GIVING SUBSTANCE TO THE BAD FAITH EXCEPTION OF EVANS V. JEFF D.: A RECONCILIATION OF EVANS WITH THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

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After a national reawakening to the debilitating effects of social inequity and injustice during the late 1950's and early 1960's, Congress enacted civil rights legislation with innovative fee-shifting provisions to encourage enforcement of these newly created statutory rights. Civil rights legislation passed during the Reconstruction Era did not contain such fee-shifting provisions. To encourage vindication of civil rights protected by these statutes, courts across the nation granted attorney's fees to prevailing litigants under a "private attorney general" theory. The Supreme Court halted this latter type of fee-shifting in Alyeska Pipeline Service Co. v. Wilderness Society. The Court held that the task of determining which statutes served the public good, to the extent that they warranted reimbursement of attorney's fees to successful litiga-
gants in an effort to encourage enforcement, was an issue for the legislature; absent legislative guidance, courts could not shift fees.\(^5\) Congress reacted swiftly. A little more than a year later, it enacted the Civil Rights Attorney’s Fees Awards Act of 1976\(^6\) ("Fees Act" or "Act"), providing a fee-shifting mechanism under which plaintiffs prevailing in an action to enforce the Reconstruction Era civil rights acts could receive compensation for attorney’s fees. The Fees Act boasted two purposes: to provide civil rights litigants with insufficient financial resources access to the legal process\(^7\) and to attract competent counsel to represent these litigants.\(^8\)

In *Evans v. Jeff D.*,\(^9\) the Supreme Court approved the simultaneous negotiation of settlement on the merits and attorney’s fees, including settlements incorporating a waiver of fees.\(^10\) This decision threatens to disrupt the intent of the Fees Act because it ignores both the deterrence element of fee-shifting and the degree to which enforcement of civil rights depends upon uniform fee awards. Unless the exceptions to fee waivers suggested in the *Evans* opinion provide sufficient limits to foreclose abusive waivers, i.e., waivers requested regularly by the defendant or bad faith waivers, *Evans* will undermine the congressional policies behind the Fees Act.

This Comment will propose an interpretation of the *Evans* Court’s bad faith exception that distinguishes fair settlements that are consistent with the congressional policies behind the Fees Act from those that defy congressional intent and are abusive. In its attempt to prevent some of the foreseeable damage to Congress’s intended operation of the Fees Act, and at the same time accommodate the judicial policy of encouraging settlements, this Comment seeks guidance from the *Evans* opinion, the Act’s statutory purpose, the principal mechanisms used by the judiciary to encourage settlement, and judicial and

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\(^5\) *Id.* at 263-64, 269.


\(^7\) See infra text accompanying notes 23-33.
\(^8\) See infra text accompanying notes 34-42.
\(^9\) 106 S. Ct. 1531 (1986).
\(^10\) *Id.* at 1545.
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congressional interpretations of the bad faith exception to the American Rule on attorney's fees.

Part I of this Comment examines the legislative history of the Fees Act and the Supreme Court's endorsement of the policies therein. It then explores the Evans decision and its doctrinal underpinnings. Part II illustrates that Evans cannot be reconciled with the legislative intent of the Fees Act, and that the decision will fail to effectuate its stated purpose of encouraging settlement unless it encompasses some limiting principle. However, after undertaking an examination of the Evans exceptions, Part III concludes that the Court's bad faith exception provides a vehicle through which both the vigor of the Fees Act in enforcing civil rights can be restored and the Court's goal of encouraging settlement can be implemented.

I. BACKGROUND

A. Attorney's Fees Awards

The American Rule on attorney's fees requires each litigant to bear her own cost. The judiciary, concerned that if the loser bore all costs the poor would not assert their rights out of fear of incurring this debt, adopted this doctrine over the European Rule, which shifted the full cost of litigation onto the losing party. Ironically, the American Rule has drawn similar criticism: because attorney's fees are not ordinarily part of the remedy of a successful litigant, the poor are often unable to pursue meritorious claims. The rich are able to stifle the claims of those with modest incomes by forcing delays that escalate the cost of litigation.

Perhaps in response to this criticism, the judiciary created three exceptions to the American Rule. The first exception is the "common

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13 See Ehrenzweig, supra note 12, at 794-98.

14 See Comment, supra note 12, at 639.
fund” theory, which permits the award of fees to a litigant who successfully preserves a common fund for a class of citizens. It spreads the cost of litigation throughout the class by reimbursing the named litigant out of the fund. The second exception is the “bad faith” exception, which allows courts to levy the fine of the opposing party’s attorney’s fees on a party who has proceeded in bad faith, vexatiously, or wantonly, either prior to or during litigation.

The third exception, the “private attorney general” theory, shifted liability for the plaintiff’s fees to the defendant when the plaintiff succeeded in conferring a benefit upon a class. The premise was that the vindication or preservation of certain rights benefits the society as a whole and that compensation should be forthcoming to one who, in acting on her own behalf, had also acted in the public interest. The Supreme Court, however, halted court awards of attorney’s fees under this theory when, in *Alyeska Pipeline Service Co. v. Wilderness Society,* it held that unless Congress specifically authorized fee-shifting, courts could not order it. The Court reasoned that the task of judging the societal importance of certain statutory mandates, and thus encouraging their enforcement through fee-shifting, was a task suited exclusively for the legislature.

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15 See Trustees v. Greenough, 105 U.S. 527 (1882). The *Greenough* Court reasoned that because the plaintiff had assumed the role of trustee by litigating to preserve or retrieve the fund, to deny fees would be to unjustly enrich the other beneficiaries of the fund. *Id. at 532.* See generally 6 J. Moore, W. Taggert & J. Wicker, Moore’s Federal Practice ¶ 54.77[2] (2d ed. 1986) [hereinafter Moore’s Federal Practice] (discussing the development of the “common fund” theory); Note, supra note 12, at 349 & n.23 (same).


18 See Comment, supra note 12, at 666-67.


20 *Id.* at 263-64. Although the Supreme Court later ruled otherwise, Senator Tunney, sponsor of the Senate version of the Fees Act, remarked that judicial encouragement of public interest litigation through fee-shifting was in response to congressional enactment of such provisions in similar legislation. That Congress was silent as to fee awards in some statutes was “merely a by-product of the legislative process and not a conscious signal to the courts of any kind.” Tunney, *Foreword: Financing the Cost of Enforcing Legal Rights,* 122 U. Pa. L. Rev. 632, 633 (1974).
B. Congressional Intent and Judicial Observance: The Civil Rights Attorney’s Fees Awards Act of 1976

In response to the Supreme Court’s decision in Alyeska, Congress enacted the Fees Act, which gave the courts authority to award reasonable attorney’s fees to a party prevailing on a civil rights claim. Congress’s goal was to create a mechanism for the vigorous enforcement of civil rights legislation without erecting a new bureaucratic scheme. The private attorney general theory rejected by the Alyeska Court provided the model. Its effective operation, however, depends on a scheme securing access to the legal process for all citizens, particularly disenfranchised minorities and the poor who were forced to endure the brunt of these violations. As Senator Mathias recognized: “Rights that cannot be enforced through the legal process are valueless; such a situation breeds cynicism about the basic fairness of our judicial system.” Fee-shifting simply recognizes that procurement of legal representation is necessary to obtain access to the legal process. Congress, therefore, translated its substantive goal into two intertwined directives to the judiciary. First, Congress foresaw the need for a uniform, nonpunitive cost recovery scheme favoring plaintiffs. The pitfalls of a strictly applied European Rule on attorney’s fees had been well documented. 


24 122 CONG. REC. 31,471 (1976), reprinted in SOURCE BOOK, supra note 21, at 20. Senator Mathias recognized that this legislation was especially necessary because “[a] series of decisions have shaped the doctrines of jurisdiction, justiciability and remedy, so as to increasingly bar the courthouse door . . . to the poor, the underprivileged, the deprived minorities.” (quoting Justice Brennan). Id.

25 Phillip Mause has comprehensively analyzed the defects of a winner-take-all rule. See Mause, Winner Takes All: A Re-examination of the Indemnity System, 55 IOWA L. REV. 26, 28-37 (1969); see also Comment, supra note 12, at 650-52 (“Studies suggest that the English Rule does not invariably encourage the disadvantaged to pursue their rights.”).
gress, therefore, declared in the Act's legislative history that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." On the other hand, a prevailing defendant should recover fees only where the plaintiff could be charged with having brought suit frivolously, or to harass or embarrass the defendant. These standards avoid the possibility that citizens with meritorious claims could be deterred from asserting them because of a lack of financial resources and a fear of assuming the defendant's fees. Similarly, Congress emphasized that "[t]he phrase 'prevailing party' [was] not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." Plaintiffs succeeding through a consent decree or through out-of-court settlement have benefited the public in the pursuit of their claim and should not be punished because in the process they also avoided congesting court dockets. Finally, Congress announced its intention that the states' eleventh amendment immunity was not to present a bar to the award of attorney's fees because to do so would be to disempower the Act at its inception. The civil rights statutes proscribe state action;


28 See S. REP. NO. 1011, supra note 21, at 4-5, reprinted in SOURCE BOOK, supra note 21, at 10-11; H.R. REP. NO. 1558, supra note 23, at 6-7, reprinted in SOURCE BOOK, supra note 21, at 214-15. Senator Kennedy, addressing the dual standard of recovery under the Fees Act, noted:

Awarding fees to prevailing defendants is intended to protect parties from being harassed by unjustifiable law suits. It is not, however, intended to deter plaintiffs from seeking to enforce the protections afforded by our civil rights laws . . . . Were Congress or the courts to provide otherwise, it would have a substantial chilling effect on the bringing of genuinely meritorious actions.


30 H.R. REP. NO. 1558, supra note 23, at 7, reprinted in SOURCE BOOK, supra note 21, at 215; see also S. REP. NO. 1011, supra note 21, at 5, reprinted in SOURCE BOOK, supra note 21, at 11 ("[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they indicate rights through a consent judgment or without formally obtaining relief.").

31 See H.R. REP. NO. 1558, supra note 23, at 6, reprinted in SOURCE BOOK, supra note 21, at 215; cf. Maher v. Gagne, 448 U.S. 122, 129-30 (1980) (drawing on the legislative history of the Fees Act to hold that a plaintiff prevailing on an out-of-court settlement was a "prevailing party" entitled to fees so long as sufficient relief was obtained therein).
if the Fees Act is to empower citizens to reach all constitutional violations, the states’ immunity must be limited.²² In short, by establishing a dual standard of recovery and by sanctioning the full operation of the Act to all possible defendants and to the entire length of the legal process, Congress added attorney’s fees “as a matter of course” to the remedies available to combat constitutional violations.³³

Congress also envisioned the attraction of competent counsel as necessary to fulfill the Act’s goals.³⁴ In this regard, Congress indicated that awards under the Fees Act should mirror awards “in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.”³⁵

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²² Senator Tunney announced in the Committee Report to the Senate that the defendants in these [civil rights] cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys’ fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

³³ S. REP. NO. 1011, supra note 21, at 5, reprinted in SOURCE BOOK, supra note 21, at 11 (footnotes omitted). Representative Drinan reported to the House that “[t]he greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.” H.R. REP. NO. 1558, supra note 23, at 7, reprinted in SOURCE BOOK, supra note 21, at 215. He thereafter noted that “the 11th Amendment is not a bar to the awarding of counsel fees against state governments.” H.R. REP. NO. 1558, supra note 23, at 7 n.14 (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)), reprinted in SOURCE BOOK, supra note 21, at 215 n.14.

Finding it impossible to overlook these statements of congressional intent, the Supreme Court held that attorney’s fees were recoverable against the state under the Fees Act as part of the costs traditionally awarded “without regard for the States’ Eleventh Amendment immunity.” Hutto v. Finney, 437 U.S. 678, 694-695 (1978). The Court recognized that “[i]f the Act does not impose liability for attorney’s fees on the States, it has no meaning with respect to them.” Id. at 698 n.31. Coupling this with the fact that “the Act primarily applies to laws passed specifically to restrain state action,” id. at 694, evidences that to hold otherwise would have been to repeal the Act.

³⁴ See S. REP. NO. 1011, supra note 21, at 6, reprinted in SOURCE BOOK, supra note 21, at 12 (stating that the standard chosen is one intended to produce “fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys”); H.R. REP. NO. 1558, supra note 23, at 9, reprinted in SOURCE BOOK, supra note 21, at 217 (stating that the Act, by ensuring that “reasonable fees are awarded to attract competent counsel . . . [w]ill . . . promote the enforcement of the Federal civil rights acts, as Congress intended, and . . . achieve uniformity in those statutes and justice for all citizens”).

³⁵ S. REP. NO. 1011, supra note 21, at 6, reprinted in SOURCE BOOK, supra note 21, at 12; see also H.R. REP. NO. 1558, supra note 23, at 9, reprinted in SOURCE BOOK, supra note 21, at 217. The Court has continued to endorse the view that attorneys who assume civil rights cases should receive § 1988 fees irrespective of the actual monetary recovery obtained so long as the suit has been otherwise successful. See City of Riverside v. Rivera, 106 S. Ct. 2686, 2689-90, 2695-97 (1986) (plurality opinion)
Thus the Court’s holding in *Blum v. Stenson*, that all attorneys who represent successful civil rights plaintiffs—whether private or non-profit—be compensated at the prevailing community market rates, can be imputed to Congress’s rejection of any notion of a public interest discount.

Under the Fees Act, the bait offered to attract competent counsel consists not only of the promise of payment at the market rate but also of the promise of payment in accordance with the degree of success. Congress articulated this directive by referring the courts to the twelve factors set down in *Johnson v. Georgia Highway Express, Inc.*, and insisting that its directives be interpreted broadly to effect the purpose of the Act. Consequently, the Supreme Court responded by holding that success on the core claim of a civil rights suit, although accompanied by court dismissal of the appended contentions, did not warrant a

(refusing to reduce an award of $245,456.25 in attorney’s fees so that it would proportionally reflect a damage recovery of only $33,350 in a case where essentially every charge was resolved in favor of the plaintiffs).

“Public interest discount” refers to the notion that attorneys who accept these cases are driven by civic responsibility, which consequently warrants fee reductions. See generally Berger, *Court Awarded Attorneys’ Fees: What Is “Reasonable”?*, 126 U. PA. L. REV. 281, 322-24 (1977). However, by reducing the economic attractiveness of certain cases, courts also restrict the supply of legal resources made available. See id. at 322-23.

The Supreme Court has distilled the *Johnson* standard into twelve factors:

1. the time and labor required; 2. the novelty and difficulty of the questions; 3. the skill requisite to perform the legal service properly; 4. the preclusion of employment by the attorney due to acceptance of the case; 5. the customary fee; 6. whether the fee is fixed or contingent; 7. time limitations imposed by the client or the circumstances; 8. the amount involved and the results obtained; 9. the experience, reputation, and ability of the attorneys; 10. the “undesirability” of the case; 11. the nature and length of the professional relationship with the client; and 12. awards in similar cases.

Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983) (emphasis added). The Court also has held that many of these considerations, among them the novelty and complexity of issues, and the quality of representation, are subsumed by the number of reasonably billable hours, and the reasonable hourly rate. *Stenson*, 465 U.S. at 898-90.

*See S. REP. No. 1011, supra note 21, at 3, reprinted in SOURCE BOOK, supra note 21, at 9; H.R. REP. No. 1558, supra note 23, at 8, reprinted in SOURCE BOOK, supra note 21, at 216; see also Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980) (citing S. REP. No. 1011, supra note 21); Mid-Hudson Legal Serv. v. G & U, Inc., 578 F.2d 34, 37 (2d Cir. 1978) (citing S. REP. No. 1011, supra note 21); Seals v. Quarterly Country Court, 562 F.2d 390, 393 (6th Cir. 1977) (citing H.R. REP. No. 1558, supra note 23); Donaldson v. O’Connor, 454 F. Supp. 311, 313 (N.D. Fla. 1978) (citing H.R. REP. No. 1558, supra note 23).
reduction in the fee award. In addition, the Court has indicated that an upward adjustment in the fee award may be warranted by the riskiness of success from the start of legal action.

Each prong of this legislative design contributes to make the Fees Act an effective deterrent to constitutional violations. Every potential violator understands that she is also a potentially unsuccessful defendant against whom fees can be assessed, because no defendant is exempt from the Act. This effect was not accidental. Congress both anticipated and relied on the Act's deterrent quality to aid the enforcement of civil rights.

In sum, the Fees Act finds its genesis in the notion that Congress has enacted legislation to redress social ills, which when enforced benefits the public. But if the rights conferred go unenforced because prospective plaintiffs lack the resources to procure representation and

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41 'Hensley, 461 U.S. at 435.
42 See Stenson, 465 U.S. at 901; see, e.g., Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 YALE L.J. 473, 473 (1981) (illustrating that to "add a contingency bonus to the basic fee award in cases that the plaintiff was unlikely to win . . . give[s] lawyers for nonpaying clients an incentive to take risky . . . cases").

The Court is divided over the awarding of contingency bonuses under fee-shifting. In a case coming under the Clean Air Act, § 304(d), 42 U.S.C. § 7604(d) (1982), a plurality of Justices agreed "that Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee shifting provisions such as that of . . . the Fees Act." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078, 3089 (1987) (O'Connor, J., concurring in part). A different plurality agreed, however, "that the 'novelty and difficulty of the issues presented, and . . . the potential for protracted litigation,' are factors adequately reflected in the lodestar." Id. (O'Connor, J., concurring in part) (quoting White, J., id. at 3087).

43 See S. Rep. No. 1011, supra note 21, at 3, reprinted in SOURCE BOOK, supra note 21, at 9 ("[F]ees are an integral part of the remedy necessary to achieve compliance with our statutory policies."); id. at 5, reprinted in SOURCE BOOK, supra note 21, at 11 ("[T]he effects of . . . fee awards are ancillary and incident to securing compliance with these laws, and . . . fee awards are an integral part of the remedies necessary to obtain such compliance."); id. at 6, reprinted in SOURCE BOOK, supra note 21, at 12 ("[F]ee awards . . . are necessary if citizens are to be able to effectively secure compliance with these existing statutes."); see also Dennis, 611 F.2d at 1306 (A fee award "encourages potential defendants to comply with civil rights statutes."); Berger, supra note 38, at 309 ("[A]ttorneys' fee provisions act as a deterrent to noncompliance."); Levin, Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees Are Authorized, 14 CLEARINGHOUSE REV. 515, 519 (1980) ("Congress intended that the award of attorney's fees was to act as a substantial deterrent to illegal conduct by defendants.").


45 See H.R. Rep. No. 1558, supra note 23, at 1, reprinted in SOURCE BOOK,
public interest organizations lack a sufficient workforce to provide access to the courts for all those whose rights have been violated, that public benefit will be lost: meritorious grievances remain unredressed and unvindicated. The Act also recognizes that private attorneys cannot afford to take even meritorious claims if they will not be compensated. Hence, the answer is to provide compensation to the attorneys who assume these cases by adding the cost of litigation to the remedies secured by litigants who succeed. The assurance of payment for successful claims bridges the gap between the client and the attorney.

C. The Evans Decision

1. Fees Waivers: An Ethical Dilemma

_Evans v. Jeff D._ was a suit brought on behalf of emotionally and physically handicapped children in the care of the state of Idaho. The complaint alleged violations of the federal Constitution, the state constitution, and federal and state statutory provisions on behalf of these wards and sought both injunctive relief and all costs including attorney's fees. One week before trial, plaintiffs' attorney, Johnson, agreed to a settlement proposal offering "virtually all of the injunctive relief [plaintiffs] had sought in their complaint." The agreement stipulated

supra note 21, at 209; see also S. REP. No. 1011, supra note 21, at 2, reprinted in SOURCE BOOK, supra note 21, at 8.

46 A principal objective of the Fees Act is to attract private attorneys to take civil rights cases. Congress believed this would give aggrieved plaintiffs more effective access to the courts. See supra notes 34-42 and accompanying text. Thus, Congress realized that civil rights organizations could not bear the entire burden of representing persons who cannot afford protracted litigation. See H.R. REP. No. 1558, supra note 23, at 3, reprinted in SOURCE BOOK, supra note 21, at 211 ("[P]rivate lawyers are refusing to take certain types of civil rights cases," and civil rights organizations "[cannot] afford to do so."). See generally COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 312-20 (1976) (discussing court-awarded attorneys' fees as a source of funding for public interest law).

47 See 122 CONG. REC. 33,314 (1976), reprinted in SOURCE BOOK, supra note 21, at 200-02 (statement Sen. Kennedy); see also Comment, Settlement Offers Conditioned upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. PA. L. REV. 793, 795 (1983) ("The goals of the Fees Act cannot be achieved if attorneys decline to represent civil rights plaintiffs out of fear that they will go uncompensated even when their clients prevail."); Comment, supra note 12, at 708 ("Whether the purpose of awarding attorney's fees is seen as making a litigant whole or as encouraging the private bar to participate actively in certain types of litigation, that purpose is in some measure defeated if the attorney does not receive full and fair compensation adequate to induce him to take cases on the expectation of receiving such awards." (footnotes omitted)).


49 Id. at 1534.

50 Id. (quoting Brief for Respondents, at 5 (No. 84-1288)). Johnson was employed at the time by the Idaho Legal Aid Society.
that the parties would bear their own costs and attorney's fees, if approved by the District Court.\footnote{Id. at 1535 & n.5. Because the case was a class action, Rule 23(e) of the Fed. R. Civ. P. required it to be approved by the District Court.}

Johnson argued before the District Court that the simultaneous negotiation of merits relief and fees was ethically infirm: it allowed a proposed fee waiver to place the attorney in the position of negotiating either for fees or for relief, thereby undermining the attorney's duty to represent her clients' interests loyally.\footnote{Id. at 1535.} Johnson explained why he accepted the state's offer:

"I was forced, because of what I perceived to be a result favorable to the plaintiff class, a result that I didn't want to see jeopardized by a trial or by any other possible problems that might have occurred. And the result is the best result I could have gotten in this court or any other court and it is really a fair and just result in any instance and what should have occurred years earlier and which in fact should have been the case all along. That result I didn't want to see disturbed on the basis that my attorney's fees would cause a problem and cause that result to be jeopardized."\footnote{Id. at 1535 n.6.}

The District Court rejected this argument and approved the waiver, but the Court of Appeals reversed and remanded on the ground that "the strong federal policy embodied in the Fees Act normally requires an award of fees to prevailing plaintiffs in civil rights actions, including those who have prevailed through settlement."\footnote{Id. at 1536.} The Court of Appeals approved the settlement on the merits, but invalidated the fee waiver and ordered the District Court to make a reasonable determination of fees.

The Supreme Court reversed the Court of Appeals, holding that the District Court had acted within its authority.\footnote{The Court first noted that the appellate court's judgment constituted a modification of the consent decree. Justice Stevens, writing for the majority, announced that Fed. R. Civ. P. 23(e) does not give the courts power to modify a consented-to settlement; it simply authorizes a court to approve or reject the settlement. Id. at 1537.} In the Supreme Court, as in the District Court, Johnson first argued that condoning the simultaneous negotiation of relief on the merits and attorney's fees imposed an ethical dilemma on counsel who is forced to weigh his interest in an award of fees against his commitment to full and fair relief for his clients. The Court dismissed the notion that creating a conflict in-
ternal to the "strictures of professional ethics" could place a duty upon the courts to reject an offered settlement. Insisting that if this duty existed it must "derive ultimately from the Fees Act," the Court concluded that, under the Act, Johnson had no ethical obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently. Since the proposal to settle the merits was more favorable than the probable outcome of the trial, Johnson's decision to recommend acceptance was consistent with the highest standards of our profession.

The Court thereby implied that although the defendant's counsel had no ethical responsibility not to extend an offer encompassing a fee waiver, the plaintiffs' counsel might be compelled ethically to accept the offer.

2. Fees Waivers: Promoting Settlement

The Court acknowledged that "in the aggregate and in the long run" endorsing fee waivers could deter attorneys from representing the often indigent civil rights plaintiff and would therefore be antithetical to the Act's purpose. In the majority's view, however, this argument was premature, and nevertheless inapplicable to individual instances of negotiated waivers. Justice Stevens, writing for the majority, explained that "[t]he statute and its legislative history nowhere suggest that Congress intended to forbid all waivers of attorney's fees." After all, Justice Stevens asserted, the Act bestowed the award upon the cli-

56 Id.
57 Id.
58 Id. at 1537-38 (footnote omitted).
59 The New York City Bar Association has noted that when requesting a waiver of the plaintiff's statutory fees as a condition of settlement, defendants "make a demand for a benefit which the plaintiff's lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest." New York Bar Ass'n Comm. on Professional and Judicial Ethics, Op. 80-94, reprinted in 36 Rec. A.B. Cty N.Y. 507, 508 (1981). For a discussion of ethical considerations in settlement offers conditioned on fee waivers, see Comment, Evans v. Jeff D. and the Proper Scope of State Ethical Decisions, 73 VA. L. REV. 783, 784-86, 797-805 (1987) (discussing the ethical conflict created by the Supreme Court's approval of fee waivers, and concluding that the supremacy clause of the Constitution does not require state bar association opinions barring waivers to give way to Evans); Comment, supra note 47, at 810-13 (analyzing opinion by the Ethics Committee of the New York City Bar Ass'n condemning settlements conditioned upon fee waivers).
60 See Evans, 106 S. Ct. at 1545 n.34.
61 See id.
62 Id. at 1539.
ent, not the attorney, and the client has as much right to use a waiver as a bargaining chip as she does any other item of redress, such as a "concession on damages to secure broader injunctive relief." He further reasoned that a rule forbidding concurrent discussion of all outstanding liabilities would impede settlement of the case as a result of the significant liability attorney's fees pose for defendants in civil rights cases. Hence, it was clear to Justice Stevens that the Fees Act did not, and should not, bar individually requested fee waivers. To the contrary, the Court implied that so long as the defendant did not act in bad faith or pursuant to a policy of requesting fees waivers, and provided an adequate quid pro quo for the waiver, judicial disapproval would not be forthcoming.

The Court's discussion of an adequate quid pro quo for a fee waiver reveals its understanding that a fee waiver means only that the plaintiff waives the right to fees qua fees and in its place accepts some other, additional relief. Two illustrations offered by the Court con-

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63 Id. at 1539-40.
64 See id. at 1540-42.
65 See id. at 1544 ("[A] fee waiver need not be approved when the defendant 'had no realistic defense on the merits,' . . . or if the waiver was part of a 'vindictive effort . . . to teach counsel that they had better not bring such cases[.]' " (citations omitted)). The majority went so far as to refuse to evaluate the argument even though they conceded that waivers would be illegally chilling if mandated by state statute or consistently requested by a particular defendant. See id.
66 See id. ("[T]hey [respondents] have not offered to prove that the petitioners' tactics in this case merely implemented a routine state policy designed to frustrate the objectives of the Fees Act.").
67 See id. ("[T]he extensive structural relief [respondents] obtained constituted an adequate quid pro quo for their waiver of attorney's fees.").
68 The other reading is that the plaintiff can agree to completely extinguish her right to fees, and therefore the value of fees need not be accounted for in the form of other relief in order to satisfy the Court's quid pro quo requirement. This reading seems to be supported by a footnote to the Evans opinion in which the Court emphasizes the discretion afforded courts by the Fees Act. id. at 1540 n.22, as if to suggest that awards, and thus waivers, are at the complete discretion of the courts and plaintiffs have no real entitlement to fees. But the Act's legislative history reveals that the discretion afforded courts by the Fees Act merely reflects the standard for awards to prevailing plaintiffs as set forth in Newman v. Piggie Park Enter., 390 U.S. 400, 401-02 (1968). See S. Rep. No. 1011, supra note 21, at 4-5, reprinted in SOURCE BOOK, supra note 21, at 10-11; 122 Cong. Rec. 32,185 (1976), reprinted in SOURCE BOOK, supra note 21, at 138, 139 (statement of Sen. Tunney) ("S. 2278 [which became the Fees Act] states that the fees are to be allowed in the discretion of the court. That discretion has been included in the most recent civil rights statutes . . . and the standards enunciated in Newman . . . have been more than ample."). That is, prevailing civil rights plaintiffs should receive fees as a matter of course unless circumstances indicate otherwise. See Newman, 390 U.S. at 402. In addition, discretionary fee acts endorsing awards solely to prevailing plaintiffs deny awards to plaintiffs who bring harassing or frivolous suits, or plaintiffs with enough resources to assume attorneys' fees (i.e., wealthy plaintiffs). 1 M. Derfner & A. Wolf, COURT AWARDED ATTORNEY FEES § 5.03 (1986). Perhaps the Evans footnote is best explained as an attempt to
firm this position. First, the Court likened a fee waiver to a concession made on damages to secure more expansive injunctive relief; and second, it indicated that the injunctive relief attained by the Evans plaintiffs exceeded the amount the courts were willing to grant. In either case, it appears that the defendant must address her total liability in the settlement proposal, which in cases litigated under fee-shifting legislation, includes the value of fees thus far accrued. Illustrations such as these demonstrate that the Court understands the term waiver to mean a concession for which there exists equal consideration, rather than the unilateral surrender of a right. Under this definition, the plaintiff accepting a waiver surrenders only the right to transfer the fee to the attorney should the package consist of little or no monetary relief.

By permitting the simultaneous negotiation of fees and merits relief, and allowing fee waivers, the Court intended to encourage settlement by providing the parties with the greatest number of bargaining chips. Unfortunately, in promoting settlement the Court sacrificed the enforcement of the civil rights acts.

3. Fee Waivers: Encroachment on the Goal of Civil Rights Enforcement

In dissent, Justice Brennan adopted Johnson's argument that fee waivers undermine the goal of civil rights enforcement. Justice Brennan's dissent vehemently argued that the proper procedure was to "permit simultaneous negotiation of fees and merits but prohibit the plaintiff from waiving statutory fees." Brennan precisely targeted the infirmity in the Court's opinion; permitting fees waivers adds an element of uncertainty into the Fees Act, undermining congressional intent to encourage attorneys to take on civil rights cases. Consequently, the entire enforcement mechanism is subverted.

The subversion of civil rights enforcement is not an inevitable result of promoting settlement in civil rights cases. Justice Brennan's proposal in Evans, permitting simultaneous negotiation of the merits and fees while prohibiting fee waivers, would also allow the defendant to

69 See Evans, 106 S. Ct. at 1539.
70 See id. at 1534.
71 See id. at 1539 & n.20, 1540-42.
72 Id. at 1551 (Brennan, J., dissenting).
73 See infra text accompanying notes 88-93.
74 Evans, 106 S. Ct. at 1551, 1557 (Brennan, J., dissenting).
know the full extent of her liability and promote settlement. Nonetheless, this proposal was rejected by the Court.\textsuperscript{75}

In rejecting Justice Brennan's proposal, the Court established the promotion of settlement as its paramount concern, even to the extent of encouraging improper settlement agreements. An improper settlement can result from at least two situations. First, the Court's decision is designed to encourage settlement in those situations where the injunctive relief offered exceeds that which would reasonably be expected at trial, but where anything less would be ad hoc,\textsuperscript{76} by permitting waived fees to be added to the defendant's resources giving her the amount necessary to provide broader relief. Second, the Court envisions the decision as making settlement possible where the plaintiff's "prospect of winning at trial may be very doubtful," and the defendant "would rather gamble on the outcome at trial than pay attorney's fees and costs up front."\textsuperscript{77}

As Justice Brennan's dissent observed, these situations enable plaintiffs to obtain relief to which they are not entitled.\textsuperscript{78} To promote the interest of plaintiffs with doubtful claims over those who possess meritorious claims offends the bold purpose of the Fees Act, which is to facilitate the enforcement of civil rights through the private prosecution of meritorious claims.\textsuperscript{79}

\textit{Evans} creates a structure favoring the individual client at the expense of the attorney,\textsuperscript{80} and ultimately at the expense of future civil rights litigants, who, because of the inadequate fee generating alternatives,\textsuperscript{81} depend on the Fees Act's uniform and consistent operation to attract counsel to represent them.\textsuperscript{82} Such a harsh and unyielding result could not have been the intent of the Court, which realized that "Congress expected fee-shifting to attract competent counsel to represent citizens deprived of their civil rights."\textsuperscript{83} The Court simply reasoned that Congress did not intend "to forbid all waivers."\textsuperscript{84}

Thus, \textit{Evans} is not an unconditional endorsement of fee waivers,
because it contains two exceptions to its rule that district courts have the discretion to approve fee waivers. These exceptions occur when: 1) the defendant routinely proposes fee waivers to frustrate the objectives of the Fees Act; and 2) the defendant demonstrates bad faith in proposing the fee waiver, for example, a vindictive effort to deter attorneys from taking civil rights cases. Absent these exceptions, the Court risks effectively repealing the Fees Act's enforcement machinery as well as escalating the number of cases which go to trial or which seek appeals on the matter of fees.

II. EVANS: THE ANOMALOUS RESULTS

Since one of the overriding purposes of the Fees Act is to encourage private enforcement by attracting competent counsel, this purpose is furthered by the preservation of fees qua fees as an entitlement of the client. Such an interpretation goes farthest in both ensuring attorneys of payment upon successfully litigating a civil rights claim and securing the rigorous enforcement of civil rights. Evans v. Jeff D. seems to hold an opposite conclusion: the client possesses the complete discretion to waive the attorney's right to fees. Should Evans be
interpreted in this manner it will dismantle the Act's enforcement ma-
chinery with regard to cases poised for settlement. Since settlement
serves both the client and the judicial system by eliminating the need
for trial and lessening docket congestion, it is usually the goal of every
attorney. Therefore, all private attorneys who venture to take on civil
rights cases will accordingly have to consider the effects of Evans, and
the number choosing to assume these cases in spite of Evans will cer-
tainly decline; and in fact, these attorneys will have no greater incentive
to settle cases that are brought.

A. The Inadequacy of Alternative Fee Generating Agreements

In theory, alternatives exist for an attorney seeking to guarantee
payment upon having successfully shepherded a case through the legal
process, most notably contingent fee and retainer agreements. These al-
ternatives, however, are generally ineffective because they possess many
disabilities.

Contingent fee agreements are a viable option when the magnitude
of the anticipated judgement can cover the cost of litigation. This cir-
cumstance rarely occurs with claims of constitutional violations. Many litigants seek injunctive relief. In addition, an award of dam-
ages depends upon actual physical or emotional harm. Thus after months, possibly years, of entanglement in the legal process, a prevail-
ing plaintiff may walk away with a pittance. Absent actual injury to
the plaintiff, courts can award only nominal damages, a reflection perhaps of the notion that constitutional rights are not for sale. Neither
may damage awards be based on the value to society of the right in-
fringed. Moreover, the various immunity doctrines either bar or limit monetary relief to plaintiffs asserting a valid violation of their constitutional rights by the state or state officials.

93 The "vast majority" of complaints filed are settled. See D. Waterman & M. Peterson, Models of Legal Decisionmaking 1 & n.2 (1981).
94 See O. Fiss, Injunctions 391 (2d ed. 1984); cf. Simon, The New Meaning of Rule 68: Marek v. Chesney and Beyond, 14 N.Y.U. REV. L. & SOC. CHANGE 475, 485 n.62 (1986) (citing the frequency of cases that seek, among other remedies, injunc-
tive relief).
95 O. Fiss, supra note 94, at 58.
96 Id. at 59.
97 See, e.g., Carey v. Piphus, 435 U.S. 247, 266-67 (1978) (directing that absent proof of actual injury, the plaintiff is entitled solely to recover nominal damages not to exceed one dollar).
98 See, e.g., Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537, 2545 (1986) (holding that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages").
Attempts to determine the viability of retainer agreements face equally distressing obstacles. Although the Fees Act cannot prevent an attorney from requiring that her client agree to settle only if the settlement offer encompasses reasonable attorney's fees,\textsuperscript{100} proscriptions are found in the Model Rules of Professional Conduct. Model Rule 1.2(a)\textsuperscript{101} and Model Rule 1.7(b)\textsuperscript{102} provide respectively that any significant limitation on the client's exclusive right to settle litigation is invalid and that counsel's financial interests cannot overshadow the client's interests. An agreement in which the client agrees to forego settlement should the defendant propose an Evans offer would, therefore, appear invalid by virtue of the application of these rules. Significantly, performance of such an agreement turns on the existence or the absence of fees per se in the settlement package.\textsuperscript{103} Ultimately, therefore, the client alone makes the decision either to continue or to resist an offer enhanced at the expense of the attorney.

Disregarding the attitudes of courts or bar associations toward retainers binding clients to specific forms of settlement, the serious consequence of the Evans decision is the effect on the enforcement of civil rights. Evans requires attorneys to entertain and employ tactics previously reserved for obtaining merit relief to secure compensation for otherwise worthy efforts. No longer is a successful attorney assured of compensation; payment is ensured only as long as the client does not waive it, unless the attorney short-circuits the client's waiver.

B. After Evans: An Incentive To Litigate Fee Waivers

Before Evans, the prospect of incurring plaintiff's fees provided a

\textsuperscript{100} Neither the Fees Act nor its legislative history address the possibility of alternative means of payment between the attorney and client.

\textsuperscript{101} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

\textsuperscript{102} Id. at Rule 1.7(b) (1983).

\textsuperscript{103} Evans can also be read to require that the attorney's decision as to how to proceed during the course of litigation must not be based, in any part, upon concern for the fee award. See Evans 106 S. Ct. at 1537-38. But cf. Goldstein, Settlement Offers Contingent Upon Waivers of Attorney Fees: A Continuing Dilemma After Evans v. Jeff D., 20 CLEARINGHOUSE REV. 693, 699-701 (1986) (suggesting the restructuring of retainer agreements in compliance with the Evans doctrine and an attorney's ethical obligations).
defendant incentive to settle meritorious civil rights claims quickly. Plaintiffs were similarly encouraged to settle by the Supreme Court's "plain meaning" interpretation of Rule 68 of the Federal Rules of Civil Procedure\textsuperscript{104} and its interaction with the Fees Act\textsuperscript{108} in \textit{Marek v. Chesny}.\textsuperscript{106} The \textit{Marek} Court equated attorney's fees to "costs" for purposes of Rule 68. The Court, as a result, held that if a plaintiff rejects a proposed settlement offer only to recover less relief at trial, then the defendant is relieved of liability for the plaintiff's post-offer fees and costs.\textsuperscript{107} Defendants now can propose a slightly more or less fair settlement offer during early negotiations, thereby disarming the plaintiff throughout the remainder of the negotiations of the statutorily implemented leverage.\textsuperscript{108}

With the \textit{Evans} rule in place, the combined ambiguities of \textit{Evans} and \textit{Marek} produce three possible scenarios in which the client and the attorney must decide whether to settle or to continue. First, a \textit{Marek} Rule 68 offer, which prevents a plaintiff from shifting post-offer costs to the defendant if the success on the merits is less than the offer, can simultaneously operate as an \textit{Evans} offer, which is a reasonable settlement conditioned on a fee waiver. This possibility exists because, although the \textit{Marek} Court held that a Rule 68 offer must include attorney's fees,\textsuperscript{109} the courts may decide that an \textit{Evans} offer implicitly contains attorney's fees.\textsuperscript{110} Second, \textit{Marek} can be interpreted as permitting the abatement of post-offer fees under fee-shifting statutes when the plaintiff obtains less favorable relief at trial even for offers outside the context of Rule 68.\textsuperscript{111} In other words, the crucial factor in denying fees from the date of the offer will be whether the proposed merit relief exceeded the merit relief obtained at trial.\textsuperscript{112} Under these circumstances, an \textit{Evans} offer mirrors a \textit{Marek} offer.

\textsuperscript{104} FED. R. CIV. P. 68. Rule 68 requires that a plaintiff less successful at trial than she would have been at settlement bear her own post-offer "costs."
\textsuperscript{105} 42 U.S.C. § 1988. The Fees Act awards attorney's fees "as part of the costs."
\textsuperscript{106} 473 U.S. 1 (1985).
\textsuperscript{107} Id. at 10-11.
\textsuperscript{109} Marek, 473 U.S. at 9. The Supreme Court has held that if a Rule 68 offer does not explicitly state that fees are included, a court may award reasonable attorney's fees. See Delta Air Lines v. August, 450 U.S. 346, 362-64 (1981). The question remaining is whether a Rule 68 offer that explicitly states that attorney's fees have been added to the injunctive relief may double as an \textit{Evans} offer.
\textsuperscript{110} This conclusion is derived from \textit{Evans}, which states that fees are not considered waived, but rather are seen as exchanged for other relief. See \textit{supra} text accompanying notes 68-70.
\textsuperscript{111} See Simon, \textit{supra} note 94, at 513.
\textsuperscript{112} See id.
Defendants in these situations will have a disincentive to proffer a fair settlement at the commencement of negotiations. They will instead have an incentive to make low early offers and hold out until eleventh-hour negotiations to offer relief at or just above that expected at trial but conditioned upon a fee waiver, because even by proposing a grossly understated offer the defendant’s attorney forces the plaintiff’s attorney to evaluate her position in light of two unfavorable rules of law. It is rather likely that defense attorney’s will view this situation as an unparallelled opportunity to precipitate a windfall settlement. Informed counsel for the plaintiff in these circumstances may find trial a more attractive alternative because, if successful, she would receive compensation for her efforts and simultaneously acquire “meritorious” relief for her client. Even if an understated initial offering were accepted, the attorney and client could well institute a separate action for attorney’s fees, alleging that the defendant proceeded in bad faith.

Civil rights cases are most widely undertaken against states, municipalities, their agencies, and their officials. The defendant’s representation is, therefore, charged to salaried attorneys general and assistant attorneys general. It is foreseeable that Evans will permit, and indeed encourage, these attorneys to deny or understate liability during the initial settlement negotiations in an effort to wear away the plaintiff’s confidence and resolve. If the plaintiff persists, and trial appears imminent, the defendants will then be cornered into offering a valid settlement, at which time the attorney would be "remiss" not to request a fee waiver, thereby limiting the state’s liability. Cf. Evans, 106 S. Ct. at 1553 (Brennan, J. dissenting) (a fee waiver offer would be part of an attorney’s duty of zeal).

Although this maneuver may be halted by the courts as contradictory to the ethical obligations of an attorney, see supra text accompanying note 102, one also can conclude that, given the client’s approval, these actions are not circumscribed, see supra text accompanying note 103.

The courts have already approved motions by the attorney or the client, not even necessarily based on bad faith, to prevent defense counsel from executing a fee waiver. See, e.g., Lisa F. v. Snider, 561 F. Supp. 724, 725-26 (N.D. Ind. 1983) (fee waiver is private agreement contrary to intent of Fees Act; no mention of bad faith requirement). Other courts, however, have denied motions to extinguish waivers or grant fees where the settlement did not provide for such an award. See, e.g., Aho v. Clark, 608 F.2d 365, 366-67 (9th Cir. 1979) (denial of attorney’s fees within scope of court’s discretion under statute). However, in cases where defendants have either acted in bad faith or have a practice of requesting fee waivers, the Court’s suggestion in Evans of defenses to an accepted waiver would suggest that courts are now bound to entertain these motions.

Post-Evans cases have already reached the courts. In Willard v. City of Los Angeles, 803 F.2d 526 (9th Cir. 1986), the Ninth Circuit held that an attorney has no standing to seek attorney’s fees on his own behalf and found no evidence that the defendant “adopted a statute, policy or practice of requiring waiver of fees as a condition of settlement or that it has vindictively sought to deter attorneys from bringing civil rights suits.” Id. at 527-28. The court did not articulate what evidence was necessary to make a finding of policy or practice or bad faith. See also Blackwell v. Department of Offenders Rehabilitation, 807 F.2d 914, 915 (11th Cir. 1987) (attorney’s claim for fees
Finally, *Marek* could be restricted to Rule 68 offers and *Evans* interpreted as explicitly excluding attorney’s fees, thus making the offers incompatible. This would give rise to two divergent strategies. First, the defendant’s attorney could make an *Evans* offer early. Because *Evans* offers enhance the appearance of the settlement by augmenting what the defendant would ordinarily offer with funds originally targeted for the attorney’s fee, these offers are more appealing to defendants as a result of their added attractiveness to plaintiffs. Such an offer, however, is a last resort; it is always advantageous for the defendant to hesitate and understate liability in order to further enhance the “real” offer. If such a final offer is rejected, the defendant will rush to enter a Rule 68 offer in an attempt to arrest the accrual of fees. At this point, settlement conceivably could occur because the defendant has addressed both the attorney’s interest and the client’s interest. Furthermore, the offer is probably a fair one because it is in the defendant’s best interest to extend an offer that hovers around the anticipated court award to curtail its potential liability for the plaintiff’s attorney’s fees.

The second strategy that could be undertaken by a defendant is to offer a Rule 68 settlement early in the negotiation process. If the offer is rejected, the defendant nullifies the threat of accruing fees. The defendant is now free to pursue tactics aimed at weakening the plaintiff—a pursuit which naturally culminates in an offer conditioned on a waiver of fees. Faced with this situation, a plaintiff’s attorney who does not accept the initial Rule 68 offer will probably choose to litigate, provided she has the approval of her client, taking the chance that an offer tendered by the defendant just after the case was filed was inaccurate. Moreover, for the plaintiff’s attorney the choice is between going to trial or receiving nothing for her services. As the above discussion of the incentives created by *Marek* and *Evans* reveals, the Supreme Court may have fashioned a rule which encourages rather than discourages litigation.

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116 *See Simon, supra* note 94, at 514.
117 *Cf. id.* at 510-12 (discussing *Marek* offers).
118 *See id.* at 514.
119 *See id.* at 506.
120 *Cf. id.* at 510 (recommending that a defendant make a low initial *Marek* offer to catch the timid plaintiff or the plaintiff with a weak case).
III. A Reconciliation of Evans with the Fees Act: Giving Substance to Evans' Bad Faith Exception

A. The Impotence of Evans' "Policy" Exception

The holding in Evans v. Jeff. D., that fee waivers are permissible, was accompanied by a discussion in dicta of two primary exceptions to the Court's approval of fee waivers: fees could not be waived (1) where the defendant makes a policy of demanding waivers as a condition of settlement, or (2) where the defendant's requested waiver constitutes vindictiveness, i.e., bad faith. Although neither exception has been fully explicated by the Supreme Court or lower courts, the nature of the judicial process suggests that the fee waiver policy exception cannot safeguard the interests of civil rights litigants. Such an allegation would require extensive discovery to find evidence, statistical or otherwise, that requested waivers are an entrenched procedure with the defendant. An appeal under this exception would simply increase litigation (and expense) without increasing the plaintiff's likelihood of obtaining fees. As anticipation of success is the instrument through which the Fees Act is intended to attract attorneys to these cases, the Court's disqualification of "policy" fee waivers fails to further congressional intent because it fails to restore the predictability of fee awards.

B. The Effectiveness of Evans' Bad Faith Exception: A Proposed Interpretation

The bad faith exception suggested by the Court in Evans can be defined in such a way as to bolster the Act's purpose and to encourage settlement. Just as the Supreme Court fashioned a rule in Marek v. Chesney presuming the disentitlement to post-offer fees of plaintiffs who reject settlement offers greater than relief obtained at trial, a court could fashion a rule presuming the disentitlement to a fee waiver of a defendant who rejects a plaintiff's settlement offer only to later propose a similar settlement conditioned on a fee waiver.

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121 106 S. Ct. 1531 (1986).
122 Id. at 1543-44.
123 The Evans exceptions have been litigated in some lower courts, but the standard of proof necessary to demonstrate that a waiver is the result of a policy designed to undercut the Fees Act or a vindictive effort to deter civil rights attorneys from taking cases has not been established. See, e.g., Willard v. City of Los Angeles, 803 F.2d 526, 528 (9th Cir. 1986) (court asserted that defendant had not adopted a policy of requiring fee waivers as a condition of settlement; it did not adduce a standard of proof).
125 Id. at 11.
In *Marek*, the court noted that the prevention of delay justified the automatic rule prohibiting the recovery of post-offer fees by some plaintiffs:

Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants . . . . Civil rights plaintiffs . . . who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. . . . And, . . . settlement will provide [plaintiffs] with compensation at an earlier date without the burdens, stress, and time of litigation.\(^\text{126}\)

Turning to the policy underlying the Fees Act, the Court reasoned that because the degree of success was "'the most critical factor'" in determining the reasonableness of fees, the plaintiff's lack of benefits received for post-offer services lent strong support to its conclusion that such post-offer fees were not recoverable.\(^\text{127}\)

One commentator, Professor Simon, has suggested that the nexus between reasonableness of fees and degree of success illustrates that a civil rights plaintiff has no entitlement to fees accrued after a more favorable offer of settlement than judgment received at trial whether or not the offer is a Rule 68 offer.\(^\text{128}\) Indeed, prior to Rule 68 the courts may have possessed the authority to deny fees in these circumstances.\(^\text{129}\) In effect, *Marek* and Professor Simon's suggestion embody a presumption that lack of success between the offer and trial is a result of inexcusably dilatory proceedings, i.e., that counsel has acted vindictively, wantonly, and in bad faith.

By analogy, it is fair to say that where the defendant rejects an offer of settlement only to propose substantially the same offer much later in the negotiating process with the addition of a fee waiver the proceedings have been dilatorily and vexatiously multiplied, duly warranting the presumption of bad faith and vindictiveness. In this scenario, the defendant's offer expressly concedes the plaintiff's right to the

\(^{126}\) *Id.* at 10.

\(^{127}\) *Id.* at 11 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

\(^{128}\) See Simon, *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. Cin. L. Rev. 889, 904-05 (1984) (Professor Simon contributed to the petitioner's brief in *Marek*). Professor Simon also suggests that there are situations where despite the apparent lack of post-offer success an award of fees would be justified, e.g., "if a key witness . . . dies or disappears after the settlement offer," or "if an adverse and controlling case is decided after the rejection of the settlement offer." *Id.* at 904 & n.72. In these situations, the time spent litigating would not be presumptively dilatory.

\(^{129}\) See *id.* at 904 & n.72; see also Simon, *supra* note 94, at 513.
originally proffered settlement. Because it also contains a fee waiver, the Evans offer denigrates the plaintiff's attorney's efforts following the plaintiff's original offer.

This Comment urges the uniform adoption of this presumption of bad faith on the part of such defendants. The presumptive rule mitigates some of the harm that would otherwise result from Evans by reinstating a fees predictor. Moreover, with this rule in place, when settlement is feasible, settlement will ensue and be facilitated.

1. The Merits of Adopting the Presumptive Rule

The adoption of an interpretation of Evans' bad faith exception to include presumptively those situations in which a plaintiff offers a settlement which is rejected, but later substantially resumed by the defendant with the addition of a fee waiver provision, would restore some of the lost assurance of a fee award to successful plaintiffs' attorneys. At any point during the negotiation process at which the plaintiff's attorney extends a valid offer to the defendant, she could extinguish the defendant's use of the fee waiver. This presumptive rule, therefore, enables the plaintiff's attorney to combat the defendant-biased power unleashed by both the Marek and Evans decisions. Because the presumptive rule forces defendants to consider thoughtfully the efficacy of accepting the plaintiff's offer, the probability that they will accept the plaintiff's proposal is greatly enhanced if the plaintiff's counsel scrupulously researches the value of the case. By once again linking pay-

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130 See supra text accompanying notes 88-103.
131 This Comment does not address every facet of the presumptive rule. Nonetheless, I would suggest that defendant's offer be considered "substantially the same" as plaintiff's original if it is: a) equal to or exceeds the relief on the merits in plaintiff's offer, and b) is less than or equal to the plaintiff's total original offer plus the value of attorney's fees accrued since that time. For example, consider the case of a § 1983 action for illegal search and seizure by police officers who also cause extensive bodily and emotional harm to plaintiff, X. X's attorney proposes a $100,000 settlement offer—$60,000 for the physical harm to X, $20,000 for her emotional harm, and $20,000 for fees thus far accrued. The offer is rejected. Six months later, after X's attorney has accrued an additional $20,000 in fees, the defendant's attorney extends a $115,000 fee waiver offer. Because $115,000 falls within $80,000 (the plaintiff's offer less fees) and $120,000, (the plaintiff's offer plus fees accrued since it was rendered) this would constitute substantially the same offer.
132 Clearly, the defendant will not propose a substantially greater offer in order to avoid payment of fees. The whole reason for requesting a waiver of fees is to somehow cap liability, but at the same time offer the plaintiff the most selfishly attractive offer. If the plaintiff is secure in the fact that her offer is a valid one, then if the defendant offers a substantially lower amount, plaintiff can reject it with confidence that a court will rule at least as favorably.
133 See supra notes 104-20 and accompanying text.
134 By investigating the circumstances of the suit as early as possible, even before
ment to the skill of the attorney, in assessing both the merit and worth of the case, the presumptive rule reinstates the promise of pecuniary gain for a job well done, thereby attracting competent counsel and promoting the enforcement of civil rights.

Moreover, presuming bad faith when a defendant rejects a valid settlement, later to propose it on her own behalf with the appended condition that the plaintiff waive her attorney's fees, serves the important function of encouraging settlement as intended by the Evans court. Rather than delaying putting an honest proposal on the table until minutes before trial, the prospect that the plaintiff could make a fair settlement offer at commencement of negotiations, thus permitting fees to accrue should the offer be rejected, would create adequate impetus for the defendant to do so first. There is a very good reason for the defendant to put forth a Marek offer explicitly accounting for fees towards the beginning of litigation: it makes the offer attractive to both the client and her attorney. If the defendant puts forth a fair settlement offer, the Marek rule makes it imperative that the plaintiff accept.

Even if the offer extended by the defendant is an Evans offer, excluding attorney's fees, and the client chooses to accept, at least the attorney has not laboriously and lengthily pursued the case without remuneration.

2. Judicial and Congressional Precedents for Curbing Dilatory, Bad Faith Delays

The doctrinal underpinnings of the bad faith exception to the American Rule on attorney's fees supports the ability of courts to presume vexatious behavior in the circumstances proposed. The Court has already concluded that "bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." Likewise, in Roadway Express, Inc. v. Piper, the Court

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<sup>135</sup> See supra note 113 and accompanying text.

<sup>136</sup> See supra text accompanying notes 104-08.

<sup>137</sup> See supra text accompanying note 15.

<sup>138</sup> Hall v. Cole, 412 U.S. 1, 15 (1973) (stating that the Supreme Court has held that the general equity power of courts to order exceptions to the American Rule on attorneys' fees does not apply in "Lanham Act cases because Congress acted to circumscribe the general powers of courts by prescribing detailed remedies under section 35"), superseded on other grounds as stated in Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1025 (9th Cir. 1985), cert. den., 474 U.S. 1059 (1986) (Lanham Act § 35, 15 U.S.C. § 1117 (1982)).

<sup>139</sup> 447 U.S. 752, 766 (1980) (stating that Congress amended statute to expressly
stated that "[i]f a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes." Indeed, misuse of the courts is within the traditional definition of bad faith justifying a court's equitable power to tax fees despite the American Rule. In applying the bad faith exception to the American Rule, courts have recognized that unjustifiable delay is a misuse of the courts which may give rise to the bad faith exception.

For example, in Browning Debenture Holders' Committee v. DASA Corp., the Second Circuit held that bad faith may be found where a claim is "entirely without color and has been asserted wantonly, for purposes of harassment or delay or for other improper reasons." In Browning, the court found ample evidence of bad faith delay to justify the taxing of fees in the procedural steps of one of the plaintiffs: "e.g., the appeal of mooted issues, the delay for discovery never undertaken, . . . the making of frivolous motions." Because the plaintiff caused the protraction of the proceedings, he could be taxed with the defendant's fees and costs attributable to his bad faith delay.

In Jaquette v. Black Hawk County, the Eighth Circuit recognized that the defendant's rejection of a settlement offer only to reach the same settlement later may be a demonstration of bad faith delay justifying fee-shifting. The final settlement agreement consisting of $1,500 and an expunged employment record was virtually identical to a settlement offer rejected by the defendant almost three years earlier.

In Jaquette, there was no fee waiver. In fact, the appeals court affirmed the district court's reduction of the excessively high fees requested by the plaintiffs. However, because the court felt that the judicial process had been abused by the delay in resolving this litigation, it remanded the case for a district court inquiry into potential bad
faith by both parties. Presumably, if the court found bad faith, it would tax fees and costs against the offending party—be it plaintiff or defendant.

Similarly, Congress has recognized that delay in litigation may justify the assessment of fees against the offending party:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.

In application, courts require a finding that the attorney has both multiplied the proceedings and done so vexatiously and unreasonably.

Although this statute is directed against bad faith conduct by an attorney, a similar rule may be applied to bad faith by a defendant. Indeed, Congress has expressly indicated an interest in preventing defendants from abusing their judicially created power to exert pressure on plaintiffs to accept settlement offers. The legislature took this action in response to a Supreme Court decision in *Smith v. Robinson*. In *Smith*, the Court offered a restrictive interpretation of the Education of the Handicapped Act to deny fees to a prevailing plaintiff despite the

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140 *Id.* The court was alerted to bad faith on the part of the defendant when the plaintiff asserted that the final settlement offer “was identical to her original offer to settle that [had been made] three years earlier.” *Id.* at 456.

150 Focusing on the defendant’s attorney as the possible cause of the delay of the suit, the court stated that if the district court concludes that the defendant’s actions caused the proliferation, then the plaintiff’s “counsel should not be denied a reasonable fee for time expended simply because the amount of the award is not great.” *Id.* at 458. That the defendant’s counsel may have caused the delays which led to a reduction in the plaintiff’s attorney’s fees can be likened to the identical delay experienced when a defendant rejects a valid offer, only to restate the proposal later but to condition acceptance on a fee waiver. It is of little significance that in the former scenario the defendant’s actions threaten to cause a court-imposed reduction in the fee award, while in the latter the defendant’s imposition of a waiver plays on the ethical responsibility of the attorney to her client. Even though the *Jacquette* court did not adopt a presumptive rule, it did recognize that the defendant’s rejection of a valid offer, later to reinstate the proposal, should trigger close judicial scrutiny of the defendant’s behavior. *Id.* at 461.


153 Under the rule proposed by this Comment, if the rejection of a settlement offer multiplies the proceedings, as evidenced by the fact that a settlement on similar terms is later reached, the unreasonableness and vexatiousness are presumed. This presumption justifies the taxing of fees through the prohibition of a fee waiver.

plaintiff's argument that an action under the Act was an action under 42 U.S.C. § 1983, allowing a fee award under the Fees Act.\textsuperscript{156} Congress reacted by amending section 615(e)(4) of the Education of the Handicapped Act to provide attorney's fees.\textsuperscript{158}

This amendment suggests that Congress has interpreted the Supreme Court's \textit{Marek} decision to be a presumptive rule aimed at uncovering bad faith delay and protraction of the legal process. First, Congress consciously incorporated \textit{Marek} into this amendment.\textsuperscript{157} With the addition of subparagraph D, Congress appears to have codified the \textit{Marek} rule by denying the recovery of attorney's fees and costs if the final relief is less favorable than the settlement offer.\textsuperscript{158}

Congress, however, provided further that "[n]otwithstanding the provisions of subparagraph (D), an award of attorneys' fees . . . may be made to a parent or guardian who is the prevailing party and who was \textit{substantially justified} in rejecting the settlement offer."\textsuperscript{159} This exception suggests that Congress has interpreted \textit{Marek} as directed at behavior that is presumptively "unjustified." Having codified \textit{Marek}'s objective rule for the detection of "unjustified" behavior, Congress added a subjective test in subsection (F). The test allows courts to deny fees to plaintiffs to the extent that those fees reimburse efforts that have resulted in an unreasonable protraction of the controversy.\textsuperscript{160} But realizing that delay is a double-edged sword, the legislature directed that if the state or local agency defendant was actually the party that pro-

\textsuperscript{155} Id. at 1012-14.
\textsuperscript{158} (D) No award of attorneys' fees . . . may be made in any action or proceeding under this subsection . . . , if—
\begin{itemize}
  \item[(i)] the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure . . .
  \item[(ii)] the court . . . finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.
\end{itemize}
\textsuperscript{159} Id. (emphasis added).
\textsuperscript{160} Subsection (F) provides:
\begin{itemize}
  \item[(F)] Whenever the court finds that—
    \begin{itemize}
      \item[(i)] the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
      \item[(ii)] . . .
      \item[(iii)] the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.
\end{itemize}
\textsuperscript{160} Id. at 796-97.
tracted the proceedings then subsection (F) was inoperative.\textsuperscript{161}

These congressional directives disapproving of a plaintiff's bad faith prolongation of the proceedings in fact serve to uncover situations in which it is the defendant who has extended the proceeding without justification. If delaying activity is considered to be in bad faith warranting close judicial scrutiny when it leads merely to a reduction of the attorney's fees (as in the amendments to the Education of the Handicapped Act), then when bad faith conduct leads to the annihilation of plaintiff's attorney's fees at the request of the defendant (as in an Evans offer), a presumptive rule geared towards detecting abusive defendant behavior is warranted.

The above judicial and congressional precedents punish the bad faith protraction of litigation with a denial or taxation of fees. The rule suggested by this Comment merely changes the standard of proof for finding bad faith by adding a presumption similar to that found in Marek.\textsuperscript{162} This rule is not a radical departure from current law. Furthermore, this rule is supported by the policy behind the Fees Act. Because each case in which a fees waiver is obtained will cause attorneys to hesitate before taking on civil rights cases, the practice of permitting fees waivers, as long as it must exist, should be limited to situations where there is no question of impropriety. At the very least, the wholesale adoption of this more rigorous bad faith standard, when coupled with the mechanisms already in place, will tend to make attorneys on both sides cost-conscious, thereby eliminating frivolous behavior.\textsuperscript{163}

**CONCLUSION**

Apart from criminal offenses, constitutional violations are the most offensive to a structured society. The harm of such violations extends to the entire community. Because enforcement of these rights depends on individual action, our society has a high stake in facilitating access to the courts for those whose rights have been infringed. It is simply a corollary of self-preservation. If court access can be guaranteed only by society's assuming or providing for the cost of legal representation for these litigants, it is government's responsibility to so provide. Evans v.

\textsuperscript{161} Id. at 797 ("(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding . . . ").

\textsuperscript{162} The denial of fees in Marek may be read as a presumption that the plaintiff has protracted the litigation unreasonably by litigating a case and receiving less relief at trial than she would have received in settlement.

\textsuperscript{163} Cf. Comment, supra note 12, at 653 (asserting that making litigants pay the costs of their dilatory tactics would promote justice, efficiency, and respect for the law).
Jeff D.\textsuperscript{164} could, at present, undermine the mechanism installed to provide such remedial aid. Hence, the judicial system has a duty to restrict the sweeping language of \textit{Evans}. The bad faith exception discussed by the Court provides a touchstone from which courts can reinstate the predictable operation of the Fees Act. If the bad faith exception is interpreted to operate mechanically rather than by an ad hoc factual inquiry, the necessary predictability can be regained.

Courts should adopt a rule that presumptively accuses civil rights defendants of bad faith when, after rejecting a valid offer of settlement extended by the plaintiff, they later extend substantially the same offer on their own behalf, but in addition request that the plaintiff waive her attorney’s fees. The presumptive rule gives the plaintiff’s attorney the power to extinguish the defendant’s waiver request in cases that are clearly amenable to settlement. Accordingly, the ability of the plaintiff’s attorney to assess the likelihood of success is to some degree revived. Congress’s intent of attracting competent counsel and encouraging enforcement of civil rights is thereby served. Moreover, because this presumptive rule makes it imperative that defendants seriously consider plaintiffs’ offers, under the threat of accruing fees, the rule will facilitate settlement by making it more attractive to defendants.

\textsuperscript{164} 106 S. Ct. 1531 (1986).