggrieved parties to have easy access to the courts and

\[\text{190}\text{ This is all the 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 58, at 204.}\\text{191}\text{ Rhode, supra note 3, at 28.}\\text{192}\text{ See id.}\\text{193}\text{ See id. at 26-27. See also Leubsdorf, supra note 159, at 451 (“[O]ften, 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.”).}\\]
deterring parties from ‘oversuing’ when their cases are marginal or nonexistent. There is no ‘empirically correct’ answer to this dilemma.”

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. 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.”

Even assuming that Posner is mistaken and that the proposed one way fee-shifting rule would increase the volume of claims filed, this would not necessarily be a bad thing. In fact, the prospect of more litigation is, in all likelihood, actually a blessing. Belying the vociferous grumbling about the so-called “litigation explosion” or hyperlexis (excessive litigation), many studies have found that it is in fact a myth. Indeed, the real problem emerges as quite the opposite—not enough litigation—which leads to a 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 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

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195 See, e.g., Leubsdorf, *supra* note 159, at 449.


airline accidents. The tort liability system reimburses only about 4 percent of victims’ direct costs of accidental injuries.\textsuperscript{199} 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, the latter (which are usually large entities such as government bodies or large corporations) know that the risk of being sued for violation of substantive norms are quite slim and, thus, have no incentive to refrain from wrongful conduct or take adequate precautions against the risks they create.\textsuperscript{200} As explained, the proposed general progressive rule would encourage weak parties to file and litigate aggressively claims (even for small monetary damages and non-monetary 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 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. For 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. The proposed general progressive rule, in increasing the overall feasibility and, thus, probability of litigation, particularly of small claims, would not lead, therefore, to a waste of social resources.\textsuperscript{201} Indeed, “the feasibility of such suits would in all likelihood … deter[] the defendant from committing the wrongful act in the first place.”\textsuperscript{202}

4.  \textit{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 subject to debate. The conventional wisdom is that two-way fee shifting leads to a lower settlement rate, since, it is argued, the practice reinforces the effects of differences of opinion between parties to litigation regarding the possible outcome of the trial. People 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 “settlement gap”—the difference between the plaintiff’s demand and defendant’s offer—widens and the likelihood of going to trial correspondingly increases.\textsuperscript{203} Some, however, dispute this conventional wisdom, asserting that fee shifting actually increases the likelihood of the parties reaching a settlement. Their reasoning is that the greater expenses parties are likely to incur under the English Rule could counterbalance parties’ tendency to

\textsuperscript{199} Rhode, \textit{supra} note 3, at 31.
\textsuperscript{200} See Katz, \textit{supra} note 167, at 76.
\textsuperscript{201} See Krent, \textit{supra} note 14, at 2052.
\textsuperscript{202} Posner, \textit{supra} note 14, at 587.
\textsuperscript{203} See, e.g., Shavell, \textit{supra} note 13, at 456; Hughes &. Snyder, \textit{supra} note 170, at 230-31.
prefer litigation as predicted under the optimism model and, therefore, increase the likelihood of settlement.\textsuperscript{204} Then, there are 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.\textsuperscript{205} 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.\textsuperscript{206}

It is important to recall, however, that settlements are not good 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, the government and big business are in a position to force unfairly low (or even no) settlements on average-income legal adversaries. Since strong parties possess far greater litigation resources than their weaker adversaries, under the American Rule they are able to wrest settlements favorable to them but unjust to their opponents by threatening to drag the latter into protracted litigation, which, in the absence of fee shifting, they would not be able to shoulder. Weaker parties fare no better under the English Rule. When parties are at 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. True, advocates of the fairness argument would admit, the poor are entitled to equal access to the civil justice system, just as they


\textsuperscript{206} See Katz, \textit{supra} note 167, 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, \textit{supra} note 159, at 456-58; see also Krent, \textit{supra} note 14, at 2079-82.
deserve a good education and decent 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 that only a selection of the broad group of those who should participate in the ideal comprehensive redistributive scheme would bear its costs.\footnote{Robert E. Goodin, \textit{Compensation and Redistribution}, in \textit{NOMOS XXXIII} 143, 162 (John W. Chapman ed., 1991) ("in the same way redistributionists 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 being the uncompensated [party]").} 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 interpret narrowly 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 party.\footnote{Fed. R. Civ. P. 54(d); 28 U.S.C. § 1920 (1994). 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.} While the jurisprudence of a small number of these courts encourages judges to consider relative financial status in awarding costs,\footnote{See, for example, Nat’l Org’ 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 concluding that the district court had not abused its discretion by considering the plaintiff’s limited budgets. The Ninth Circuit reaffirmed this position in Wrighten v. Metropolitan Hospitals, 726 F.2d 1346 (9th Cir. 1984), 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.”} the majority of the federal courts take the view that this practice should be rejected as “fundamentally unfair to wealthy litigants.”\footnote{John M. Blumers, \textit{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, 1544-49 (1995). \textit{See also} Resnik, \textit{supra} note 4, at 2137-38.} In \textit{Smith v. Southern Pennsylvania Transportation Authority},\footnote{47 F.3d 97 (3d Cir. 1995).} 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.”

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, but at the same time fairer to the rich. In fact, however, the proposed rule is superior to the alternatives that could be presented by its potential opponents 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.\textsuperscript{213} In contrast, the general progressive fee-shifting rule is based on a notion of entitlement, not charity, and would therefore be likely to empower the disadvantaged, assist them in attaining such objective goods as self–respect, and enhance their appreciation 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.\textsuperscript{214}

Second, even assuming \textit{arguendo} that legal aid and the tax system are, indeed, superior regimes to the proposed rule on all counts (efficiency, distribution, expressivity, and fairness), it is 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, sufficiently if at all.\textsuperscript{215} 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.\textsuperscript{216} Consequently, these are virtual rather than real alternatives.

Third, the problem of limited participation would be a compelling argument only if the redistribution to be effected by the proposed rule were to place its rich participants in a worse position than what 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 in fact do 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.\textsuperscript{217} 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 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 in fact quite

\textsuperscript{213} See Keren-Paz, \textit{supra} note 147, at 48.


\textsuperscript{215} See Keren-Paz, \textit{supra} note 147, at 53.


\textsuperscript{217} See Keren-Paz, \textit{supra} note 147, at 36-38.
systematic and progressive. On average, the richer the institutional 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 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 people 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. For 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.\textsuperscript{218}

V. CONCLUSION

Serving more than one master is a daunting task.\textsuperscript{219} 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 progressivity 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 quite hard to imagine that, under the current conditions of economic crisis and budgetary constraints, the government will make it a priority to ensure adequate representation for the poor in civil litigation.

If we do wish, then, to make equal 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 contingency fee, another 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

\textsuperscript{218} See Keren-Paz, supra note 147, at 35. See also Sanchirico, supra note 151, at 1052-53.

\textsuperscript{219} Kudos to CARLO OSVALDO GOLDFINI, THE SERVANT OF TWO MASTERS (1745).
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 (ill-)equipped.

Almost quarter of a century ago, John Leubsdorf made the following optimistic observation: “[T]he 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.” Thus far, this prediction has yet to materialize. Adopting the proposed general progressive fee-shifting rule, however, could turn this vision into a reality.