

**CLASSLESS AND UNCIVIL:  
THE THREE-DECADE LEGACY OF *EVANS V. JEFF D.***

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INTRODUCTION

Blood was spilled to bring civil rights laws to the United States. While the drafters of those laws might have worked from the relative safety of congressional offices, the people who created the political conditions necessary for that act of drafting to be possible put their bodies on the line for their conception of a more just and equal society. From abolitionists taking up arms in Bleeding Kansas, to Student Nonviolent Coordinating Committee activists risking brutal beatings to organize the march on Selma, to disability rights activists crawling up Capitol Hill to shame lawmakers into passing the Americans with Disabilities Act, great civil rights advances in our society have often been brought about by awesome acts of raw physical courage on the part of otherwise ordinary people.<sup>1</sup>

It can be difficult to relate the heroism that brought us these laws to the fine points of their routine operation. While standing in the shadow of that heroism, to worry about how private attorneys and litigants finance civil right lawsuits can seem entirely beside the point—or worse yet, mercenary. But that shadow should not blind. Civil rights fee-shifting, in which a losing civil rights defendant is made to pay the attorney’s fee for a civil rights plaintiff, has played a key role in making effective private enforcement of our civil rights laws economically feasible. To understand how the physical courage of civil rights activists has—and has not—translated into material changes in

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<sup>1</sup> See John Craig Hammond, *Slavery, Sovereignty, and Empires: North American Borderlands and the American Civil War, 1660-1860*, 4 J. CIVIL WAR ERA 264, 286 (2014) (describing the war in Kansas); William J. Eaton, *Disabled Persons Rally, Crawl up Capitol Step*, L.A. TIMES (March 13, 1990), [http://articles.latimes.com/1990-03-13/news/mn-211\\_1\\_capitol-steps](http://articles.latimes.com/1990-03-13/news/mn-211_1_capitol-steps) (describing the Capitol Crawl); Junius Williams, *Selma to Montgomery: But What about SNCC?*, HUFF. POST (May 2, 2015), [https://www.huffingtonpost.com/junius-williams/selma-to-montgomery-but-sncc\\_b\\_6763208.html](https://www.huffingtonpost.com/junius-williams/selma-to-montgomery-but-sncc_b_6763208.html) (describing SNCC’s role in the March on Selma).

the lives of aggrieved, marginalized people, one must look into the economics of private civil rights enforcement.

For as long as the United States has contemplated civil rights laws, there have been controversies over whether and how those laws should be privately enforced. During congressional debate on the Civil Rights Act of 1871, Representative James Beck (D-KY), as part of an impassioned, voluminous, and unabashedly racist denunciation of the bill, warned of the federal tyranny that would result if private parties were permitted to bring civil rights actions: to allow federal courts jurisdiction over civil rights claims brought by private parties would be, Beck claimed, a “supreme folly” that would bring “local state government [to] an end” by making their “laws . . . a mockery and their courts a farce.”<sup>2</sup> Latter-day critics of the civil rights enforcement regime tend to be less bombastic than Representative Beck, but questions about the propriety, efficacy, and social utility of the private right of action have persisted. While in the 1960s, anti-regulation Republicans embraced private civil rights enforcement as a preferable alternative to the creation of a centralized civil rights bureaucracy, by the 1980s, conservative sentiments had shifted.<sup>3</sup> The Reagan Administration complained that litigation authorized by the same statute Beck had criticized more than a century prior had “mushroomed” and “ballooned,” inconveniencing government and private business to an extent that necessitated the curtailment of the traditional prevailing party fee-shift, which had been extended to all civil rights cases through the 1976 Civil Rights Attorney’s Fees Awards Act.<sup>4</sup> Reagan’s concerns have been occasionally echoed by more liberal voices: in 2016, Anderson Cooper reported on a supposed epidemic of frivolous, “drive-by” lawsuits arising under the Americans with Disabilities Act.<sup>5</sup> Private civil rights enforcement, in both substance and procedure, remains a live-fire ideological battlefield.

This Comment will explore a corner of that battlefield: the Supreme Court’s decision in *Evans v. Jeff D.*<sup>6</sup> Two things were at stake in *Jeff D.*: the ability of private civil rights attorneys to protect their statutorily authorized fees and, consequently, the efficacy of the private enforcement regime as a

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<sup>2</sup> CONG. GLOBE, 42nd Cong., 1st Sess. 352 (1871).

<sup>3</sup> STEPHEN BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTER-REVOLUTION AGAINST FEDERAL LITIGATION 9, 30 (2017).

<sup>4</sup> Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (2012)); BURBANK & FARHANG, *supra* note 3, at 30.

<sup>5</sup> *60 Minutes: What’s A “Drive-by Lawsuit”?* (CBS television broadcast Dec. 4, 2016), <https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/>. In the report, a “drive-by” lawsuit was described as a low- or no-merit civil rights claim raised against a business with which the plaintiff never actually interacted.

<sup>6</sup> 475 U.S. 717 (1986).

whole. In the case, Charles Johnson, a legal aid attorney, brought a civil rights class action suit against the Governor of Idaho and other state officials on behalf of institutionalized disabled children who had been denied access to adequate education or healthcare.<sup>7</sup> The plaintiffs sought injunctive and declaratory relief and statutorily authorized attorney's fees, but made no demand for money damages.<sup>8</sup> The defense made a settlement offer that would have substantially granted the injunctive relief sought, but which was conditioned on the plaintiff accepting a waiver of statutory attorney's fees.<sup>9</sup> Johnson, who had been appointed next friend for his clients, believed he had an ethical duty to accept the settlement, but filed a motion requesting that the district court refuse to approve the fee waiver.<sup>10</sup> The district court denied Johnson's request; on appeal, however, the Ninth Circuit invalidated the fee waiver while leaving the rest of the settlement in place.<sup>11</sup> Unfortunately for Johnson, the Supreme Court granted the Idaho defendants certiorari.

Johnson's predicament was hardly unique. In the 1980s, statutory fee waiver offers were extremely common in the field of civil rights law.<sup>12</sup> These offers put the attorneys who received them in a bind. The attorneys, of course, could not ethically prevent their clients from accepting the settlement offers, no matter how unfavorable they might be to the attorneys' interests.<sup>13</sup> But if the client did so, not only the attorney, but the civils rights bar in general, would be left in the lurch: the attorney would receive no payment for her services, and other attorneys, in fear of suffering the same fate, might be dissuaded from taking on civil rights cases in the future—especially those cases unlikely to produce substantial damage awards.<sup>14</sup> If those attorneys turned away from civil rights litigation, the vitality of the civil rights private enforcement regime would be threatened.

The Court did not find fears of the collapse of private civil rights enforcement persuasive. Arguing instead that prohibiting fee waiver would actually hinder civil rights enforcements by “reducing the attractiveness of settlement,” the Court found that the practice did not undermine the policies of the Civil Rights Attorney's Fees Awards Act.<sup>15</sup> The fee waiver offer had obtained legal legitimacy.

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<sup>7</sup> *Id.* at 720–21.

<sup>8</sup> *Id.* at 721.

<sup>9</sup> *Id.* at 722.

<sup>10</sup> *Id.* at 720, 722–23.

<sup>11</sup> *Id.* at 724.

<sup>12</sup> See Josh Fitzhugh, *Supreme Court Profile: To Win Your Case, Waive Your Fees*, 71 A.B.A. J. 44, 47 (1985) (claiming that fee waiver offers were made in over half of all civil rights cases).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Jeff D.*, 475 U.S. at 732.

Regardless of fee waiver's legal legitimacy, the propriety and social utility of fee waiver remains a live question. This Comment will examine the history, effects, and normative value of the *Jeff D.* decision. Part I explores the legal history that led to the *Jeff D.* ruling and examines the decision itself. Part II examines the actual empirical effects of the ruling, using the Integrated Database of the Federal Judicial Center to evaluate the case's impact on new privately-brought federal civil rights filings and consent decrees, and concludes that the case brought about a collapse of the civil rights class action bar. Part III examines ethical difficulties created by the ruling and argues that there are substantial ethical and philosophical reasons to reject the principle behind the ruling.

### I. *JEFF D.* AND ITS HISTORY

Fee-shifting in private attorney general civil rights suits—in which a private plaintiff is awarded attorney's fees at defendant's expense in consideration for her efforts to vindicate a civil and hence inherently public right—has a venerable history in the United States. Congress first authorized fee-shifting during the Reconstruction Era, in the Enforcement Act of 1870, which created “such allowance for counsel fees as the court shall deem just” for prevailing plaintiffs in voting rights cases.<sup>16</sup> Early private attorney general actions were more hypothetical than actual, however. The exigencies of Reconstruction and its aftermath—in particular, widespread racial terrorism against African Americans and the lack of sufficiently strong political structures to support plaintiffs in bringing claims and enforcing judgments—prevented the creation of a functional civil rights bar.<sup>17</sup> Not until the 1950s did Reconstruction-era civil rights statutes see a substantial revival, when lawyers from the National Association for the Advancement of Colored People began regularly bringing actions under the Ku Klux Act,<sup>18</sup> which authorizes fee-shifting for cases involving the violation of constitutional rights under the color of law.<sup>19</sup> Private civil rights lawsuits continued to grow in volume throughout the 1960s and '70s, aided in large part by the passage of the Civil Rights Act of 1964, which favored private litigation over administrative enforcement actions.<sup>20</sup>

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<sup>16</sup> Enforcement Act of 1870, ch. 114, § 3, 16 Stat. 140, 141 (1870).

<sup>17</sup> Paul J. Gardner, *Private Enforcement of Constitutional Guarantees in the Ku Klux Act of 1871*, 2 CONST. STUD., 81, 90 (2016).

<sup>18</sup> Civil Rights Act of 1871 (Ku Klux Act), Pub. L. No. 42-22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2012)).

<sup>19</sup> Gardner, *supra* note 17, at 92.

<sup>20</sup> See BURBANK & FARHANG *supra* note 3, at 30; *infra* Table I.

Though the Supreme Court eventually rejected the practice of judicial (but not statutory) imposition of civil rights fee-shifting in *Alyeska Pipeline Service Company v. Wilderness Society*,<sup>21</sup> the private attorney general concept would prove to be an enduring feature of the American legal system, and, in particular, the civil rights enforcement regime. A year after *Alyeska*, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976.<sup>22</sup> Congress, fearing that the Court's decision in *Alyeska* had threatened the vitality of private enforcement of the civil rights laws by rendering fee-shifting "suddenly unavailable in the most fundamental civil rights cases," explicitly extended the availability of prevailing party fee-shifting to a wide variety of civil rights actions.<sup>23</sup> Congress believed that the Fees Act would "attract competent counsel to represent the victims of civil rights violations" by "creating economic incentives for lawyers to represent them."<sup>24</sup>

Against the threat of a burgeoning civil rights bar, defendants adopted innovative negotiation tactics to avoid large payouts and discourage the filing of subsequent civil rights claims. One such tactic involved the exploitation of the differences in interest between civil rights attorneys and their clients. Specifically, civil rights defendants identified the statutory provision of attorney's fees as a key point of potential attorney-client tension. To exploit this tension, defendants would make settlement offers that decoupled attorney's fees from the client's relief on the merits. In some cases, civil rights defendants would offer so-called "sweetheart" settlement offers—offers of attorney's fees substantially in excess of what the civil rights attorney could reasonably expect to be awarded at trial, coupled with unreasonably limited substantial relief to the plaintiff.<sup>25</sup> In other cases, defendants would make

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<sup>21</sup> 421 U.S. 240, 263 (1975).

<sup>22</sup> Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (2012)).

<sup>23</sup> S. REP. NO. 94-1011 (1976).

<sup>24</sup> *Evans v. Jeff D.*, 475 U.S. 717, 751–52 (1986).

<sup>25</sup> Neil M. Goldstein, *Preserving Fee-Shifting After Evans v. Jeff D.: Joint Attorney/Client Control of Settlements*, 11 INDUS. REL. L.J. 267, 269 (1989) (discussing the practice of sweetheart offers). The pre-*Jeff D.* repudiation of sweetheart offers is detailed in Daniel Nazer, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 GEO. J. LEGAL ETHICS 499, 502 (2004), which noted that several courts of appeal had banned the simultaneous negotiation of relief on the merits and fees, in the belief that such a prohibition would make sweetheart offers impossible. *See, e.g.,* *Mendoza v. United States*, 623 F.2d 1338, 1352–53 (9th Cir. 1980) (noting that simultaneous negotiations of attorneys' fees and substantive issues in class action settlements is strongly discouraged); *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977) ("A reasonable solution, we suggest, is for trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees."). This Comment will not examine the effect that *Jeff D.* had on sweetheart offers. The availability of sweetheart offers post-*Jeff D.* is unlikely to have had a measurable impact on civil rights filings, because potential civil rights plaintiffs are not an organized profession, and would be unlikely to have a collective awareness of subtle changes in the civil rights litigation landscape. Perhaps one might argue that the proliferation of sweetheart offers could cause general reputational

settlement offers under which the plaintiff would substantially achieve their ends, but which were contingent on the waiver of statutory attorney's fees.<sup>26</sup> This latter species of offer preyed on an attorney's ethical duty to her client—an attorney given such an offer would be obligated to present it to her client, and could not ethically prevent her client from accepting it.<sup>27</sup> Unfortunately for civil rights attorneys, clients had little incentive not to accept the proposed relief.<sup>28</sup> The attorneys had a duty to advance the interests of their client in substantive relief; the clients had no reciprocal duty to advance the interest of their attorneys in being paid for their services.<sup>29</sup>

The benefits of making such fee waiver offers to civil rights defendants were two-fold: first, if accepted, the defendant would avoid paying a potentially substantial attorney's fee to the other party; second, and perhaps more importantly, especially for an institutional defendant likely to face future civil rights litigation, the fee waiver offer disincentivized the bringing of future claims.<sup>30</sup> Attorneys, uncertain of the prospect of seeing any return on their investment of time, energy, and money, even when successful in winning relief for their clients, would be less likely to bring a case in the future.<sup>31</sup> This would be especially true in low-damages or injunctive-relief-only cases, which were and are common in the civil rights context.<sup>32</sup> Attorneys who nonetheless took civil rights cases in the hopes of receiving their statutorily prescribed fee were assuming a risk significantly greater than that of an attorney taking a tort claim on contingency—the contingency fee attorney runs the risk of not getting paid if she loses her case; the civil rights attorney ran the risk of not being paid even if she secured a favorable

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damage to the civil rights plaintiffs' bar among potential civil rights plaintiffs. However, this hypothesis is belied by the fact that low-income clients—a group disproportionately likely to be the victim of civil rights violations—have a generally positive view of lawyers from whom they seek assistance. See HANNAH LIEBERMAN CONSULTING, LLC/JOHN A. TULL & ASSOCIATES, OVERCOMING BARRIERS THAT PREVENT LOW-INCOME PERSONS FROM RESOLVING CIVIL LEGAL PROBLEMS 47 (2011).

<sup>26</sup> See Goldstein, *supra* note 25.

<sup>27</sup> MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 2 (AM. BAR ASS'N 2009), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_4\\_communications/comment\\_on\\_rule\\_1\\_4/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/comment_on_rule_1_4/); Goldstein, *supra* note 25, at 270.

<sup>28</sup> See Goldstein, *supra* note 25.

<sup>29</sup> See *supra* text accompanying note 25 (“On the one hand, attorneys fear that their assertion of a fee interest to reduce or block a settlement which is otherwise satisfactory to the plaintiffs may be unethical or may undermine their relationships with their clients. On the other hand, if attorneys are unable to protect their reasonable fee interests, they may be discouraged from taking the very cases which Congress intended to promote by the fee-shifting statutes.”).

<sup>30</sup> See *supra* text accompanying note 25.

<sup>31</sup> See *supra* text accompanying note 25.

<sup>32</sup> Peter H. Woodlin, Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions after Evans v. Jeff D.*, 87 COLUM. L. REV. 1214, 1217 (1987).

settlement for her client.<sup>33</sup> This state of affairs was thought to pose an existential threat to the civil rights plaintiffs' bar, and in particular, small, private civil rights practices.<sup>34</sup>

Throughout the 1980s, the fee-waiver offer increasingly became a *de rigueur* feature of defensive civil rights lawyering. By 1985, approximately half of all civil rights cases involved such an offer at some stage of litigation.<sup>35</sup> While some state and local bar associations responded by declaring such offers to be ethical violations on the part of defense counsel, such prohibitions did little to soften the growth of fee waiver offers in practice.<sup>36</sup>

It was against this background that Charles Johnson, a twenty-five year old, newly-barred attorney working for the Idaho Legal Aid Society, encountered a grave injustice in a state mental health facility.<sup>37</sup> Mentally disabled children were being warehoused in state institutions, without receiving proper mental treatment or education.<sup>38</sup> Johnson reacted with horror to the reality he observed in State Hospital South: "I saw children as young as 11 years old institutionalized with adult mental patients, including some child molesters . . . . Maybe I had lived a sheltered life, but I thought the conditions I found there didn't exist anywhere except in a Charles Dickens novel."<sup>39</sup>

In 1980, Johnson, still working for Idaho Legal Aid, brought a Section 1983 class action against Idaho's governor, alleging that the institutionalized children had suffered a deprivation of their constitutional rights.<sup>40</sup> Johnson sought injunctive and declaratory relief for the class—specifically, that the institutionalized children be separated from the adult population, and that they receive adequate education and therapy—but advanced no claim for money damages.<sup>41</sup> Johnson's class action represented a paradigmatic example of the cases most vulnerable to fee waiver offers: a case of indigent clients with no independent means to pay attorney's fees advancing a claim for injunctive and declaratory relief only. Unsurprisingly, it fell victim to the practice. A week before trial, the defense offered settlement terms that would grant "virtually all" of the injunctive relief sought, in exchange for a waiver

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<sup>33</sup> *Id.*

<sup>34</sup> See Goldstein, *supra* note 25.

<sup>35</sup> See Fitzhugh, *supra* note 12.

<sup>36</sup> See *supra* text accompanying note 12.

<sup>37</sup> See *supra* text accompanying note 12, at 45.

<sup>38</sup> See *supra* text accompanying note 12.

<sup>39</sup> See *supra* text accompanying note 12.

<sup>40</sup> See *supra* text accompanying note 12.

<sup>41</sup> See *supra* text accompanying note 12.

of all claims to fees and costs.<sup>42</sup> While Idaho Legal Aid opposed acceptance, Johnson, who had been appointed next friend of his clients and thus had sole authority to accept or reject settlements, felt ethically obligated to acquiesce to the substantively favorable offer.<sup>43</sup> However, alleging that defense counsel had exploited his ethical duty to his clients, Johnson motioned the district court to use its power to review class action settlements<sup>44</sup> to set aside the fee waiver and to give him leave to submit a bill of fees.<sup>45</sup> While the district court rejected the ethics-based argument, on appeal, the Ninth Circuit sided with Johnson, striking down the settlement's fee waiver while upholding its substantive terms and remanding the case with instructions to the district court to award reasonable attorney's fees.<sup>46</sup> The Ninth Circuit reasoned that fee waiver was contrary to the Civil Rights Attorney's Fees Award Act; in order to comply with the act's policies, settlement negotiations in civil rights class actions would have to be bifurcated into negotiations on the merits, and negotiations for fees.<sup>47</sup> The defendants appealed to the Supreme Court.

The Court, in an 6-3 opinion written by Justice Stevens, rejected the Court of Appeals' reasoning. First, it rejected the notion that the district court had the power to modify the settlement in the way Johnson had requested—while the district court could accept or reject the settlement's terms, it had no power to accept the relief offered on the merits while requiring the defendant to, against its wishes, pay attorney's fees.<sup>48</sup> It further reasoned that because Congress had, through the Civil Rights Attorney's Fees Awards Act, intended for fees to go the prevailing *party* in litigation, the plaintiff, not the attorney, could dispose of the fees as she deemed fit.<sup>49</sup> Further, to allow fee waiver would not otherwise contravene the policies of the Fees Act—fee waiver would actually, the Court argued, promote the effective vindication of civil rights claims by making defendants more likely to settle or enter into consent decrees.<sup>50</sup>

While the Court did not categorically forbid district courts from rejecting settlement terms based on their inclusion of fee waiver,<sup>51</sup> it did confirm the

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<sup>42</sup> *Evans v. Jeff D.*, 475 U.S. 717, 722 (1986).

<sup>43</sup> *Id.*

<sup>44</sup> FED. R. CIV. P. 23(e).

<sup>45</sup> *Jeff D.*, 475 U.S. at 723.

<sup>46</sup> *Id.* at 723–24.

<sup>47</sup> *Id.* at 724–25.

<sup>48</sup> *Id.* at 726.

<sup>49</sup> *Id.* at 730.

<sup>50</sup> *Id.* at 731.

<sup>51</sup> *Id.* at 739–40 (holding that a state could not categorically refuse to enter into any civil rights settlement that included attorney's fees, and that fee waiver terms based on a bad faith desire to dissuade counsel from bringing future cases ought to be rejected).



legitimacy of the fee waiver offer as a tool of defensive civil rights lawyering. For better or for worse, the practice of civil rights law had changed.

## II. THE IMPACT OF *JEFF D.*

Justice Stevens' decision did not escape criticism. While Justice Brennan remained optimistic that private attorney general suits would survive, he could not help but denounce the ruling as an attack on effective civil rights enforcement, writing in dissent, "[I]t does not require a sociological study to see that permitting fee waivers will make it more difficult for civil rights plaintiffs to obtain legal assistance. It requires only common sense."<sup>52</sup> Others spoke in more apocalyptic tones, with one scholar claiming, "Short of a swift reaction by Congress, the potential for a plaintiff to ever recover his attorney's fees in future civil rights litigation is speculative."<sup>53</sup> Other writers, sharing Brennan's fear that the rule of *Jeff D.*, left unchecked, would have a deleterious impact on civil rights litigation, proposed a variety of mechanisms they believed could significantly soften its negative impact.<sup>54</sup> But even the more optimistic of the contemporary commentators could not conceal a growing consensus that the Supreme Court, wittingly or not, had created a crisis that threatened the ability of private plaintiffs to effectively vindicate their rights recognized under civil right statutes.

Controversy over *Jeff D.* was not limited to the pages of law journals. Congress, in a general rebuke to the Supreme Court's recent jurisprudence on civil rights issues,<sup>55</sup> passed new civil rights legislation that, among other things, amended the Civil Rights Attorney's Fees Awards Act to include a ban on fee waiver offers.<sup>56</sup> Under the bill, settlements, consent decrees, and

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<sup>52</sup> *Id.* at 755 (Brennan, J., dissenting).

<sup>53</sup> Debra Watts McCormick, *The Effect of Evans v. Jeff D. on Civil Rights Litigation*, 12 OKLA. CITY U. L. REV. 415, 429 (1987).

<sup>54</sup> *See, e.g.*, Margaret Annabel de Lisser, Comment, *Giving Substance to the Bad Faith Exception of Evans v. Jeff D.*, 136 U. PA. L. REV. 553, 554 (1987) (arguing that proper judicial policing of bad faith settlement offers could prevent abuse of fee waiver offers); Goldstein, *supra* note 25, at 272 (proposing "properly limited joint control [of settlements] contracts" as a means to "promote the policies of both the fee-shifting statutes and the ethical codes"); Woodlin, *supra* note 32, at 1215 (1987) (arguing that state and local ethics committees can and should bar defense attorneys from making fee waiver offers).

<sup>55</sup> This rebuke was probably not intended specifically for the decision in *Jeff D.* Congress found that "in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections." Civil Rights Act of 1990, S. 2104, 101st Cong. § 2 (emphasis added). Congress may have been referring to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989) (requiring more stringent proof than mere statistical evidence of racial imbalance within a defendant's workforce to make out a disparate impact claim under Title VII) and other employment discrimination cases, e.g. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>56</sup> Civil Rights Act of 1990, S. 2104, 101st Cong. § 9 (1990).

stipulations of dismissal would be ineffective, “unless the parties or their counsel attest to the court that a waiver of all or substantially all attorney’s fees was not compelled as a condition of the settlement.”<sup>57</sup> However, the 1990 Act did not become law, as the first President Bush vetoed the bill.<sup>58</sup> While concerns about fee waiver were not the thrust of President Bush’s objections—he primarily objected to provisions in the bill that he claimed would incentivize businesses to adopt racial quotas to avoid disparate impact discrimination liability—he did take time to criticize the fee waiver provisions in his veto message.<sup>59</sup> His reasoning echoed that of Justice Stevens in the original *Jeff D.* decision; he argued that a ban on fee waiver would make more settlement in civil rights cases more difficult, and would further be a boon not to a deserving population of victims of civil rights violations, but to a supposedly selfish plaintiff’s bar.<sup>60</sup> With that veto, legislative fee waiver reform died in Congress. While Congress would pass the Civil Rights Act of 1991, it excluded the fee waiver language, perhaps as a concession to overcome the threat of a second veto.<sup>61</sup> The effects of *Jeff D.* would not be legislatively blunted. We are still living with those effects today.

Despite its deprecation at the hands of Justice Brennan, a little sociological study can do a lot to clarify what sort of effect *Jeff D.* really had on civil rights litigation—but it can also occlude that effect. More recent scholarship tends to be somewhat equivocal about the question of what empirically provable effect *Jeff D.* had. Professor Reingold, while adamant that it is “common knowledge within the plaintiffs’ bar” that *Jeff D.* brought about the “death of section 1983 [for plaintiffs with low-damage cases and for plaintiffs seeking injunctive relief],” acknowledges the difficulty of proving this fact through statistical evidence.<sup>62</sup> To understand the true effect of *Jeff D.*, one must examine the relevant statistics in a more fine-grained manner than have previous commentators.

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<sup>57</sup> *Id.*

<sup>58</sup> S. DOC. NO. 101-35, at 11 (1990), <https://www.senate.gov/reference/Legislation/Vetoes/Messages/BushGHW/S2104-Sdoc-101-35.pdf>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

<sup>62</sup> Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL’Y 1 38 (2008); see also Nazer, *supra* note 25, at 500 (“[C]ommentators have claimed that *Jeff D.* will discourage attorneys from accepting civil rights cases and will cause plaintiffs’ attorneys to regularly miss out on collecting statutory attorney’s fees. Empirical research, however, suggests that *Jeff D.* did not have as dire an effect as was anticipated”).

### A. Methodology and Data

To determine the effects of *Jeff D.*, I examine the following categories of data: (1) the annual number of new privately brought civil rights filings in federal district courts, (2) the annual number of new privately brought civil rights class action cases in federal district courts, and (3) the annual number of new consent decrees entered into in privately brought civil rights class action cases in federal district courts. “Privately brought” here is defined to mean any action not initiated by the U.S. Government. This language can prove slightly misleading, however, as any civil rights action brought by a state government in a federal district court would be treated as private. “Private” also does not distinguish between different kinds of plaintiff’s attorneys—it does not tell us if an attorney was working in private practice, or for the Legal Services Corporation, or for some other civil rights non-profit.

To find the overall number of new privately brought federal civil rights filings, I consulted the Annual Reports of the Director of the Administrative Office of the United States Courts.<sup>63</sup> The Reports contain information on the number of suits brought per year by type of action and by basis of jurisdiction. To get an annual figure for privately-brought federal civil rights filings, for each year between 1970 and 2017, I added together the number of civil rights cases brought under U.S. defendant, federal question, and diversity jurisdictions.<sup>64</sup> The Annual Reports classify civil rights cases brought by prisoners separately from all other civil rights cases; I chose to honor this convention, in large part due to the high volume of pro se prisoner petitions, the volume of which would be, presumably, unaffected by changes in rules regarding attorney’s fees.<sup>65</sup>

To track the number of privately brought civil rights class actions, I used the Integrated Database of the Federal Judicial Center, which allows one to search civil filings from fiscal year 1970 to present.<sup>66</sup> I refined my searches to include civil rights cases with class action allegations filed on the basis of

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<sup>63</sup> ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-2 (1970–2017).

<sup>64</sup> From 1970–2000, very, very few civil rights cases were brought under diversity jurisdiction. *See id.*

<sup>65</sup> For an examination of prisoner *pro se* actions, *see* Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 14 (1998).

<sup>66</sup> *IDB Civil 1970-1987*, FED. JUD. CTR., <https://www.fjc.gov/research/idb/interactive/IDB-civil-1970-1987> (last visited May 1, 2019) (providing data from fiscal year 1970–1987); *IDB Civil 1988-present*, FED. JUD. CTR., <https://www.fjc.gov/research/idb/interactive/IDB-civil-since-1988> (last visited May 1, 2019) (providing data from fiscal year 1988 to present). Prior to 1976, fiscal years began on July 1st of the calendar year before the fiscal year and end on June 30th of the calendar year that matches the fiscal year. In order to promote consistency in the data set, July 1st and June 30th were used as the starting and ending points, respectively, of *all* fiscal years.

U.S. defendant, federal question, and diversity jurisdictions per year. I again excluded prisoner petitions.

I also used the Integrated Database to find the number of new civil rights consent decrees. I refined my searches to include civil rights cases filed on the basis of U.S. defendant, federal question, and diversity jurisdictions that were disposed through consent decrees per year. Once again, I excluded prisoner petitions.

I treat the critics and proponents of *Jeff D.* as making two distinct hypotheses. The critic's hypothesis is that, all other things being equal, the permissibility of fee waiver offers would cause new civil rights federal filings to fall by dissuading attorneys from taking on new civil rights cases. The proponent's hypothesis is that the permissibility of fee waiver offers would not cause new federal filings to fall, but would rather lead to a rise in the number of settlements.

This data admittedly has limitations that may obscure our analysis of the effects of *Jeff D.* First, it will obviously not pick up civil rights filings in state forums. While there is no obvious reason to suspect that *Jeff D.* would have a different effect on federal claims in state forums than on federal claims in federal forums, the lack of state filing data is still a limitation on our analysis. On a related note, *Jeff D.* may have caused an uptick in the pursuit of state law civil rights remedies, as states are free to interpret their own fee-shifting statutes so as to forbid fee waiver.<sup>67</sup>

Second, the data set only begins to track pro se filings in FY 1988, which constitute a substantial percentage of all new federal filings.<sup>68</sup> Further, the data available for pro se petitions in the years 1988 to 1995 is highly suspect, as the number of pro se filings reported is implausibly low, both for privately brought civil rights cases, and for all civil cases (in 1988, for example, the data set reports only 47 pro se cases of any type). While data from the late 1990s onward shows that pro se filings constitute a significant fraction of all privately brought civil rights claims, ranging from approximately a tenth in 1998 to nearly a third in 2010, the data does not give us a sufficient basis to analyze the effect that *Jeff D.* had on pro se filings. One would predict that pro se filing rates would presumably not be negatively affected by *Jeff D.*, both because the threat of fee waiver is irrelevant to a party representing herself. One might speculate that, if anything, *Jeff D.* would have actually *increased* civil rights pro se filings, as particularly perseverant plaintiffs, unable

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<sup>67</sup> See, e.g., *Flannery v. Prentice*, 28 P.3d 860, 862 (Cal. 2001) (holding that attorney's fees awarded under California's Fair Employment and Housing Act belonged to the attorney); *Woods v. Parker*, 901 S.W.2d 375, 378 (Tenn. Ct. App. 1995) (finding that attorney's fees awarded under Tennessee's anti-discrimination statute belonged to the attorney, not the plaintiff).

<sup>68</sup> See Goldschmidt, *supra* note 65.

to secure an attorney, go forward with bringing civil rights claims on their own behalf.

Third, while major civil rights statutes uniformly have fee-shifting, either through the Fees Act<sup>69</sup> or through their own autonomous fee-shifting provisions,<sup>70</sup> the provision of statutory attorney's fees may be less important in certain categories of cases, namely those where substantial money damages are sought. In such cases, attorneys and clients may enter into contingency fee agreements that would largely immunize the attorney from the harms associated with fee waiver offers.<sup>71</sup> In particular, the Americans with Disabilities Act of 1990 ("ADA"), which allows for damages claims, may have spurred much of the growth in privately filed civil rights acts throughout the 1990s, as its damages provision may have, at times, lead to substantial verdicts and settlements.<sup>72</sup> However, this hypothesis cannot be confirmed with the data used here, as the dataset does not separately track ADA claims prior to 2004. If the ADA was the driving force behind the increase in civil rights in the first half of the 1990s, the apparent lenity with which judges treated ADA defendants may have caused the later decline in new filings; plaintiffs rarely prevailed in ADA cases brought to trial in the 1990s.<sup>73</sup>

Finally, the data on consent decrees clearly does not tell us the full story of pre- and post-*Jeff D.* settlements. The Integrated Database does allow for searches of cases that ended in settlement; however, it appears that this data was not accurately coded before the mid-1980s. For fiscal year 1985, a

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<sup>69</sup> 42 U.S.C. § 1988 (2012). The Civil Rights Attorney's Fees Awards Act creates prevailing party fee-shifting for actions arising under 34 U.S.C. § 12361 (concerning crimes of gender-based violence committed under color of law), 42 U.S.C. § 1981 (concerning the right to contract and participate equally in the court system), 42 U.S.C. § 1982 (concerning the right to acquire and dispose of property), 42 U.S.C. § 1983 (concerning the deprivation under color of law of rights, privileges, and immunities guaranteed under the Constitution), 42 U.S.C. § 1985 (concerning conspiracy to violate civil rights and obstruction of justice), 42 U.S.C. § 1986 (concerning complicity liability for parties aware of conspiracy to violate civil rights or obstruct justice who, despite having power to do so, neglect or refuse to stop the conspiracy), 42 U.S.C. § 2000bb (concerning official acts that substantially burden the free exercise of religion), 42 U.S.C. § 2000cc (concerning land-use regulations that impede religious exercise), and 42 U.S.C. § 2000d (concerning discrimination in federally funded programs).

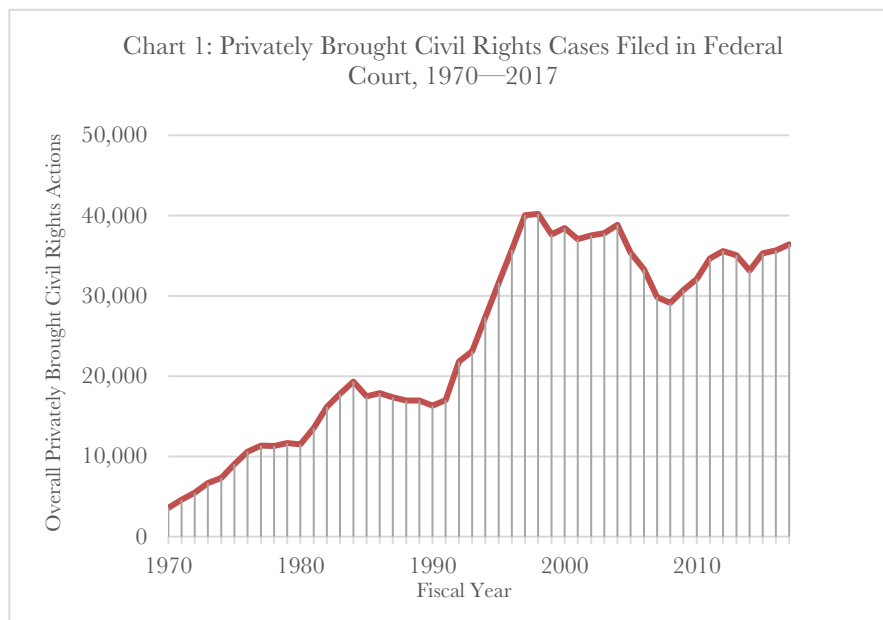
<sup>70</sup> See, e.g., Equal Pay Act of 1963, Pub. L. 88-38, § 216(b), 77 Stat. 56; Age Discrimination Act of 1975, 42 U.S.C. § 6401(e)(1) (1979); Age Discrimination in Employment Act, 29 U.S.C. § 216(b) (2018).

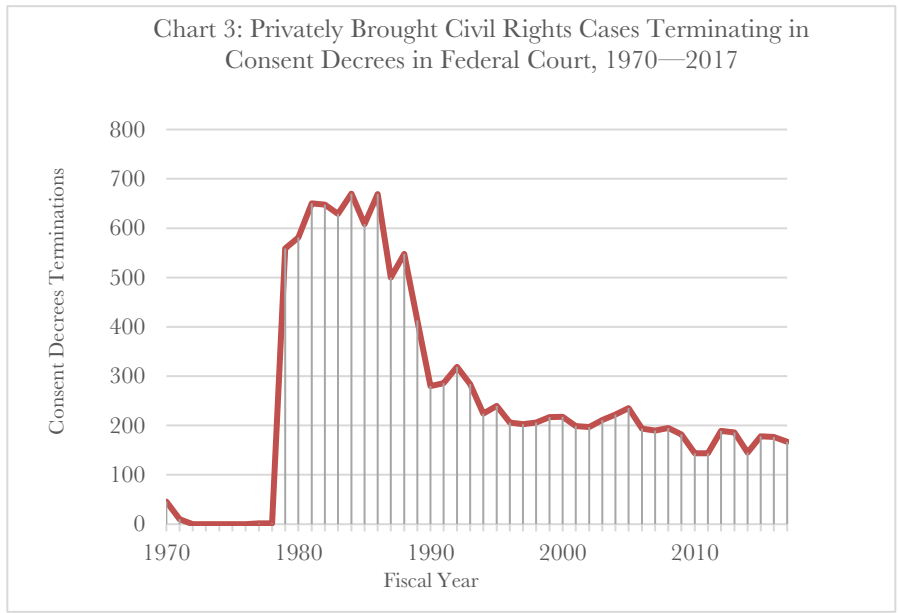
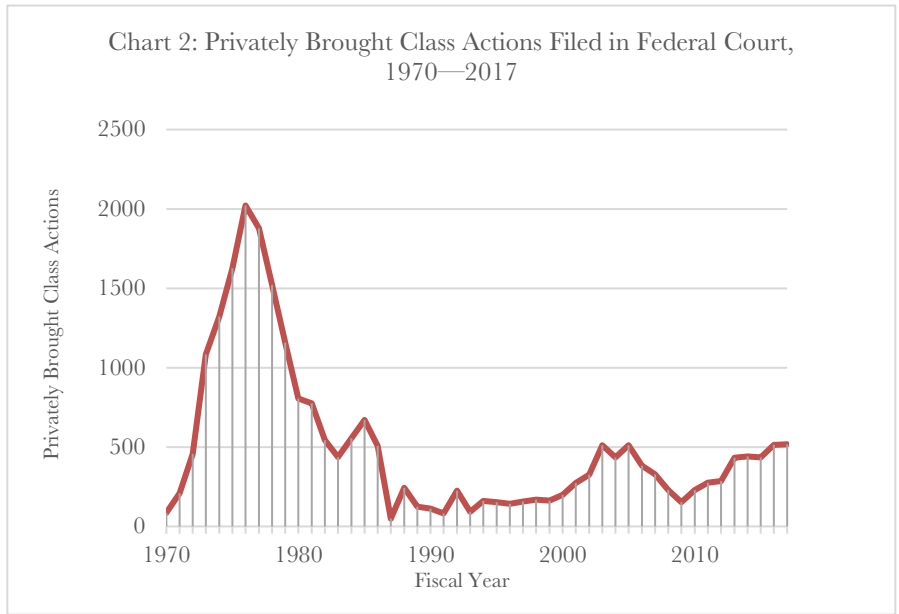
<sup>71</sup> *Venegas v. Mitchell*, 495 U.S. 82, 85 (1990) (holding that contingent fee contracts are valid in Section 1988 cases, even if the contract would result in the attorney earning more than the statutory attorney's fee).

<sup>72</sup> See, e.g., *Jury Verdict Round-Up: Year-to-Date Top 10 Employment Verdicts*, LEXIS (2016), <https://www.lexisnexis.com/jvsubmission/b/adjudication/archive/2016/09/09/jury-verdict-round-up-year-to-date-top-10-employment-verdicts.aspx> (recording several multi-million-dollar ADA verdicts). Such verdicts are likely atypical.

<sup>73</sup> Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-CL. L. REV. 99, 108 (1999) (finding that ADA defendants prevailed at a rate of 94% at trial through either dismissal, judgment, or verdict, and that defendants prevailed on appeal at a rate of 84%).

search for all cases *of any type* terminating in settlement yields only 13 results. It is not until 1988 that it shows a remotely plausible overall settlement number of 32,520 (which, while plausible, is likely incorrect). As such, this Comment cannot examine the effect of *Jeff D.* on overall settlement rates. However, consent decree numbers can still be useful for this Comment's purposes, because consent decrees often arise in litigation in which injunctive relief is sought. If more consent decrees followed the *Jeff D.* decision, one might be forced to conclude that the *Jeff D.* majority's contention that fee waiver promotes effective vindication of civil rights proved correct after all. However, the consent decree numbers provided by the Integrated Database prior to 1979 are implausibly low and thus suspect; those data points have been labelled as suspect.





### B. Analysis

Looking only at overall privately-brought civil rights filings, one does not find the apocalyptic decline some of *Jeff D.*'s critics predicted. Overall new annual private civil rights filings did decline after *Jeff D.*; however, that decline had begun after 1984, when new private civil rights filings reached their pre-*Jeff D.* peak of 20,889.<sup>74</sup> Filings declined 3.0% in 1987 relative to 1986 and 2.2% in 1988 relative to 1987. When compared to the 9.5% decline in filings from 1984 to 1985, the supposed impact of *Jeff D.* seems relatively small. While it is certainly possible that the threat of fee waiver offers had something to do with the post-1984 decline of civil rights filings—after all, the fee waiver offer was not *invented* in 1986, but rather had played a prominent role in civil rights litigation for some time<sup>75</sup>—it is difficult to reconcile the reality of *Jeff D.* with the vision proffered by Justice Brennan and Professor Reingold. Overall civil rights filings rallied significantly in the 1990s, likely due to the passage of new civil rights bills, including the Americans with Disabilities Act and the Civil Rights Act of 1991.

However, *overall* civil rights filings do not tell the full story of *Jeff D.* The case immediately preceded a collapse in new private civil rights *class action* filings, a collapse from which the civil rights class action bar has yet to fully recover.<sup>76</sup> While, prior to *Jeff D.* the number of civil rights class actions filed annually in federal court had been trending steadily downward from its peak of 2022 new cases in 1976, with an average 9.2% annual decline from 1977 to 1986, the drop in new private filings after *Jeff D.* was nothing short of precipitous. 1987, the first fiscal year after the decision, saw 458 fewer new private civil rights class action filings than 1986, a 90.3% decline.<sup>77</sup> Not until 2003 did the civil rights class action filing rate reach pre-*Jeff D.* levels—and it did not stay there! Despite the passage of new civil rights legislation in the 1990s, including the Americans with Disabilities Act, since *Jeff D.* the annual filing rate for civil rights class actions has only equaled or exceeded the 1986 filing rate in only four out of thirty years.<sup>78</sup>

The civil rights class action litigation rate did not rise at all with the overall civil rights filing rate.

The critics of *Jeff D.* are further vindicated by the post-*Jeff D.* decline in civil rights consent decrees.<sup>79</sup> The number of civil rights consent decrees entered into was at its highest in 1984 and 1986 (670 and 669 consent

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<sup>74</sup> See *supra* Table I and Chart 1.

<sup>75</sup> Fitzhugh, *supra* note 12 and accompanying text.

<sup>76</sup> See *supra* Table I and Chart 2.

<sup>77</sup> See *supra* Table I and Chart 2.

<sup>78</sup> See *supra* Table I and Chart 2.

<sup>79</sup> See *supra* Table I and Chart 3.



decrees, respectively). That number declined by 25% in 1987 relative to 1986, and by 33% in 1990 relative to 1989. It never recovered to its pre-*Jeff D.* levels; in fact, as of 2017, it has declined 75% relative to its pre-*Jeff D.* figure—this, again, despite the proliferation of new civil rights statutes in the 1990s. This Comment does not claim that the decline was caused by *Jeff D.*; however, the decline nonetheless suggests that the supporters of fee waiver were mistaken in their arguments that *Jeff D.* would increase settlement.

Ultimately, the data suggests that *Jeff D.* did have a negative effect on the willingness of attorneys to bring civil rights actions, but that that negative effect was smaller than its critics anticipated. This Comment cannot authoritatively answer why the decline in civil rights filings was localized to class actions. However, it can offer a few broad speculations in that direction. Attorneys may have found class actions a more dangerous prospect than other civil rights cases, due to worries about increased costs of litigation that they might not recoup. Civil rights attorneys may have been confident that carefully written retainer agreements would be adequate to protect their fees in a non-class context. But those same attorneys might have feared that judges would either treat those retainer agreements as unenforceable in class actions, or use their Rule 23(e) power over settlement to encourage fee-waiver. Finally, there might be other factors impacting civil rights class action litigation that go beyond the scope of this Comment. Class action filings grew from 1982 to 1985, but in 1985 they were still only about a third of their peak in 1976. While the immediate aftermath of *Jeff D.* saw a more dramatic percentage decline in filing than any other previous years, *Jeff D.* might be interpreted not as a uniquely cataclysmic event, but rather as a point in a longer process of civil rights class action decline.

### III. PHILOSOPHICAL AND ETHICAL DIFFICULTIES OF *JEFF D.*

Beyond the systemic effects that the threat of fee waiver offers has on filings in civil rights litigation, fee waiver offers engender unfairness and negatively affect the attorney-client relationship. Additionally, civil rights defense attorneys may face potential ethical issues in *making* a settlement offer conditioned on fee-waiver.

#### A. *Individual Unfairness*

Fee waiver offers are unfair to lawyers who receive them. It is axiomatically true that civil rights policy-making should prioritize fairness for the victims of civil rights violations over fairness for their lawyers. Indeed, it should even prioritize fairness for civil rights defendants over fairness for plaintiff's lawyers (after all, defendants, as parties to litigation, have due process rights that attorneys lack). The goals of this area of policy-making

should be to efficiently remedy past and present injustice, and to disincentivize the future practice of injustice. However, the prioritization of fairness for actual parties to litigation need not cause the wholesale discounting of the value of fairness to lawyers themselves. The fact that a rule causes obvious unfairness to lawyers engaged in litigation, especially when that rule does not clearly advance a legitimate countervailing interest for parties to litigation, is by itself a sufficient reason to at least re-consider the propriety of that rule.

If one accepts the principles that a lawyer deserves reasonable compensation for her efforts in pursuit of a meritorious claim (especially when the vindication of that claim substantially promotes broader social goods), and that the prevailing party fee-shift is reasonable and proper in civil rights cases, one cannot deny that the rule of *Jeff D.* lends itself to significant unfairness. The fact that a civil rights defendant makes a fee waiver offer in is itself a strong indicator that the civil rights attorney has done an effective job in building a case for her client. This was the case in *Jeff D.* itself, as attorney Johnson had spent several years of his life investigating and advocating on the behalf of institutionalized children in Idaho.<sup>80</sup> While the district court might not have been inclined to grant all the injunctive relief Johnson sought,<sup>81</sup> Johnson's case was strong enough that the defendants felt it was in their best interest to voluntarily incur the likely significant costs of paying for proper treatment for the institutionalized plaintiff class rather than risk going to trial. Johnson, and attorneys like him, are left utterly in the lurch. They have done a commendable service to the public by ensuring the effective enforcement of civil rights laws, but are left with nothing to show for it other than the warm feelings of their clients. This is particularly pernicious for attorneys who eschew more remunerative fields of law in order to work in public interest. Such attorneys have already made sacrifices to serve the public. It is insulting to their dignity and injurious to their ability to perform that service to consider their labor as being worth so little.

Of course, one can conceive of instances where a fee waiver agreement might be more reasonable. Cases that arrive in the attorney's office in already relatively strong shape might be quickly and fairly resolved if an attorney is willing to forego her fee. Indeed, this was the case for part of the controversy in *Jeff D.*—Johnson voluntarily waived his fee to quickly resolve the elements of the case related to education.<sup>82</sup> However, such cases should not be enough to dismiss the unfairness of the *Jeff D.* rule. In the absence of the case's rule, reasonable attorneys could be expected (but not required) to

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<sup>80</sup> *Evans v. Jeff D.*, 475 U.S. 717, 722 (1986).

<sup>81</sup> *Id.* (noting that the substantive terms of defendant's settlement offer were significantly better than what the district court had signaled it was likely to order at trial).

<sup>82</sup> *Id.*

follow Johnson's example and waive their fee. Further, even if they are unwilling to do so, the statutory award of *reasonable* attorney's fees suggests that the fees they would be entitled to would be relatively small. Defendants would still be incentivized to settle such cases early in litigation, because the more quickly they resolved the case, the less they would pay in fees.

Another difficulty appears in cases that are *not* strong but for which the injunctive relief or substantive damages sought are relatively inexpensive to defendant. In such cases, defendants might be inclined to enter into a settlement *only* if the attorney agrees to a fee waiver. If the attorney were able to refuse this offer, the client might lose their only opportunity for relief. This case does seem like it could create some potential unfairness to the client—losing what really might be their only opportunity for relief. This is a genuine difficulty but is not strong enough to overcome the sense that the *Jeff D.* rule creates more unfairness for attorneys than it does fairness for clients.

### *B. Perversion of the Attorney-Client Relationship*

A further philosophical difficulty ought to be addressed. The relationship that the threat of the fee waiver offer creates between public interest attorneys and their clients is antithetical to the ethos of public interest practice. Public interest attorneys, if they want to protect their attorneys' fees, can request or require that their clients sign retainers that waive their right to accept a fee waiver offer—that is, the client can assign the attorney's fees to the attorney.<sup>83</sup> The public interest attorney makes this request or demand knowing that their client, by agreeing, foregoes an important property interest. The assignment of this interest, in at least some cases, might make favorable settlement on the merits more difficult. This raises serious questions about informed consent.

To explain why there might be a lack of informed consent for such retainer agreements, I offer my experiences working in the summer of 2017 in the landlord-tenant housing unit of a non-profit legal services organization. While my experiences are admittedly anecdotal, I believe they can offer insight into the daily effects of *Jeff D.* on the practice of public interest law. One of my duties as a legal intern at the legal services organization was to interview prospective clients. If I determined that these prospective clients fell within certain categories of need, I would have them sign a form retainer, and, additionally, an attorney's fees addendum to the retainer, in which they assigned any attorney's fees to which they might be entitled to the organization. They additionally agreed not to accept an offer of settlement that included a fee waiver. The prospective clients I saw were,

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<sup>83</sup> See, e.g., *Zeisler v. Neese*, 24 F.3d 1000, 1002 (7th Cir. 1994) (holding that retainers that assign attorney's fees to attorneys are enforceable in civil rights actions).

by and large, very unlikely to be in a position where they would be entitled to collect statutory attorney's fees—the vast majority were defendants in eviction actions in Philadelphia Municipal Court. However, while I never interviewed a client in such a case, the likelihood of encountering a potentially meritorious civil rights case in a landlord-tenant context is obviously high—racial discrimination in housing, while perhaps more subtle than it was decades ago, is still common.<sup>84</sup>

While at the organization, I made no systematic effort to track my clients' reaction to their retainer forms. At the time, I was myself totally ignorant of *Jeff D.* and the threat of fee waiver offers. But based on my best collections, I believe throughout my summer, I interviewed in the vicinity of eighty to one hundred potential clients, and accepted approximately forty to fifty for further assistance.<sup>85</sup> Of those forty to fifty, I do not recall a single one who objected to the terms of the retainer agreement. I think this is in large part because clients were not inclined to pay the terms very much attention. While I would give a general overview of the terms, and would offer to read through the retainer with client if so desired, I cannot recall a single instance where a client asked substantial questions regarding the retainer agreement. While a few would take the time to read it over, most would sign it after giving it only a few moments' attention, if any. Clients were generally interested in how to resolve their legal issue, and on how to get an attorney to represent them at their hearings. They rarely—and understandably!—expressed interest in the substance of the documents they were signing. Whether this was because the client trusted me and the organization to provide them with fair terms of representation, or because the client, fearing they would lose their one opportunity to find counsel, felt unable to bargain over the terms of representation, may have varied from case to case.<sup>86</sup> But

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<sup>84</sup> See, e.g., Suzanne Gamboa, *Study: Race Affects Home Buying, Renting*, NBC 10 (June 12, 2013), <https://www.nbcphiladelphia.com/news/local/Study-Race-Affects-Home-Buying-Renting-211136721.html> (reporting on racial discrimination in the Philadelphia rental market); see also Caitlin McCabe, *For Minorities, There's Still Inequality in the Housing Market*, PHILA. INQUIRER (Nov. 17, 2017), [http://www.philly.com/philly/business/real\\_estate/residential/minority-homeownership-black-homeowner-discriminatory-lending-zillow-barrier-renting-20171117.html](http://www.philly.com/philly/business/real_estate/residential/minority-homeownership-black-homeowner-discriminatory-lending-zillow-barrier-renting-20171117.html) (describing racial bias in the home-buyer's market); N.Y. Times Editorial Board, *The Race-Based Mortgage Penalty*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/opinion/mortgage-minority-income.html> (describing difficulties black home-buyers face in attaining a mortgage).

<sup>85</sup> In most cases, this meant lobbying an attorney in the unit to agree to represent my client in an eviction; in other, non-eviction cases, I would only provide advice. Despite the stupendously high volume of new clients coming in daily, the incredible attorneys in my unit would almost invariably agree to represent my clients if it was at all within their power to do so.

<sup>86</sup> Of course, while I was happy to answer any questions a client might pose about a retainer, it was not in my interest, or the organization's interest, to overly encourage a long dialogue about the document. Intake at legal services organizations, especially legal services organizations in large cities, can occur at a breakneck speed. This was especially true in the landlord-tenant unit, which

one thing is clear to me in retrospect: the rule of *Jeff D.* was (unbeknownst to me, and likely unbeknownst to most, if not all, of the other law students and paralegals at the organization who did intake interviews) undermining the fairness of my relationship with clients.

Beyond these philosophical difficulties lies a more practical question: to what degree are these retainer agreements enforceable? These retainer agreements purport to cede a traditionally client-centered aspect of litigation to an attorney's control. Through the retainer, the attorney acquires the ability to prevent her client from entering into a settlement that contains a fee waiver, or at least to collect contractual damages against a settling client for breach of conduct. This acquisition seems to run counter to the Model Rules of Professional Conduct, which state that "[a] lawyer shall abide by a client's decision whether to settle a matter."<sup>87</sup> Courts tend to look with disfavor on attempts by counsel to settle or discontinue litigation contrary to client wishes,<sup>88</sup> and some courts and state ethics committees have explicitly held that contractual provisions giving lawyers a right to control settlement are unethical or unenforceable.<sup>89</sup> However, it has been suggested that, even in states where attorney control of settlement is explicitly forbidden, an attorney may generally enter into retainer agreements whereby she acquires a right to pursue an action against her client if the client agrees to enter into a fee waiver settlement.<sup>90</sup> However, this situation still poses practical and philosophical problems for both public interest attorneys and attorneys in private practice. Practically speaking, collecting fees from civil rights plaintiffs may be difficult, as they may be judgment-proof. Philosophically speaking, for a public interest attorney to pursue an action for recovery of

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was the highest-volume department in the organization. On days when I was doing intake, I would often interview six or seven clients before lunch. Unnecessarily extending these interviews was not something I particularly desired to do.

<sup>87</sup> MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N. 2002).

<sup>88</sup> *See, e.g.*, *Estate of Falco v. Decker*, 233 Cal. Rptr. 807, 815 (Cal. Ct. App. 1987) ("A client's right to reject a settlement is absolute."); *In re Estate of Netzorg*, 15 P.3d 926, 930 (Mont. 2000) ("It is . . . axiomatic . . . that a client has an absolute right to settle his or her case without the consent of counsel."); *Michael D. Tully Company, L.P.A. v. Dollney*, 537 N.E.2d 242, 245 (Ohio Ct. App. 1987) (holding that an attorney operating on a contingency fee basis could not compel a client to accept a reasonable settlement, even if non-acceptance would make it extremely unlikely that the lawyer would be compensated).

<sup>89</sup> *Lemmer v. Charney*, 125 Cal. Rptr. 3d 502, 504 (Cal. Ct. App. 2011) ("[A] clause in a retainer agreement between an attorney and his client prohibiting the client from settling his lawsuit without the consent of his attorney is void as against public policy."); *Jones v. Feiger*, 903 P.2d 27, 34 (Colo. App. 1994) ("Any provision in an agreement to provide legal services that would deprive a client of the right to control settlement is unenforceable as against public policy"); CAL. COMM. ON PROF'L RESPONSIBILITY & CONDUCT, Formal Op. 136 (1994) (holding that, in a Section 1988 action, an attorney could not ethically require a client to sign a retainer agreement giving the attorney control over settlement).

<sup>90</sup> *See* cases cited *supra* note 89.

fees against a client once again puts her in a position adverse both to the client's interests and to the ethos of public interest practice.

I do not mean to suggest that the organization for which I worked necessarily acts unethically in having clients sign those retainers. Having clients sign such retainers provides a real benefit to the organization and its pursuit of justice, by blanketly immunizing itself from fee waivers. This may be a legitimate solution to the ethical quandary caused by fee waiver offers. The point is rather that fee waiver *creates* a genuine ethical quandary. The point of a legal services organization is to make accessible a legal system that often presents itself as a hostile, Kafkaesque obstacle course to marginalized people. When an intake worker—even, in the best-case scenario, one equipped with better knowledge of Supreme Court case law than I had, and able to effectively communicate that knowledge—asks a client to sign over an important property interest, the legal services organization is undermining its own purpose. It is making a demand (even when the waiver is phrased as a request, practically speaking, for reasons discussed above, it is probably heard as a demand) of a marginalized person, a demand they practically cannot refuse. The legal services organization, even if it acts in the wider interests of utilitarian justice, is in this small way, making itself part of the great hostile byzantine legal complex the marginalized person has been confronting their whole life. *Jeff D.* forces the legal services organization into this philosophically uncomfortable position.

### C. *The Ethics of Making Fee Waiver Offers*

Finally, a defense attorney may face ethical difficulties in making a fee waiver offer. Before the *Jeff D.* decision, the ethics committees of several state and local bar associations weighed in on the matter of fee waiver. Their conclusions varied: some committees found that simultaneous negotiations of substantive relief and fees was itself unethical; some found that lump sum offers were ethical, but that demands for a *complete* waiver of attorney's fees was not; and others found there to be no ethical issue with the fee waiver.<sup>91</sup> The reasoning behind the restrictive ethical rules rested in the defense attorney's supposed duty to ensure the effective enforcement of our civil rights laws.<sup>92</sup> By taking steps that would systemically undermine the ability of civil rights plaintiffs to bring actions in the future, the defense attorney, the

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<sup>91</sup> See Robert Hewitt Pate, *Evans v. Jeff D. and the Proper Scope of State Ethics Decisions*, 73 VA. L. REV. 783, 795–96 (1987) (noting that the bar association of the City of New York had taken the strictest anti-fee waiver stance, that the bar associations of the District of Columbia and Georgia had taken the middle ground, and that the bar associations of Connecticut, Virginia, and New Mexico had taken the least restrictive stance).

<sup>92</sup> *Id.*

reasoning goes, is not merely playing hard ball at the negotiating table, but is maliciously attacking access to justice.<sup>93</sup>

Views differ on the legality of state ethics committees regulating fee waiver.<sup>94</sup> Regardless of the legality of such bans, the reasoning behind ethics bans on fee waivers seems to overstep the authority of bar association ethics committees. Fee waiver ethics rules effectively regulate not just the conduct of the attorney, but the conduct of the defendant. Under these rules, the defendant, who has the right to seek a settlement with fee waiver, finds itself governed by an ethics committee that has no rightful jurisdiction over it. Further, the interest being regulated here is not the defense attorney's, but rather her client's. The moneys that would go to the plaintiff's attorney belong to the defendant, not the defendant's attorney. The defense attorney does not really garner any direct benefit from making the fee waiver offer. If anything, the systematic effect of fee waiver is contrary to the defense attorney's pecuniary interest, because, while she may be hesitant to admit it, her livelihood is dependent on the willingness of entrepreneurial plaintiff's attorneys to bring future actions. In holding fee waiver offers to be unethical, state bar associations attempt to act as a surrogate legislature, regulating non-attorney conduct. While the rule of *Jeff D.* may create unsavory ethical scenarios for plaintiff's lawyers, to impose an ethical constraint on the defense attorney is really to impose an ethical constraint on the defendant.

### CONCLUSION

More than thirty years after the decision, *Jeff D.* and its aftermath may seem to be of merely historical interest. The threat of fee waiver has become simply part of the background of the civil rights enforcement landscape. Perhaps we might be curious about how we arrived at this state of affairs, but this state of affairs is no longer *political*. We might talk about how civil rights attorneys approach the rule of *Jeff D.*—their use of creative retainers, their attempts to educate their clients—we might even bemoan the rule as deeply unjust, but we no longer talk about what is to be done about the rule. The issue is not a live one.

A deep flaw runs through this way of thinking. The unjustness of a rule is not undone because it has been in place for three decades. An unjust rule can be circumvented, it can be undermined, it can even be criticized—but, most crucially, it can be undone.

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<sup>93</sup> *Id.*

<sup>94</sup> See Hewitt Pate, *supra* note 91, at 795–96 (1987) (arguing that state ethical regulation of fee waiver violates the supremacy clause); Woodlin, *supra* note 54, at 1215 (arguing that state and local ethics committees can and should bar defense attorneys from making fee waiver offers).

The civil rights problems of our day have been eloquently articulated.<sup>95</sup> While their solutions do not lie solely in the courtroom, effective private enforcement of our civil rights laws remains a necessity in addressing them. Undoing *Jeff D.* would improve the access of victims of civil rights violations to effective advocates and hence effective remedies. It could revitalize the civil rights class action bar by increasing the viability of low-damage and no-damage claims. It would abolish the unfairness inherent to denying a fee to an attorney who has spent time, energy, and money building a strong case on behalf of her client. Finally, it would dispense with the awkward philosophical unseemliness of a legal services organization requesting or demanding that a prospective client assign to it an important property interest. Congress ought to act and implement the language it first considered in the failed Civil Rights Act of 1990.

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<sup>95</sup> See, e.g., TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015) (presenting a poignant account of a black man's encounters with systemic racism, including police brutality and murder); RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017) (highlighting the role consciously racist public policy played in creating still extant segregation in housing); Ta-Nehisi Coates, *The First White President*, ATLANTIC MONTHLY (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/> ("To Trump, whiteness is neither notional nor symbolic but is the very core of his power. In this, Trump is not singular. But whereas his forebears carried whiteness like an ancestral talisman, Trump cracked the glowing amulet open, releasing its eldritch energies"); Vann R. Newkirk II, *What's Missing from Reports on Alabama's Black Turnout*, ATLANTIC (Dec. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/12/can-doug-jones-get-enough-black-voters-to-win/547574/> (describing voter suppression efforts against black voters in Alabama); Richard Perez-Peña, *White Supremacists Were Ready for Violence in Charlottesville. The Police Were Not*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/us/charlottesville-white-supremacist-rally.html> (describing private white supremacist violence at the "Unite the Right" rally in Charlottesville, Virginia).



## APPENDIX

TABLE I: FILINGS AND TERMINATIONS, 1970–2017

Fiscal Year	Overall Privately Brought Civil Rights Actions Filed in Federal Court	Percent change from previous year	Privately Brought Class Actions Filed in Federal Court	Percent change from previous year	Consent Decrees Terminated in Federal Court	Percent change from previous year
1970	3,586	n/a	86	n/a	46	n/a
1971	4,609	+ 28.5%	210	+ 144.2%	10	n/a
1972	5,482	+ 18.9%	457	+ 117.6%	0	n/a
1973	6,691	+ 22.1%	1,085	+ 137.4%	0	n/a
1974	7,294	+ 7.7%	1,321	+ 21.7%	0	n/a
1975	9,037	+ 25.4%	1,626	+ 23.1%	0	n/a
1976	10,585	+ 17.1%	2,022	+ 24.4%	0	n/a
1977	11,329	+ 7.0%	1,878	- 8.9%	2	n/a
1978	11,301	- 0.2%	1,522	- 19.0%	2	n/a
1979	11,656	+ 3.1%	1,158	- 23.9%	559	n/a
1980	11,485	- 14.7%	806	- 30.4%	581	+ 3.9%
1981	13,534	+ 17.8%	776	- 3.7%	650	+ 11.9%
1982	16,144	+ 19.3%	544	- 29.9%	648	- 0.3%
1983	17,798	+ 10.2%	436	- 19.5%	629	- 2.9%
1984	19,299	+ 8.4%	555	+ 27.3%	670	+ 6.5%
1985	17,472	- 9.5%	670	+ 20.7%	608	- 9.2%
1986	17,872	+ 2.3%	507	- 24.3%	669	+ 10.0%
1987	17,342	- 3.0%	49	- 90.3%	500	- 25.3%

1988	16,966	- 2.2%	244	+ 398.0%	548	+ 9.6%
1989	16,950	- 0.1%	125	- 48.8%	413	- 24.6%
1990	16,310	- 3.8%	113	- 9.6%	280	- 32.2%
1991	16,992	+ 4.2%	82	- 27.4%	286	+ 2.1%
1992	21,821	+ 28.4	226	+ 175.6%	319	+ 11.5%
1993	23,109	+ 5.9	92	- 59.3%	284	- 11.0%
1994	27,335	+ 18.3%	161	+ 75.0%	224	- 21.1%
1995	31,627	+ 15.7%	152	- 5.6%	240	+ 7.1%
1996	35,726	+ 13.0%	143	- 5.9%	206	-14.2%
1997	40,026	+ 12.0%	156	+ 9.1%	203	- 1.5%
1998	40,205	+ 0.4%	168	+ 7.7%	206	+ 1.5%
1999	37,646	- 6.4%	163	- 3.0%	217	+ 5.3%
2000	38,446	+ 2.7%	199	+ 22.1%	218	+ 0.5%
2001	37,067	- 3.6%	273	+ 37.2%	199	- 8.7%
2002	37,541	+ 1.3%	327	+ 19.8%	197	+ 1.0%
2003	37,814	+ 0.7%	512	+ 57.1%	211	+ 7.1%
2004	38,845	+ 2.7%	435	- 15.0%	222	+ 5.2%
2005	35,364	- 9.0%	512	+ 17.7%	235	+ 5.9%
2006	33,296	- 5.8%	383	+ 25.2	194	- 17.4%
2007	29,814	- 10.5%	329	- 14.1%	190	- 2.1%
2008	29,124	- 2.3%	230	- 30.1%	195	+ 2.6%
2009	30,699	+ 5.4%	153	- 33.5%	182	- 6.7%
2010	32,125	+ 4.6%	230	+ 50.3%	144	- 20.9%
2011	34,671	+ 7.9%	275	+ 19.6%	144	0%
2012	35,572	+ 2.6%	286	+ 4.0%	189	+ 31.3%
2013	35,048	- 1.5%	432	+ 51.0%	186	- 1.6%
2014	33,153	- 5.4%	441	+ 2.1%	145	- 22.0%

2015	35,312	+ 6.5%	435	- 1.4%	178	+ 18.5%
2016	35,658	+ 1.0%	513	+ 17.9%	177	+ 0.6%
2017	36,407	+ 2.1%	518	+ 1.0%	167	- 5.6%