Fee Awards and Optimal Deterrence

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I. INTRODUCTION

Hundreds of federal and state statutes call for the award of attorney fees to plaintiffs who successfully sue to enforce the statutes. But what is an appropriate fee award? Suppose, for example, that an environmental protection statute permits courts, in suits brought against violators of the statute, to award both damages and attorney fees to injured plaintiffs. The size of the award may influence the amount plaintiffs' attorneys invest in enforcing the statute and also the extent to which regulated firms comply with the statute's requirements. What determines the right award in a setting like this?

My purpose in this Article is to examine this problem from the standpoint of a court (or, more generally, a "social planner") whose object is to achieve optimal deterrence of undesirable activities. I take as my starting point Gary Becker's pathbreaking work on optimal criminal law enforcement, together with the literature it has inspired on public and private civil enforcement. Using a simple model of a damages action, I try to identify the basic properties of an optimal fee-awards policy. To make clear the limits of the Article, I should emphasize that I do not make specific claims about how fee-awards should be calculated in particular cases; nor do I try to fit my conclusions into the apparatus of existing case law on how fee awards should be calculated. My aim is to provide a framework for thinking about fee-awards policy.

The Article is organized as follows. Part II advances the optimal-deterrence rationale for supplementing damages with fee awards. Part III derives the basic factors on which the optimal fee award depends. Part IV discusses the model's consequences for fee-awards policy. Part V concludes.

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1. For some efforts at cataloguing, see Mary Francis Derfner & Arthur D. Wolf, Court Awarded Attorney Fees ¶ 5 (1995); Note, State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?, 47 Law & Contemp. Probs. 321, 323 (1984).
II. THE THEORY OF OPTIMAL ENFORCEMENT

A. The Social Planner's Problem

Consider a simple model in which a (potential) defendant engages in some activity that may injure a (potential) plaintiff. The defendant can reduce or eliminate the likelihood of causing injury by taking precautions (broadly construed to include any compliance measures) that require some investment of resources. The plaintiff, if wrongfully injured, may sue the defendant; the more the plaintiff invests in the case, the more likely the defendant is held liable.

We will assume that the social planner's objective is to achieve (within the system of private civil litigation) optimal deterrence of wrongful behavior. For our purposes, this can have either of two meanings. First, it may mean that the planner wants to maximize social welfare, given here by the benefits of injury reduction net of its costs. We can express this objective as that of minimizing the following sum:

precaution costs + injury costs + enforcement costs.

(We assume these categories represent all costs associated with injuries and their prevention.) As this expression indicates, under this meaning of optimal deterrence the planner balances the value of precaution—represented in injury costs—against its costs.

Second, optimal deterrence may mean that the planner wants to induce a certain level of precaution (compliance) by the defendant, but to do so at the lowest possible cost. Under this meaning, the planner first decides what degree of precaution she wants; that decision may be based on considerations very different from social utility. (Consider antidiscrimination laws; we demand compliance regardless of whether it is "efficient.") However, the planner wants to achieve that level of precaution at the lowest possible enforcement cost. Thus, on this account, the planner's objective is simply to minimize the term enforcement costs subject to the constraint that the enforcement system successfully induce the desired level of precaution.

It makes no difference, in what follows, which interpretation of optimal deterrence we adopt. The following discussion does not assume, therefore, that the objective of the law is to maximize social

2. In the discussion to follow, we put aside the question of suit being brought even if the plaintiff has not been wrongfully injured.
utility. All it assumes is that the planner wants (among other things) to minimize enforcement costs, perhaps along with other costs.

B. Fee Awards and Optimal Penalties

Gary Becker's well-known analysis of optimal penalties gives the general form of the solution to the planner's problem. The optimal enforcement system will normally involve a relatively low enforcement effort coupled with relatively large penalties. The intuition behind Becker's result is simple: consider a given mix of enforcement effort and penalty severity. Suppose that we simultaneously lower enforcement effort and raise the penalty so as to keep the level of deterrence (the defendant's level of care) unchanged. The result is unambiguously desirable: we have saved on enforcement expenditures, while leaving all other costs unchanged.

Fee awards to prevailing plaintiffs—being a method of augmenting the relief paid by the defendant—represent one method of implementing this type of solution. To see this, begin with a system in which defendants simply pay the plaintiff's damages when held liable—we will call this the "damages-only world." Assume that, in such a system, a given amount of effort is invested in litigation. Now suppose we augment the damage award with a fee award, while simultaneously reducing the amount invested in litigation— in such a way as to keep the level of deterrence constant. Then, we have, in the manner just described, unambiguously lowered social costs.

The point can be made clearer with a bit of notation. Define the following terms as listed below:

\[ k = \text{Defendant's precautions against causing injury}; \]
\[ p = \text{Probability of injury given defendant's precautions}; \]
\[ D = \text{Harm to the plaintiff in the event injury occurs}; \]
\[ x = \text{Plaintiff's lawyer's investment in litigation}; \]
\[ q = \text{Probability the defendant will be held liable, given the lawyer's investment in litigation}. \]

Let us assume, for simplicity's sake, that defendants have no litigation costs; that plaintiffs sue if and only if they have a valid cause of action; and that all cases go to trial. These assumptions are made for clarity of exposition; relaxing them may, I freely admit, have important con-


4. For now I put aside the question of how the planner gets the plaintiff to reduce rather than increase his litigation investment.
sequences (some of which we consider below), but taking these into account here would unduly complicate the analysis.

Suppose that we are in a "damages-only world," and that defendants are strictly liable for any injuries they cause. Then, in a given case, the plaintiff's lawyer will invest some amount \( \bar{x} \) if the plaintiff is injured, yielding a corresponding probability \( \tilde{q} \) that the defendant will be held liable. The defendant, anticipating this, will choose the level of care that minimizes the sum of her precaution costs and her expected liability, given by \( k + p(\tilde{q}D) \). Let \( \bar{k} \) depict the solution to the defendant's optimization problem, and \( \tilde{p} \) the resulting likelihood of injury. Using a bar over each term to indicate its value in a damages-only world, total social costs are then given by

\[
k + \tilde{p}(D + \tilde{x}).
\]

(1)

Now suppose that the damage award is augmented by a supplemental award of attorney fees. Let

\[
A = \text{Attorney's fee award.}
\]

Suppose, in addition, that the plaintiff's attorney chooses a litigation investment that ensures that the defendant's expected liability in the event he injures the plaintiff is the same as in the damages-only world. That is, suppose that the plaintiff's attorney chooses a litigation investment \( \bar{x} \) such that

\[
\tilde{q}(D+A) = \tilde{q}D.
\]

(2)

Then the defendant, anticipating this, will choose the same level of care (\( \bar{k} \)) as he did in the damages-only world. Total social costs are then given by

\[
k + \tilde{p}(D + \tilde{x}).
\]

(3)

Observe, finally, that expression (2) implies that \( \tilde{q} < \tilde{q} \), which means (since \( q \) is assumed to increase with \( x \)) that \( \bar{x} < \bar{x} \). It follows that expression (3) is smaller than (1).

In this discussion we have assumed the defendant is strictly liable for injuries; but the same basic point obtains if we assume the defendant is only liable for injuries if he violates some standard of care. Suppose that \( \bar{k} \) (the amount of care taken in a damages-only world) is below the standard of care. Then victims will sue when injured, and

5. Thus, \( q \) indicates the value \( q \) would have in a damages-only world, and so on.
6. Because \( \bar{k} \) is assumed to minimize \( k + p(\tilde{q}D) \), it must also minimize \( k + p(\bar{q}[D+A]) \).
7. Note that \( A \), being a transfer payment from the defendant to the plaintiff, does not constitute a social cost. Hence, it does not appear in expression (3).
total social costs will again be given by (1) above. But suppose we augment the damage award with an attorney’s fee award \( A \), and also ensure that the plaintiff’s attorney invests an amount \( \bar{x} \) satisfying (2). Then total social costs will be given by (3), which for reasons just seen is less than (1).

### C. Advantages of the Fee Award

The lesson of the above argument is that the damages-only world can always be improved upon by a policy that awards attorney fees to the prevailing plaintiff. Why? Because, at the very least, we can in principle save litigation costs, while leaving everything else unchanged. Axiomatically, therefore, the fee award must leave society better off, since we have conserved enforcement resources without giving up anything else. (This argument depends crucially on the assumption that the plaintiff’s lawyer “cooperates” by investing less in the litigation than he would in a damages-only world, an assumption I take up below.)

This is not to say, though, that enforcement cost savings are the only advantage conferred by fee awards. The social planner can also use them to change the defendant’s primary behavior, making him take more precautions against harm than he would in a damages-only world. To do this, the planner would have the plaintiff’s attorney invest enough to make the defendant’s expected liability for harming the plaintiff greater than in a damages-only world. Thus, the planner would want the attorney to invest an amount \( \bar{x} \) such that

\[
\bar{q}(D+A) > \bar{q}D. \tag{4}
\]

The defendant, anticipating this, would choose a higher level of care than he would in the damages-only world. Depending on the value of these additional precautions to the social planner, this heightened care may represent still another improvement on the damages-only world.

The basic logic of awarding attorney fees, then, is this: (i) At the very least, the social planner can improve on the damages-only world by choosing an attorney’s fee and a level of enforcement effort that leave the amount of deterrence unchanged, but, in doing so, conserve on litigation costs; and (ii) The social planner may be able to improve the world still further by choosing a level of enforcement effort that increases the amount of deterrence. The critical point for our purposes is that (i) alone furnishes a sufficient justification for a fee-shifting policy; even if we do not want to change the level of deterrence, there is good reason, in principle, to augment damage awards with a
fee award. If we want to encourage greater precautions against harm, we have an additional justification.

III. A Model of Optimal Fee-Awards Policy

The foregoing analysis gives an argument for augmenting the damage award with an award of attorney fees. But how is the award determined? In what follows, I discuss some basic properties of the optimal fee award. I will make the points in this section informally; I do not attempt here to prove them rigorously.8

A. Basic Account

Let us begin by assuming that the court can observe the level of effort the plaintiff's attorney invests in the litigation. Define the following notations as shown below:

\[ A^* = \text{The optimal fee award amount.} \]
\[ \hat{A} = \text{The maximum feasible fee award amount.} \]

We can think of \( \hat{A} \) as representing the largest amount the court is able to take from the defendant, after the defendant has paid damages. (The court's ability in this regard might be constrained by fairness considerations as well as by limits on the defendant's wealth; it makes no difference what factors go into determining what is feasible in this regard.)

Our central result, which follows from Becker's analysis of public enforcement, is as follows: the optimal fee award consists of the maximum feasible award.9 In other words,

\[ A^* = \hat{A}. \] (5)

This result is a generalization of what we saw in Part I. To see why it holds, suppose the court has the power to control the amount of effort invested by the plaintiff's attorney. Take any award less than \( \hat{A} \). According to the argument presented in Part I, it must be possible to raise the award and lower the attorney's level of effort so as to leave deterrence unchanged—so that the net effect of raising the award is to lower litigation costs while leaving other costs untouched. Thus, any award less than \( \hat{A} \) can be improved upon.

We can assume that, in a system of private enforcement, the court lacks the power to control directly the lawyer's level of investment.

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8. For a formal model with proofs, see Bruce L. Hay, Optimal Fee Awards (Sept. 1995) (unpublished manuscript, on file with author).
9. See Becker, supra note 3, at 183-84.
(Becker’s model assumes, in contrast, that the social planner directly chooses both the penalty and the amount invested in enforcement.) However, if the court can observe the lawyer’s investment, it can exert effective control over the lawyer by conditioning payment on the lawyer’s choosing the appropriate level of effort. More precisely, let

\[ \hat{x} = \text{The level of attorney effort that maximizes social welfare, given that the defendant is forced to pay } \hat{A} \text{ if held liable.} \]

That is, the court can use a fee schedule that pays the lawyer as follows:

\[
\begin{align*}
\hat{A} & \text{ if } x = \hat{x} \\
0 & \text{ if } x \neq \hat{x}.
\end{align*}
\]

Under this fee schedule, the lawyer (if he takes the case at all) will invest exactly the right amount, \( \hat{x} \).

Now, the Becker solution of imposing the maximum feasible sanction has—in the context of public enforcement—been given several qualifications. For example, if the defendant is risk averse, the optimal sanction will generally lie below the maximum feasible sanction.\(^{10}\) Similarly, if the defendant can affect the probability of liability by investing in some sort of evasive action (including investing in litigation), then the optimal sanction may well be less than the maximum feasible one.\(^{11}\)

These qualifications carry over to the present context. Whatever restrictions exist on the magnitude of the sanction in the public enforcement context apply with equal force to the private enforcement scenario.\(^{12}\) The important point for our purposes is that, if the court can monitor the plaintiff attorney’s effort, the same considerations that govern the design of optimal sanctions in public enforcement also govern their design in a regime of private enforcement.

**B. The Monitoring Problem**

The analysis to this point has assumed the court can observe the level of effort invested by the plaintiff’s attorney. The result just reached does not hold if we drop this assumption. The reason is sim-
pie: the Becker approach to optimal enforcement involves simultaneously raising the penalty imposed on the defendant and lowering the level of enforcement effort. However, if the choice of effort level is left up to the attorney, raising the fee award will actually have the effect of increasing his effort level; the bigger the award, the more effort he rationally will invest to get it.13

The point can be seen as follows. If the court cannot observe the attorney's level of effort, the attorney will choose an effort level $x$ to maximize the expression

$$qA - x.$$  

As we have seen, the lawyer's probability ($q$) of getting the award is an increasing function of $x$. The larger the award, the more effort (all else being equal) the lawyer will invest in trying to get it. Thus, raising the award has the perverse effect (perverse from the standpoint of optimal deterrence) of increasing the lawyer's effort.

As a result, the court's problem is to choose the value of $A$ subject to the constraint that the lawyer will choose $x$ to maximize (6). (This constraint does not exist when the lawyer's effort is observable by the court, because then the court can, in effect, choose the lawyer's level of effort.) Adding this constraint gives us our second result: When the court cannot observe the plaintiff lawyer's level of effort, then the optimal fee award is generally lower, and the plaintiff lawyer's level of effort higher, than when effort is observable.

The basic intuition for this result is that, if the court were to choose the highest possible court award $A$, the plaintiff's lawyer would invest a huge amount in the case—leading to substantial overdeterrence of the defendant. With a policy that sets the award equal to $A$, the defendant faces both a high probability of liability if he injures the plaintiff and a huge penalty. His incentive, therefore, will be to invest a tremendous amount in avoiding injury. This is overdeterrence, in the sense that a preferable result may be obtained by allowing a smaller fee award—thereby inducing less effort on the plaintiff lawyer's part, and (consequently) less expected liability for the defendant.

Interestingly, this result implies that excessive lawyer effort, rather than its opposite, would be the main concern of courts when dealing with a fee-award system designed to induce optimal deter-

rence. That is, under the optimal system, courts would not be worried that lawyers were trying to "pad their hours" or exaggerate the amount of work they had done on the case. On the contrary, the worry would be that lawyers were understating the amount of effort they had put into the case. Given unobservability of effort, courts would have to assume that lawyers were working harder (not less hard) than they claimed in their fee-award applications.

This second result provides an important caveat to our earlier discussion of the advantages of fee awards. Given unobservability of effort, it may be that the optimal fee award is zero.\textsuperscript{14} The only situation in which a positive fee award is certain to reduce aggregate enforcement costs is one in which the court can observe the plaintiff lawyer's investment of effort.

\section*{C. Settlement Considerations}

We have assumed to this point that cases go to trial. What happens when we take the possibility of settlement into account? If our concern is with conserving enforcement resources, we naturally want to know how fee awards affect the possibility of settlement, since settling is one obvious way of avoiding litigation costs. This too creates an important qualification to the basic analysis above: raising the fee has the effect of discouraging settlement.

In general, if the parties are symmetrically informed about the case, the fee-awards policy should not affect the likelihood of settlement. No matter how large the fee award is in the event of plaintiff victory, there will be some settlement amount that makes both parties better off than going to trial. To see this, suppose the parties have identical beliefs about how the case will be resolved at trial. The defendant then will be prepared to settle for any amount less than his expected loss from trial, given by

\begin{equation}
q(D+A); \tag{7}
\end{equation}

the plaintiff and her lawyer will be willing to settle\textsuperscript{15} for any amount exceeding their expected gain from going to trial, given by

\begin{equation}
q(D+A) - x. \tag{8}
\end{equation}

Since (7) exceeds (8), there is some amount between the two figures that would make both sides better off than going to trial.

\textsuperscript{14} Or even negative, if the court has the power to tax the attorney.
\textsuperscript{15} I assume here that they act to maximize their joint welfare. The conclusion is unchanged if we relax that assumption.
If, instead, the parties are not symmetrically informed about the case, then awarding fees will have the effect of preventing, or at least delaying, some settlements. With asymmetric information, parties have trouble settling since they have divergent beliefs about what will happen at trial; the difficulty increases as the stakes in the case rise. The larger the value of $A$, the greater the stakes in the case, so the less likely settlement becomes (at least until discovery reduces the informational asymmetry). This too furnishes a reason for setting $A$ below (perhaps well below) the maximum feasible amount.

IV. The Model's Implications

The analysis just developed identifies some of the major considerations that would go into determining the optimal fee-award policy, but it does not tell us the magnitudes of these different factors—some of which push $A^*$ in one direction, others in the opposite direction. For that reason, the model does not tell us precisely how to determine the optimal fee in a given case. It does enable us, however, to draw some general conclusions about using fee awards to produce optimal deterrence.

A. Grounds for Awarding Fees

The model has two important pairs of implications. One pair concerns the rationale for awarding fees. These implications are: (i) in principle, all damages actions are suitable candidates for fee awards; and (ii) optimally used, fee awards should not necessarily encourage greater plaintiff investments in litigation. These conclusions run against the common perception of how fee awards should be used to deter undesirable activity—the perception that (i) fee awards are only appropriate in those cases where the costs of litigation might be a barrier to bringing suit, or (more generally) where plaintiffs' lawyers are prone to "underinvest" in the litigation, and (ii) the objective of the fee award should be to encourage greater plaintiff investments.

Why does the model depart from these common perceptions? In essence, the model treats the fee award not (primarily) as an inducement to plaintiffs' lawyers, but rather as a penalty inflicted on defendants. (An essential feature of the model is that the fee award be paid from the defendant's pocket, rather than, say, from some public coffers.) The argument given in Part II shows that, viewed in this way, a

fee award may lower social costs in all cases because, once again, by augmenting the damage award with a fee award, we can achieve the same amount of deterrence, but with less litigation investment. Moreover, the argument given in Part III shows that, optimally used, a fee award may be coupled with a very small investment by the plaintiff's lawyer—a smaller investment, perhaps, than he would make in the absence of a fee award.\textsuperscript{17}

\textbf{B. Basis for Computing the Fee Award}

The second pair of implications concerns the basis for computing the fee award. These implications are: (i) the optimal fee award is, in general, unrelated to the amount of work actually done on the case (the quality or quantity of the lawyer's input); and (ii) the optimal fee is also, in general, unrelated to the amount recovered in the case (the quality or quantity of the lawyer's output). These conclusions are of course at odds with the practices of the courts, which generally tie the amount of an award to either the amount of effort exerted or the quality of the results achieved by the lawyer (or both).\textsuperscript{18}

Consider the question of lawyer input. In the model, the fee award has nothing to do with the amount of effort expended by the lawyer, in that the value of $A^*$ may be much more than is necessary to compensate the lawyer for the work he has done.\textsuperscript{19} The court does not, in other words, derive the optimal fee by multiplying the lawyer's time for that particular case by a specified hourly rate.

This point is worth emphasizing. In the basic model, where the court can observe the plaintiff lawyer's level of effort, the court simply chooses to award the maximum feasible amount $\hat{A}$, and then asks—given that $\hat{A}$ will be awarded—what level of lawyer effort ($\hat{x}$) will yield the optimal level of deterrence. All else equal, the larger $\hat{A}$ is, the smaller $\hat{x}$ is; if it is feasible for the court to take a very large payment from the defendant, the court will want the lawyer to invest a (relatively speaking) very small amount. Thus, the more the court is able to take from the defendant, the less the size of the fee award will correspond to the amount of effort the lawyer has put into the case.

\textsuperscript{17} This point is pursued at greater length below.
\textsuperscript{19} As we have seen, if the lawyer's effort is observable, the court denies a fee award unless the attorney has invested the desired amount $\hat{x}$. To that extent, the fee award depends on the lawyer's investment. Beyond that, however, the value of $A^*$ has no relation to the amount of work the lawyer has put into the case.
Now, the matter is more complicated if the court cannot monitor the amount of effort invested by the lawyer; as we have seen, awarding $A$ will generally be a bad idea, since it will induce excessive lawyer effort. The court must accordingly scale back the award to some point below (perhaps well below) $A$. Even with this qualification, however, the fact remains that the optimal award may be a lot more than is necessary to compensate the lawyer for his efforts.

For similar reasons, the fee award has no necessary connection to the amount of damages recovered from the defendant. This is true in two senses. First, the damages recovered may be significantly greater, or significantly less, than the value of $A^*$. Thus, the court does not derive the optimal award by, for example, giving the lawyer some specified fraction (such as one-third) of the damage award. Second, to the extent the lawyer’s efforts increase the quantity of relief recovered, he should not necessarily be given a “bonus” for obtaining a large quantity of relief for his client. From a social standpoint, it is not always a good thing to encourage the lawyer to work harder on his client’s behalf.

**C. Welfare of Participants in Litigation**

We know the optimal award policy lowers aggregate social costs. How does it affect the welfare of the participants in litigation? Here, too, we reach some counterintuitive conclusions. To investigate the issue, let us again use a bar over each term to indicate its value in a damages-only world. In addition, let

\[ r = \text{Fraction of the award the plaintiff would pay the attorney in a damages-only world.} \]

1. **Lawyer Compensation**

Begin with the lawyer’s net expected recovery, given by

\[ q^*A^* - x^* \]

(9)

where $q^*$ indicates the value of $q$ when $A^*$ is used, and so forth. Under the optimal shifting regime, the lawyer typically earns (in expected terms) substantial rents or “windfalls,” in that his payment substantially exceeds his opportunity cost of litigating the case.

To see the point intuitively, consider what happens when the lawyer’s effort is observable. As we have seen, the optimal shifting policy combines a very large payment from the defendant with a rather small investment of effort by the lawyer. More generally, payment is in-
versely correlated to effort: the more the court can take from the defendant (the greater the value of $A$), the less—all else equal—the court wants the lawyer to invest. There is nothing in this policy to prevent the lawyer from earning many times his opportunity cost of litigating the case.²⁰

Matters are a bit more complicated if effort is unobservable, since—as we have seen—as the value of the award increases, so does lawyer effort. However, the lawyer's choice of effort will normally be such that he earns more than his opportunity costs, if we assume (as is conventional) that additional work by the attorney produces positive but decreasing returns to the claim's chances of success in court. The intuition is this: the lawyer will continue investing in the case until, at the margin, he is just barely compensated for his effort—which means (since returns are diminishing) that he is overcompensated for his earlier efforts in the case.

2. Plaintiff Recoveries

Consider now the plaintiff's expected recovery, given by

$$q^*D.$$  (10)

Under the optimal fee-shifting system, the plaintiff may (in expected terms) recover either more or less than she would in a no-shifting world. In other words, the above figure may be greater or less than what she would get in a damages-only world, given by

$$(1-r)qD.$$  (11)

The intuition here is clearest again if we assume the court can monitor the lawyer's level of effort. The fact that the lawyer (optimally) invests only a relatively small amount means that the claim's chances of success ($q$) are relatively low. (In the limiting case, the fee award is enormous and the lawyer's investment is tiny—making $q$ very small, so that the plaintiff's expected recovery in the case is also very small.)

To be sure, this is not enough to tell us whether the client does better or worse under the optimal fee-shifting regime than she does in a damages-only world. To answer that question, we would need to know the claim's chances of success in the damages-only world, and also how much the client would have to pay the lawyer ($\hat{q}$ and $r$ re-

²⁰ On the other hand, he cannot earn less (in expected terms) than his opportunity cost, or he will not take the case.
spectively). The critical point for our purposes is that there is no reason to expect, in general, that the optimal shifting regime increases the plaintiff’s expected recovery from litigation.

3. Defendant Exposure

Finally, consider the defendant’s expected liability in the event he is sued, given by

\[ q^*(D+A^*). \]  

This figure may be greater or less than his expected liability in a damages-only world,

\[ qD. \]  

The intuition here is the same as what we just saw regarding the plaintiff’s recovery. Since \( q^* \) may be a lot smaller than \( q \), we have no way of knowing, \textit{a priori}, whether (12) exceeds (13).

V. CONCLUDING REMARKS

Perhaps the greatest lesson of this analysis is that a fee-award policy designed to induce optimal deterrence may differ sharply from a policy concerned mainly with doing justice to the participants in litigation. On one plausible account, doing justice to the participants would entail a fee-award policy that: (i) improves, not reduces, the welfare (expected recovery) of injured plaintiffs; (ii) enhances, not reduces, the expected amounts paid by wrongdoing defendants; and (iii) does not give “windfalls” to lawyers, that is, pay them more than their market wage (at the expense of one of the parties).\(^{21}\) As we have seen, pursuing optimal deterrence may require dropping all of these precepts. Whether that is desirable, I do not consider here. My objective has been to draw out some of the main properties of an optimal deterrence policy.

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21. On this last point, consider the Supreme Court’s claim that “[h]ours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.” \textit{Hensley}, 461 U.S. at 434 (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original)).