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Richard V. Falcon

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AWARD OF ATTORNEYS’ FEES IN CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION

RICHARD V. FALCON*

The general American rule requires litigants to bear their own attorneys’ fees regardless of the respective merits of their cases or the outcome of their litigation. The American rule is often defended as a democratic rule that encourages resort to courts, avoids imposing undue burdens on the loser and gives recognition to the “gambling” aspects of litigation. Nevertheless, the rule’s inequitable effects have so concerned legislatures and courts that they have created a surprising number of exceptional instances where attorneys’ fees are awarded.

Despite the American rule’s claim to historical and traditional validity, when legislatures or courts have thought it wise or expedient to redress fully the injury caused by wrongdoing, to extend equal access to the courts, to reward particularly the litigant with a meritorious case, to discourage abusive resort to frivolous litigation or simply to encourage the bringing of types of suits whose litigation is felt to be important, they have often permitted or required awards of attorneys’ fees. The categories of cases thus excepted are broad in coverage. But, because the categories of cases in which fee awards can be made are viewed as exceptions and because there is not yet a well accepted general principle explaining their purpose or application, cases within an excepted category are often inconsistent and unpredictable in result.

The purpose of this article is not to establish abstractly that the American rule ought to be replaced with one which generally permits fee awards in all litigation. Rather, after outlining the English practice and early American experience under the American rule, this article will consider the rule’s attractions and defects, particularly when its effect is to require a successful litigant

* B.A. (1963), J.D. (1967), University of Florida; Associate Professor of Law, University of Maryland.
in a civil rights or constitutional case to bear his own fees. This article will then canvas the exceptions which have been thus far created in response to the rule's operation in certain types of cases. It will note that these exceptions are intended to permit and often do permit awards of fees in civil rights and constitutional cases and that adoption of a principle which generally allows fee awards in these cases would, therefore, be neither novel nor unexpected. Finally, the article will attempt to formulate a general principle which will operate to require fee awards in all such cases and to defend adoption of that principle.

THE AMERICAN PRACTICE: BACKGROUND, DEFENSE AND CRITICISM

The English legal system early developed a rule that successful parties were entitled to an award of costs, and significantly, "costs" in the English scheme of things included awards for counsel's fees. There is some doubt concerning the time at which fees and costs were first generally awarded by English courts, but there is no question that a complete system of awards of costs and fees to the prevailing party, at all levels of litigation and in all types of cases, existed in England at the time of the American revolution.²

The English method for determination of costs has been described elsewhere,³ and its details need not concern us here. Suffice it to note that lengthy and detailed schedules, outlined in

1. The terms "costs" and "fees" are subject to a variety of meanings. In one sense, "costs" of a lawsuit is often understood, particularly by laymen, to refer to the actual expense incurred as a result of litigation, i.e., all items of expenditure including charges which must be paid to a lawyer for rendering professional services. For the layman, therefore, "costs" in a lawsuit represent his actual expenditures whether reimbursed or not.

However, the terms "fees" and "costs" have distinctly different meanings in the context of the subject matter of this article. "Fees" refers to those charges paid by a party to his lawyer for professional services rendered. "Costs," on the other hand, simply refers to those expenses of litigation which are awarded, by statute or court rule, to one party (usually, the winning party) and taxed against the other. Cf. Distler, The Course of Costs of Course, 46 CORNELL L. Q. 76 (1960). Obviously, taxable "costs" may cover, in a given instance, all, or more than all, of the actual litigation expense, including legal fees, as, e.g., in certain antitrust cases, or they may cover less, indeed much less than such expenses. For purposes of this article, consistent with the traditional usage of lawyers, "costs" will refer to those costs "generally" taxable against one party excluding "attorney's fees" (even in those few instances in which such "fees" are taxed against one party) since under the American system fees are not generally awarded as part of costs.


3. See Goodhart at 851-54.
court rules, govern their award. Amounts paid to court officers are recoverable, as they are generally in the United States. More significantly, fees paid to lawyers are recoverable, on an item-by-item basis, for their services. The court schedules list fixed sums taxable as costs for each particular service performed by the lawyer, e.g., the writing of a letter, or the filing of a brief.4

The American experience has been fundamentally different, despite its origins in the English legal system. Concerning the practices followed by early colonial courts, there is some disagreement among writers.5 Whatever the colonial practice, it was soon

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4. Given the fixed nature of the schedule, the fee awards, which incidentally are paid directly to the client, are not necessarily sufficient to cover the client’s full costs and fees. There are similar procedures followed in other European countries, with the same results, i.e., tedious filing of schedules and, in certain cases, underpayment to the client. See the collection of interesting articles on continental practices in 1962 Proceedings of the A.B.A. Intern. and Comp. Law Section 119-142 (1963). The important point here is the rather universal agreement that a prevailing party should, as part of his remedy, receive fees as part of his recompense for actual loss resulting from the wrongdoer’s acts. This makes obvious sense. To the extent that litigation is necessary to right the wrong done a party, any realistic measure of the loss occasioned by that wrong must take into account the client’s loss of moneys paid his attorney.

5. Goodhart, supra note 2, at 873, citing C. WARREN, A HISTORY OF THE AMERICAN BAR 4 (1913), suggests that the American colonies never followed the English common-law practice of awarding fees as part of costs, and he offers as a reason the distrust of and disrespect toward lawyers by most of the colonial citizenry:

In every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing of power in the community the ruling class, whether it was the clergy as in New England, or the merchants as in New York, Maryland and Virginia, or the Quakers as in Pennsylvania, was extremely jealous. In many of the Colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the courts; in all, they were subjected to the most rigid restrictions as to fees and procedures.

Others, however, have intimated that most colonial courts adopted the English practice, albeit without ever intending to reimburse the wronged party as part of the full compensation to which he was entitled. See C. McCORMICK, DAMAGES 235 (1935) (not suggesting a lack of intent to reimburse wronged party); Note, Use of Taxable Costs to Regulate the Conduct of Litigants, 53 COLUM. L. REV. 78, 80 (1953). The latter view, given the widespread existence of statutory maximums contained in many early colonial and state laws, seems the more accurate. Note, Use of Taxable Costs to Regulate the Conduct of Litigants, 53 COLUM. L. REV. 78, 80 n.17 (1953). Indeed, one writer, in considering early statutory history, suggests that the existence of monetary maximums explains the gradual replacement of the English practice with the American rule that fees were not recoverable. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CALIF. L. REV. 792, 799 (1966) [hereinafter cited as Ehrenzweig]. Ehrenzweig reasons that these maximums became unrealistically low and that lawyers and judges soon lost sight of their possible utilization as a compensatory mechanism. Thus they early rejected awards of fees as part of the law of damages.

Be that as it may, it seems apparent that early courts and legislatures did not consider the English practice suitable to the United States. The underlying motivation which produced this result was probably a combination of historical accidents, as suggested by
widely established that attorneys' fees were not taxable as costs in American courts. This perhaps overstates the case. It is true that in most cases, no attorneys' fees are recoverable, yet the number of exceptions to the general rule is sufficiently large because in many of its applications the "American rule" is believed to be undesirable.  

Application of the American Rule to Civil Rights and Constitutional Litigation

Civil rights cases—those cases in which private or public action is challenged on the ground that it is racially discriminatory—and constitutional cases—those cases in which the acts of a government official, acting pursuant to state or federal law, are challenged and decided on the grounds that they transgress limitations found in the United States Constitution—are litigation of public moment. Successful litigation is often significant in securing the benefits of civil rights and constitutional principles. Thus, practices which unduly burden or discourage potential litigants in these cases are particularly undesirable. Indeed, it is upon these cases that the criticisms of prevailing American practice are often focused, as later discussion will reveal in greater detail.

Constitutional limitations are seldom accidentally transgressed by an unthinking government. More frequently a government official who violates the rights of citizens acts in accordance with his perception of the desires of the politically powerful among his constituency. Discriminators seldom choose their victims in an historical vacuum. More frequently, they act in ac-

Ehrenzweig, the extreme distrust with which lawyers were held, as suggested by Goodhart, and, finally, as suggested by others, the uniquely American viewpoint that litigation is a fiercely individualistic gamble, in which pluck, as much as right, determines and ought to determine outcome. See Note, Attorneys Fees: Where Should the Ultimate Burden Lie, 20 Vand. L. Rev. 1216 (1967).

6. See discussion at note 33 et seq., infra.

7. Although the term "civil rights" is broader than the concepts advanced in these "race" cases, it has long been used to refer to this specific area. See, e.g., the Civil Rights Cases, 109 U.S. 3 (1883).

Obviously, many "civil rights" cases are also "constitutional litigation" as so defined, e.g., school desegregation cases. There is, however, reason for distinguishing among these cases for purposes of this article. Many civil rights cases are brought against private parties, whereas, "constitutional litigation", as here defined, involves challenges to public acts, to state action rather than to purely private conduct. As this article will note, this important distinction has some bearing on the question of awards of attorney's fees. See discussion in text accompanying notes 106 and 107 infra.

Because of their very different content, criminal cases, even though they often are defended on civil rights or constitutional grounds, are beyond the scope of this article.

8. See discussion in text accompanying notes 97 et seq., infra.
cordance with the perceived racial and class biases of their time. Those who bear the brunt of unconstitutional or discriminatory behavior, therefore, are most often, if not invariably, politically friendless. This class often overlaps, but is not totally synonymous with, the economically weak. Members of this class need access to courts. Almost by definition, their limited access to the political sphere permits governmental and private transgressions at their expense. Their access to courts is of particular urgency. Most obviously is this true for the minorities for whose primary benefit the civil rights amendments and statutes exist. This lack of access also characterizes, although less obviously, those for whose benefit restraints on majority action have been made part of the Constitution.

In any civil rights or constitutional case, claims for damages are likely to be secondary, if present at all. The redress sought most often is both prospective and equitable, yet the costs of proving a case for equitable relief are high. Even such unsatisfactory devices as the contingent fee are not available to the would-be litigant. The most he can hope for is to seek redress by bearing the cost himself, if he can afford to do so, or, failing that, to find some generous and sympathetic attorney or organization which will take his case. Indeed, the case is that the needs of the most disfavored of the minority are most often ignored by the organized bar. The public air of hostility or resistance to the legitimate demands of these persons are factors that weigh heavily in attorneys' decisions to accept these cases, particularly non-fee generating or low fee cases.9

Application of the American rule, in this context, is therefore paradoxical. These cases should be encouraged, precisely because they benefit a politically and often times economically weak class. However, the American rule operates to discourage these cases. It limits litigation to those suits within the financial capacity of the individuals affected or of the charitable organizations and lawyers interested in their litigation. With these effects, it would seem that little could be said in defense of the American rule. But defended, nonetheless, it often is.

Defenses Advanced in Favor of the American Rule

Critics of the American rule,10 as well as its supporters,11

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10. See, e.g., Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 IOWA L. REV. 75 (1963) [hereinafter cited as Kuenzel]; Goodhart, supra note 2, at 872-78;
advance a number of arguments in its favor, albeit seldom in the specific context of the cases with which this article is concerned. These arguments must be considered, for, if they make sense in a general context, they may well make sense in this more narrow context.

The most persuasive argument is grounded in the belief that an award of attorneys' fees is necessarily punitive in that it requires payment of fees for assertion of a right—the right to litigate: "No litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from taking a position in court in which he honestly believes—however lacking in merit that position may be."\(^\text{12}\) This point of view effectively begs the question—is there, or ought there be, a right to litigate any issue, despite its merits and despite the cost thereby incurred by the other party who, given the outcome, must have been the wronged party? If such a right exists, then the view expressed is entitled to respect. There are those who assert such a right: "The right to sue without deterrence by the specter of the possibility of paying an adversary's legal fees is part of our democratic tradition and a bulwark of equality. . . ."\(^\text{13}\)

Another statement of this position defends the present American system from the viewpoint of the "poor" or "moderate income" litigant:

It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means.\(^\text{14}\)

A second defense to fee awards is based on an artificially

Stoebuck, supra note 2, at 218.


14. Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 237 (1964) (Goldberg, J., concurring) (quoting Judges Smith, Clark and Hays, dissenting in Farmer v. Arabian Am. Oil Co., 324 F. 2d 359, 365 (2d Cir. 1963)). See also Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967), in which the Court suggests that denial of attorney's fees is helpful to the indigent who would otherwise be "unjustly discouraged from instituting actions to vindicate [his] rights . . . ."
attenuated definition of the compensable damages caused by a wrongdoer's activities. This defense is based on a denial that attorneys' fees are "proximately" incurred as a result of wrongful acts: "Now the expenses of litigation . . . are not the 'natural and proximate consequences of the wrongful act,' . . . but are remote, future and contingent."\textsuperscript{15}

Yet a third defense of the American rule has its basis in the belief that the outcome of a law suit in American courts is no indicator of right and wrong, or, restated, that making a loser pay his opponent's legal fee is adding insult to injury:

The scheme urged [the loser to pay all costs] is based on the wholly unwarranted assumption that the losing party in litigation is always, or even ordinarily, in the wrong. Its sole justification must be that an adverse verdict by a jury or an unfavorable decision of the court carries with it the necessary conclusion that the defeated party was morally culpable in bringing action, or in resisting suit, as the case may be. Nothing could be further from the actual facts of life. . . . An enlightened Judge must realize that, in spite of his most conscientious and painstaking efforts, he is, in a given case, as like as not to do injustice when he seeks to do justice.\textsuperscript{16}

These arguments and defenses seem ill-founded.

It is ironic to defend the American rule on the basis that it "insures access to the courts for those of moderate means," by not "punishing" the "taking of a position in which [one] honestly believes—however lacking in merit." Indeed, it is cruelly ironic, for those of "moderate" (or less) means are now excluded. A major factor of that exclusion is that a litigant must bear his own litigation expenses, regardless of the merit of his case.\textsuperscript{17} Because the poor are already excluded from active participation in the legal system—whatever merits a suggestion that the fear of incurring additional litigation costs will exclude indigent participation may have, \textit{in vacuo}—this defense has little substance in the context of a legal system in which free access does not exist.

As is often commented, a litigant without independent means to support his principles simply cannot, and will not, litigate unless his claim is of sufficient size to justify payment of

\textsuperscript{15} Saint Peter's Church v. Beach, 26 Conn. 355, 366 (1857).

\textsuperscript{16} Satterthwaite, \textit{supra} note 11, \textit{cited} in Goodhart, \textit{supra} note 2, at 877.

\textsuperscript{17} See, \textit{e.g.}, Carlin & Howard, \textit{Legal Representation and Class Justice}, 12 U.C.L.A.L. Rev. 381, 423 (1965); Comment, \textit{Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution}, 26 U. Pitt. L. Rev. 811 (1965).
substantial lawyer's fees.\textsuperscript{18} Consider, for example, a claim for less than $500, an amount which is a realistic limit for cases arising in the commercial and consumer transaction area. Assuming that a client has a meritorious claim, arising, for example, from breach of an implied warranty of merchantibility in an air-conditioning sales contract, litigation is not likely to be to his economic advantage—a fact not lost on the cantankerous defaulter. Regardless of the respective merit of their claims, a "big" litigant can always beat a "little" opponent because of their respective abilities to bear the cost of litigation.\textsuperscript{19} Therefore, given widespread lack of access to the courts, it seems simply untrue that an award of attorneys' fees to the prevailing party would preclude the bringing of a greater number of meritorious claims by poor citizens than are now precluded by their economic inability to retain counsel.

Hence, to the extent that the American rule is defensible because it permits the "taking of a position in which [the litigant] honestly believes," its beneficial effect is limited to that litigant who is both sufficiently wealthy and sufficiently committed to the principle he espouses to incur the costs of litigation. Burdening those both wealthy enough and frivolous enough to assert claims "lacking in merit," even if "honestly believed in," is a small price to pay to gain the benefits of fee awards.

Considered in this light, the second point given in defense of the American rule, that an attorney's fees is not a proximate, compensable result of wrongdoing, lacks persuasive force. As a matter of logic, the expenses of litigation are predictable consequences of a wrongful act. Moreover, they become so precisely because the wrongdoer chooses to defend the claim. Thus, not only are such expenses "foreseeable," but they are at all times within the control of the wrongdoer.

Differently and more importantly, this defense of the American rule begs the precise question by hiding it within the confines of the legal concept of "proximate cause." Obviously, the law does not and even ideally cannot assume complete compensation, in money, for all the consequences of a wrongful act. Among all of the varied losses, the law selects certain risks (which it calls "unreasonable," "foreseeable," "natural") and requires the

\textsuperscript{18} Ehrenzweig, \textit{supra} note 5, at 792.

\textsuperscript{19} The problem is not limited to the "poor" plaintiff. For example, a defendant may be forced to settle a case, because the expense of successfully defending the suit may exceed the settlement cost. See discussion note 25 \textit{infra} and accompanying text.
wrongdoer to pay for these, while others, even if they are as "empirically predictable" as the former, the case law finds it best not to recompense. The problem here, most agree, is one of expediency and public policy rather than scientific probability—some interests are protected, others not. The true policy question is the extent to which we wish to permit wrongdoers to escape the consequences of wrongful litigation.

The incurring of legal expenses should be recognized, by an award of fees, simply as a matter of consistency with existing practice. After all, these expenses are closely analogous to permitting recovery of expenses incurred in protecting, or receiving, property. Indeed, if recovery of property from a defaulting debtor requires a creditor to expend money in finding it or in securing possession, the creditor is entitled to reimbursement: Why should it be any the less so, if the expense necessarily incurred is that of hiring an attorney, rather than that of hiring a tow truck?

Ultimately, such legal expenses deserve to be recognized as "proximate consequences" as a matter of justice, because recognition would make whole those who deserve to be made whole, those whose claims are meritorious:

There is another reason for adopting the principle of substantial costs . . . . It does justice. . . . On what principle of justice can a plaintiff wrongfully rundown on a public highway recover his doctor's bill but not his lawyer's bill?

Especially is awarding fees, in recognition of their proximate relation to the wrongs done, truly a matter of justice in the context of civil rights and constitutional litigation. Since the judgments given are usually equitable and prospective, no economic loss is incurred by the wrongdoer. Even if the case be brought and won, the cost of securing the rights vindicated are borne by the party deprived of them in the first instance. The cost of disobedience to constitutional or statutory command and its correction falls on the party seeking obedience, rather than on the one who disobeyed. A system purposely designed to forestall litigation aimed at vindicating important public rights could not be more effective than the present system which so penalizes those seeking vindication of those rights. This unjust result was surely not the design of the American rule, although it often is its effect.

A response of those who defend the American rule is that winning a law suit is no sign of merit and that fee awards would therefore be unjust, as often as not. This position, the third defense of the American rule, is fundamentally incorrect. Granted that some decisions are wrong—unless we are willing to concede that our legal system is as often wrong as right—the effect of this objection is to burden the vast majority of innocent parties with the costs incurred at the hands of wrongdoers, so that a few innocent be spared the additional cost of an opponent's legal fees when they lose. We need not concede that our legal system is so random in its results:

Is not the answer to this that the cost must be paid by one party or the other, and that, in spite of Mr. Satterthwaite's pessimism, it is at least more probable that the losing party was in the wrong? If . . . justice is so much a matter of luck, it hardly seems worthwhile to have courts and lawyers; it would be cheaper, and certainly less dilatory, to spin a coin. If we start with the assumption that our legal system usually does allow the meritorious claim to prevail, once we appreciate the tremendous exclusionary effect the present rule has on all but the well-to-do, we must conclude that the assertion of an unfettered right to litigate meritless claims at the cost of diminution or extinguishment of the right to litigate claims with merit is not entitled to respect. To the extent that imposition of awards of attorneys' fees would permit the poor greater access to courts

22. Goodhart, supra note 2, at 877.
23. Ehrenzweig's autobiographical account and suggestion deserve setting out in full on this point:

When I came to this country twenty-seven years ago, I was penniless, did not speak English, had to support wife, children and parents, and was unable to use anything that I had learned and done as a judge and law teacher in my first life. . . .

[A]n American moving firm had cheated us out of our last belongings. . . . I was, of course, directed to a fine lawyer. "Sure," he said, "you have an airtight claim, and I shall take your case, but you will understand, I must have one hundred dollars as a retainer." I did not understand. Would he not get his fees from the defendant, as he would anywhere else in the world? I did not have the hundred dollars and even if I had won, I would not have been made whole for I had to pay my own lawyer. Of course I did not sue. The little man had lost. . . .

Ehrenzweig, supra note 5, at 792.

And as an American citizen I know that all the law offers the little man outside that second-rate court at some places and at some times, is charity. Legal aid, rather than legal right. If access to the court is said to be an inalienable right in the most rigid dictatorship, money then is the way to justice in the world's greatest democracy. But not only the little man is in jeopardy, the legal profession is hurting itself immeasurably by its doting on what it wrongly believes to be a hallowed
and would result in other benefits, without impairing the justice of the result, we must favor imposition of such costs.

**Other Benefits of Fee Awards**

Aside from increased access of the legally poor to the courts, a correlative benefit would be an augmentation by volume of cases of the utmost public importance. These cases, particularly those involving litigation of civil rights and constitutional claims, usually assert a claim for declaratory or injunctive relief, or other relief nominal in monetary terms. Theoretically, the right asserted is entitled to judicial vindication, but because legal fees must be borne by the injured party, and the contingent fee or similar devices are unavailable, only those financially able to do so can seek that vindication. And it is probably a fact that the party most needing the remedy is the party least able to afford the litigation costs. Traditionally, these cases have been brought because of the "charitable" impulses of "do-good" lawyers or institutions. Even with this device the litigated case is the exception rather than the rule.²⁴

Some proponents of fee awards have suggested a further benefit: The augmentation resulting from increased access will not increase congested court dockets, but will relieve that congestion. This effect is not inconsistent with broader access despite the

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²⁴ As Ehrenzweig characterizes this state of affairs, these suits become matters of "legal aid rather than legal right," Ehrenzweig, supra note 5, at 796. The incentive value of fee awards in this area has led to a number of courts, aided by congressional assent, to shift litigation expenses in class action cases for injunctive relief precisely because dependence on charity hardly bespeaks decent judicial responsiveness to the importance of the issues presented:

Congress did not intend that vindication of statutorily guaranteed rights would depend on the rare likelihood of economic resources in the private party (or class members) or the availability of legal assistance from charity—individual, collective or organized. An enactment aimed at legislatively enhancing human rights . . . through equality of treatment would hardly be served by compelling victims to seek out charitable help.

Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970) (attorneys' fees to be paid by defendant in a successful suit by plaintiff under Title II of the Civil Rights Act of 1964).
apparent inconsistency. It is common "lawyer's knowledge" that financial advantage may result from filing or defending a meritless case. Familiar examples include the nuisance suit, whose settlement value is a direct function of the cost of asserting defenses, and the litigious defendant whose financial position is sufficiently strong to permit him to "wear down" his opponent by constant assertion of ultimately meritless defenses and appeals.

Especially is this the case in civil rights and constitutional litigation. Under the American rule, the defendant whose acts violate constitutional or statutory principles has little to lose by insisting on litigation with a legally poor plaintiff. If he should lose his case, the result most often is prospective equitable relief. That is, he is ordered to stop doing in the future what he should never have done in the past. If there is no real possibility that he will have to pay the fees of the prevailing party, he has little to lose, and a chance of something to win, including the chance to win by merely "wearing" his opponent down, if he persists. The "odds" are such that he is a fool not to "gamble" on being able to continue his unlawful practices. Assessing attorneys' fees against the loser will hardly end these practices—but it will make it more expensive. If the party abusing the court system has to bear the cost of that abuse, the number of abuses can be expected to decrease. Therefore, awards of fees should operate as an in-

25. A plaintiff may come with a groundless claim and realize this financial advantage because the defendant will prefer to pay the plaintiff an amount less than the expense of fighting the case. This is the nuisance value of the suit, made possible by making a defendant balance the cost of payment to the plaintiff against the expense of litigating. Defendant's litigation expenses afford the plaintiff a legalized form of blackmail.

Kuenzel, supra note 10, at 78.

26. Conversely, a defendant may obstruct action as long as possible in the trial court, and regardless of merit, after judgment against him, appeal to as many courts as possible on the chance that because of the time and expense involved he will extract a settlement from the plaintiff less than the amount of the judgment. There is only the favorable possibility that the plaintiff will settle for less, particularly if he is in an acute financial condition. Not only because of the delay itself, but also because of the present cost structure of the courts, the defendant can realize a financial advantage by placing this economic pressure on the plaintiff.

Id.

27. If a party abusing the system is made to pay the actual expense of the injury caused, it is to his financial advantage not to abuse the system. The possibility of having to pay a lawyer's fee for both sides of the litigation would make a plaintiff think twice before he files a petition. It would require a defendant to consider carefully before he defends an action that should not be defended or appeals a case that should not be appealed. Opponent's attorney's fees as costs are consequently a direct deterrent to the number of cases put or kept in suit, and the congestion is reduced. Although the assessment of these costs will not prohibit the
centive to settle cases on the basis of merit rather than respective wealth—on principle rather than principal. 28

This potential favorable impact on court congestion is merely a secondary benefit of fee awards. Although commentators have supported fee awards precisely because they believe such awards would result in relieving court congestion, 29 this result is not certain. Presently, we can assume that as a matter of probability, many meritorious cases are not brought because of the expense involved in litigation. These cases could be economically pursued if the wronged party were reasonably certain of recovering fees. Whether this class of cases outnumbers the "meritless" cases whose incidence would be reduced is problematic. The value of fee awards is not the relief of court congestion. That result can be achieved in a number of ways, including our present way of limiting access to those with the price of admission. To the extent that the problem of court congestion will be aided by awarding fees, only a secondary, though happy, effect results. The primary effect sought is not that relief—it is access itself that should properly concern us.

The uneven burdens created by the American rule and the lack of merit in most of the defenses urged in its support have led to dissatisfaction with many of its applications. In response, a number of attempts to extend legal services have evolved. Thus, the contingent fee device in tort cases, 30 the widespread use of class actions, 31 and the unsatisfactory institution of the small claims court 32 are all attempts to cure problems caused by the operation of the American rule. These are, at best, stop-gap and, at worst, insufferable.

A more straightforward response is simple alteration of the utilization of the system either in a proper or an improper manner, it deters the use in an improper manner to the extent that the party abusing the system will pay the actual expense of the injury caused.


28. See discussion in text accompanying note 131 infra.


32. "[T]he small claims court is unavailable in innumerable communities; and . . . where it exists, it is prevailingly a collection agency, and presents otherwise the horrifying spectacle of a court without law . . . ." Ehrenzweig, supra note 5, at 796-97. See also D.W. Louisell & G.C. Hazard, Pleading and Procedure (1973) for a a collected bibliography.
American rule. No court, or legislature, has yet attempted to go so far. Tradition and history seem too much with us. Instead, courts have created a host of exceptions to the American rule, in which process they have been spurred by legislation and, of late, by increasing concern over the American rule's effect in cases which are deemed to be of particular public benefit.

Today, no general principle has emerged. Exceptions to the general rule are spotty in coverage, at best, and often unpredictable in application. However, these exceptions may yield a general principle which would justify fee awards in all civil rights and constitutional litigation, without a significant alteration—which courts would make with reluctance—of either the present American rule or its exceptions.

**CURRENT EXCEPTIONS TO THE AMERICAN RULE**

American courts have power to award fees pursuant to statutory authorization or in the exercise of traditional equity jurisdiction. We shall first examine the statutory exceptions and then turn to the extra statutory exceptions currently accepted.

**Statutory Exceptions to the American Rule**

The number of federal statutes authorizing or mandating awards of lawyers' fees is impressively large and is growing. There are also a large number of state statutory provisions.\(^{33}\) The federal statutes are of two distinct types, either expressly mandatory or discretionary. Judicial interpretation, however, has somewhat diminished the significance of this distinction.

The mandatory type of federal statute requires fee awards upon a showing that a prevailing party has been injured by a violation of the statute. For example, the Truth-in-Lending Act\(^ {34}\) provides that a creditor who fails to disclose required information shall be liable for certain minimum and maximum damage amounts plus "in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court."\(^ {35}\)

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\(^{33}\) State statutory provisions are beyond the scope of this article. However, it should be noted that such state statutes are neither new, nor are they insignificant, although they are not nearly as broad in scope or coverage as the federal statutes to be discussed.


\(^{35}\) Other statutes mandating awards include the Clayton Act, 15 U.S.C. § 15 (1970) (In antitrust civil actions, the plaintiff "shall recover threefold the Damages . . . ,
Judicial response to these mandatory statutes has uniformly and properly recognized them as legislative determinations of the necessity for, and efficacy of, private litigation as an adjunct to public enforcement of the statute:

The scheme of the statute, as both sides agree, is to create a species of "private attorney general" to participate prominently in enforcement. The language should be construed liberally in light of its broadly remedial purpose. . . . Congress made clear its broader scheme, and broader system of reimbursement, for private enforcement. It invited people like the present plaintiff, whether they were themselves deceived or not, to sue in the public interest. Following familiar precedents, it encouraged such actions by providing, in addition to the incentive of public service, costs and a reasonable attorney's fee above the minimum recovery of $100 . . . ."

and the cost of suit, including a reasonable attorney's fee.

See also those more limited mandatory fee award statutes which require awards to be made to a party injured by the taxed party's violation of an administrative agency's order issued pursuant to the statute, e.g., the Packers and Stockyards Act, 7 U.S.C. § 210(f) (1970); the Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b) (1970); the Railway Labor Act, 45 U.S.C. § 153(p) (1970); and the Interstate Commerce Act, 49 U.S.C. § 16(2) (1970). These statutes are similar in principle to the long accepted power of courts to require a contemner to pay the petitioner's attorney's fees in contempt cases instituted as a result of the contemner's violation of a court order. See R. Goldfarb, THE CONTEMPT POWER (1971). Thus, the statutes serve the limited purpose of granting the orders of these administrative agencies the same dignity and force as a court order.

36. Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270, 280-81 (S.D.N.Y. 1971) (decided under the Truth-in-Lending Act). The court subsequently awarded attorney's fees of $20,000, the amount reached by agreement of the parties, despite the fact that only the $100 minimum damage claim was awardable to the plaintiff and the fact that the violation was "at most a technical and debatable violation." 54 F.R.D. 412, 414 (S.D.N.Y. 1972). Similar recognition of the importance of the "private attorney general" role to the enforcement of these statutes, and the necessity of awards of fees if that role is to be encouraged, prevails in decisions of courts passing on these "mandatory" fee shifting statutes. See, e.g., Hutchinson v. William C. Barry, Inc., 50 F. Supp. 292, 298 (D. Mass. 1943) (Fair Labor Standards Act):

The government has set up a regulatory system for the benefit of persons in the plaintiff's class. . . . Suits by plaintiffs, if well founded are in the public interest. Therefore, the cost of prosecuting successful suits should be borne. . . . by those who have violated the regulations and caused the damage.

The concept of "private attorney general" had its genesis in the seminal opinion of Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), dismissed as moot, 320 U.S. 707 (1943) (reconciling Scripps-Howard Radio, Inc. v. Federal Communications Comm'n, 316 U.S. 4 (1942), with traditional standing cases). The issue in Ickes was not the award of attor-
The theoretical foundation of this response is neither "full compensation" to the injured party nor punishment of the wrongdoer. Rather, the foundation is utilization of fee awards as a device to encourage necessary private enforcement of publically important statutes by freeing the enforcing party from the burden of bearing his own costs.

A second category of federal "fee-award" statutes permit, but do not mandate, awards of attorneys' fees. These statutes cover a broad spectrum of federal law and authorize awards to successful plaintiffs, in some cases, and, in others, to the prevailing party, whether plaintiff or defendant.

Many, but not all, of these statutes expressly limit the power conferred therein to award attorneys' fees to cases in which the losing party exhibited bad faith in litigating. Under such statutes fee awards are intended to be punitive and deterrent, rather than compensatory or incentive, devices. Accordingly, given the express legislative limitation to bad faith contained in such statutes, courts tend to view them as deterrents to frivolous litigation rather than as compensatory devices or as incentives to bring suits seeking to vindicate public policy. There are other discretionary "fee-award" statutes which lack this express limitation, but which confine fee awards to the same instances by requiring a finding that the violation complained of was "willful" or "knowing." Predictably, this punishment justification under either of

37. See also the procedural rules which authorize fee awards in such instances as wrongful refusals to answer questions propounded by interrogatory, Fed. R. Civ. P. 37(a); wrongful refusals to admit the genuineness of documents or the truth of statements subsequently proven to be genuine or true, Fed. R. Civ. P. 37(c); and the wrongful prosecution of frivolous appeals, Fed. R. App. P. 38. Cf. Eaton v. New Hanover County Bd. of Educ., 459 F.2d 684, 686 (4th Cir. 1972) where fees were awarded under Fed. R. App. P. 38 because the prosecution of the appeal was "of such a frivolous nature."

38. Examples include the Securities Act of 1933, 15 U.S.C. § 77k(e) (1970) ("If the court believes the suit or defense to have been without merit . . . ."); the Trust Indentive Act, 15 U.S.C. § 77www(a) (1970) ("Having due regard to the merits and good faith of the suit or defense . . . ."); and the Patent Act, 35 U.S.C. § 285, which refers to awards to the prevailing party in "exceptional cases", which by judicial decision has been construed to refer to cases in which the court finds "unfairness or bad faith in the conduct of the losing party." Keuffel & Esser Co. v. Masback, Inc., 131 F. Supp. 237, 238 (S.D.N.Y. 1955), quoting Park-In-Theatres, Inc. v. Perkins, 190 F.2d 137, 142 (9th Cir. 1951).

39. Examples of these statutes, limited in scope because they incorporate specific
these types of statutes has limited the number of cases in which such awards are made, since the award of fees focuses on the defendant's subjective motivation rather than on the effect of the defendant's acts.  

This focus probably explains the relative inadequacy of awards made thereunder, even in the infrequent instance when such awards are made.

Of greater theoretical importance are a growing number of statutes which grant courts discretionary power to award attorney's fees but which do not, by their terms, limit the authority granted to instances where the losing party exhibits undue litigiousness or bad faith. Contextually, however, the American experience has been hostile to awards of attorneys' fees generally. Despite early recognition of equity's power to fashion whatever remedies were appropriate to a given situation, American federal courts were consistently held powerless to grant attorneys' fees, even in cases involving violations of important federal statutes. Moreover, the only experience courts had with statutory awards was either in cases arising under statutes containing mandatory fee award provisions or in cases arising under statutes containing discretionary fee award provisions, the purpose of which was clearly punitive and which contained "good faith" limitations in


40. See, e.g., Note, Attorney's Fees as an Element of Costs: The Copyright Experience, 4 GA. L. REV. 571, 582-86 (1970) [hereinafter cited as Experience]. It is interesting to note that the copyright statute does not, by express language, incorporate any punitive requirements, but a "good faith" requirement has been uniformly implied by courts. Compare Copyright Act, 17 U.S.C. § 116 (1970) ("[The court may award to the prevailing party a reasonable attorney's fee . . . .]") with, e.g., Ziegelheim v. Flohr, 119 F. Supp. 324 (E.D.N.Y. 1954) (good faith violation of statute held not to mandate award of fees). See also discussion on current judicial treatment of similar "discretionary" statutes at text accompanying notes 58 et seq., infra.

41. Experience, supra note 40, at 588-89.

42. The prime examples of this statutory type are the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501(b) (1970) (fees may be awarded "to pay the fees of counsel" of the labor union member); Title II, Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1970) (discrimination in public accommodations—"The court, in its discretion, may allow the prevailing party a reasonable attorney's fee . . . ."); Emergency School Aid Act, § 718, 86 Stat. 235 (school desegregation—"The court . . . ., in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party a reasonable attorney's fees."). Similar standards are contained in the Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1970) with the additional proviso, not yet well-explored, that the court find that the "plaintiff . . . is not financially able to assume said attorney's fees."

43. See discussion at note 65 infra and accompanying text.

44. See notes 34 to 36 supra and accompanying text.
such awards. Given this experience, and this historical hostility, early cases interpreting discretionary statutes which did not incorporate punitive requirements limited the application of such statutes to instances where the taxed party had acted in bad faith, despite the lack of any such limitation in the statute.

The first Supreme Court case modifying this hostile approach to fee awards under statutes containing discretionary fee award provisions was *Newman v. Piggie Park Enterprises, Inc.* The case arose under Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations and which provides that a “court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee.” Consistent with the practice of early federal cases, this provision, prior to *Newman*, was construed to be oriented toward punishment, not toward incentive, and was limited to the “obdurate” defendant who litigated in bad faith.

The *Newman* petitioners sought to enjoin racial discrimination in five drive-in restaurants and one sandwich shop operated by defendants. The district court enjoined discrimination in the shop but refused to do so with respect to the five drive-ins. On appeal, the Fourth Circuit reversed the refusal to enjoin discrimination at the drive-ins and remanded with instructions to award counsel fees, but only to the extent that defenses had been advanced for the “purposes of delay and not in good faith.” The circuit court had adopted this subjective standard because of the limited, and punitive, view it took of attorneys’ fee awards: “[N]o litigant ought to be punished under the guise of an award of counsel . . . from taking a position in court in which he honestly believes . . . .”

The Supreme Court, in a per curiam decision, affirmed and modified. The Court held that the discretion granted by the statute was a limited one that ought to be exercised in favor of fee awards in all but exceptional cases: “One who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”

45. See note 38 *supra*.
46. See, e.g., the experience under the copyright laws, note 40 *supra*.
49. 377 F.2d 433, 437 (4th Cir. 1967).
50. *Id*.
51. 390 U.S. at 402.
AWARD OF ATTORNEYS’ FEES

Of much greater importance to subsequent doctrinal development than the Court’s holding, however, was the Court’s refusal to base awards on any limited basis such as punishment or to require any lengthy examination of subjective motivation. Instead, the Court based its holding on a very broad and considerably more positive policy:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction he does so not for himself alone but also as a “private attorney general,” vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.52

Given the broad language of the Newman opinion, it is not surprising that its holding with respect to granting attorneys’ fees as a matter of course has been consistently applied in subsequent

52. Id. at 401-02. This broad language was unnecessary for the decision to grant attorneys’ fees. Even under a subjective test, fees would have been awarded. See 390 U.S. at 402 n.5. The defendants had interposed frivolous defenses such as the unconstitutionality of the Act (raised after the Court’s decision in Katzenbach v. McClung, 379 U.S. 294 (1965) in which Title II was expressly held to be constitutional) and the invalidity of Title II because it “contravenes the will of God’” and therefore interfered with the defendants’ first amendment rights, 377 F.2d at 438 (Winter & Sobeloff, JJ., concurring). The breadth of the opinion’s language signalled a strong desire to base attorney’s fees on a more consistent and objective basis and, therefore, was not merely due to a desire to reach a result in this particular case.

The student author of Note, Civil Rights—Attorney’s Fees, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 223 (1969), severely criticizes the reasoning of the Newman Court. He maintains that by logic and by legislative history the result reached is unsupportable, Id. at 225. While not resolving the policy question of whether the result is desirable, the student author asserts that another vehicle, such as an objective good faith standard, might be preferable to a mandatory fee shift to implement the policy objective of opening access to the courts. He concludes: “Under a mandatory test there is less incentive for a defendant to avoid dilatory conduct than there would be [under another test] because the defendant will be taxed with the fee regardless of his good faith.” Id. at 228. Curiously, this conclusion ignores the higher attorney’s fees that such a dilatory approach would incur.
cases arising under other statutes authorizing discretionary awards. Thus, cases arising under the employment anti-discrimination statute, Title VII of the Civil Rights Act of 1964,\(^5\) the Fair Housing Act of 1968,\(^4\) the school desegregation provisions of the Emergency School Aid Act,\(^5\) and, of course, subsequent cases under Title II\(^6\) have made it clear that federal courts regard awards to prevailing parties in these cases almost as “automatic”; this disposition leaves only the issue of amount. More importantly, even though the *Newman* Court did suggest that there might be circumstances which would render fee awards “unjust,”\(^5\) courts have been singularly unwilling to find such circumstance in any case.\(^5\) As a result, therefore, the same philosophical premise, founded upon the “private attorney general” function which is manifested in judicial response to the mandatory fee award statutes, has become the premise for the almost automatic award of fees in cases arising under this type of discretionary fee award statute.

This is not an uncomfortable position. The need for fee awards, as an incentive to private enforcement of public rights, is a serious one. Limiting the exercise of discretion to “unusual”

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55. 86 Stat. 235, 369. In Northcross v. Board of Educ. of the Memphis City Schools, 412 U.S. 427 (1973) (per curiam), the Court vacated a judgment of the Sixth Circuit which had denied an award. In holding that section 718 (which authorizes discretionary fee awards to the prevailing party in school desegregation cases) requires such an award to the party plaintiff “unless circumstances should render such an award unjust,” the Court cited *Newman* and construed section 718 in *pari passu* with section 204(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1970).

56. *But see* United States v. Gray, 319 F. Supp. 871 (D. R.I. 1970) (not applying *Newman*, but as a matter of course awarding fees to a private defendant who successfully defended a Title II case). Title II of the Civil Rights Act of 1964 authorizes awards to the “prevailing party”, as do many of these statutes. Others limit awards to successful plaintiffs.

57. 390 U.S. at 402.

58. *E.g.*, Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 538 (5th Cir. 1970) (decided under Title II of the Civil Rights Act of 1964) is an interesting illustration of the narrowness with which the “unjust circumstances” exception is construed. Plaintiffs were denied injunctive relief, 259 F. Supp. 523 (E.D. La. 1966). This initial denial was affirmed, on appeal, by a panel of the Fifth Circuit, 391 F.2d 86 (1967). On rehearing, en banc, the Fifth Circuit reversed and remanded the case, 394 F.2d 342 (1968). On remand, the district court refused to award attorney’s fees because it believed that the two rulings in favor of the defendant established the litigable merit of the defendant’s case, and that an award would therefore be “unjust.” On a subsequent appeal, the Fifth Circuit, citing *Newman*, reversed the denial of fees.
cases, i.e., to cases in which the private law enforcement value is
properly subordinated to other factors, is therefore entirely justi-
fi able. After all, too much discretion in the awarding or withhold-
ing of fees could destroy enforcement efforts by its guarantee of
unequal results.59

The shift in emphasis from “punishment” to “incentive”
dictates limits on a court’s discretion for yet another reason. A
court may need to exercise some discretion when finding and
weighing the facts upon which a determination of subjective in-
tent is to be made, as is the case when the basis of the award is
punitive. However, once the basis for awards shifts to granting
incentive to enforce important public rights, it becomes another
thing altogether to suggest that a court can exercise its discretion
and determine that a particular substantive area in which a stat-
ute authorizes fees is of so little public importance that the incen-
tive value of fee awards is unnecessary and, thus, can deny fees.
The decisions that the private enforcement of the right granted
by the statute is important and that the award of fees aids in
vindicating this publicly important right by the creation of an
incentive to litigate have been made by the legislature. There is
simply no room for a discretionary re-determination of either
decision.

"Extra-Statutory" Exceptions to the American Rule

Federal courts possess all those equitable powers with which
the English Chancery court was endowed.61 This includes the
power “to adjust their remedies so as to grant the necessary re-

59. See K.C. Davis, Discretionary Justice (1969) and Wechsler, Toward Neutral
60. “Extra statutory” is defined as those cases which arise under federal statutes
which do not provide for attorney’s fees. Therefore, any fee awards must be based on
equity’s inherent power to adjust remedies rather than on specific authority contained in
the statute itself.
64. “Plainly the foundation for the historic practice of granting reimbursement for
the costs of litigation other than the conventional taxable costs is part of the original
authority of the chancellor to do equity in a particular situation.” Sprague v. Ticonic Nat’l
limited the scope of "proper cases," however, to those cases decided under a federal statute that specifically provided for awards of attorneys' fee.65

The early exercise of this "equitable power" in extra statutory situations was limited and somewhat confused. Federal courts regularly gave awards in only two categories of cases—those cases in which the taxed party was thought guilty of litigating in bad faith, in which the awards were based on a punishment theory,66 and those cases in which a monetary fund was created, in which the awards were based on a "benefit" theory.67

The Punishment Rationale: Of Bad Faith and Obstinate Obduracy

As part of its power to do equity in a particular situation, a federal court has the unquestioned power to award fees to a party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."68 The underlying rationale is punitive, and the basis is the existence of some form of "bad faith" on the part of the unsuccessful litigant. A common formulation of the basis for punitive awards in this area is: "The bringing of the action should have been unnecessary and was compelled by the [defendant's] unreasonable obdurate obstinacy."69 Typically coupled with this substantive formulation of the test is the additional principle that the initial determination of such "obstinacy" is a discretionary function of the district court, which discretion will be disturbed only in "compelling circumstances."70 This test is primarily subjective, and, once we grant the fact that much of litigation is in fact an abuse of legal principles for negotiating or bargaining purposes,71 it is predictable that, with some exceptions,72 applications of this punitive test will be con-
fused and inconsistent. Thus, courts have awarded fees under the "obstinacy" standard in reapportionment cases and have also denied fees in such cases on essentially similar facts. A similar pattern existed in school desegregation cases, in which many courts made such awards and as many refused to do so. Not surprisingly, no real factual differences can be discerned that clearly justify or differentiate one set of decisions from another. In all these cases the plaintiffs prevailed, and either the state had not reapportioned or the school board had not desegregated in accordance with law. Neither would have done so but for the suits. Given the importance of these facts other factors present in the cases simply pale into insignificance.

Given the discretionary and subjective nature of the punitive rationale and the random results it produced, courts took impetus from the *Newman* decision and its progeny in the statutory area and developed alternative and more objective grounds upon which to base extra-statutory fee awards, grounds which were realistically related to the policy objective of fee awards.

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*Contempt Power* (1971). Similarly, awards in malicious prosecution or abuse of process cases in which the cost of defending the prior and wrongfully instituted cases are consistent. *Restatement of Torts* § 671(b); Annot., 45 A.L.R.2d 1183 (1954). Another example of a consistent pattern of application are cases in which the taxed party caused the prevailing party to incur expenses in a prior lawsuit resulting from the taxed party's fraud or breach of contract. See, e.g., *McOsker v. Federal Ins. Co.*, 115 Kan. 626, 224 P. 53 (1924) (recovery of fees expended in defending suit by bona fide purchaser of insurance notes fraudulently taken from plaintiff by defendant); *Edwards v. Beard*, 211 Ala. 251, 100 So. 101 (1924) (award to buyer of goods sold with warranty of title where third party successfully established title to goods in previous action).

73. *Dyer v. Love*, 307 F. Supp. 974, 987 (N.D. Miss. 1969) ("[T]he bringing of this action was made necessary by the board of supervisors' unreasonable and obstinate refusal to redistrict itself.")) (distinguishing *Damon v. Lauderdale County Bd. of Supervisors*, note 74 infra, on the basis of the attempt of the community to encourage the Board to redistrict).

74. *Damon v. Lauderdale County Bd. of Supervisors*, 254 F. Supp. 918 (S.D. Miss. 1966) (three judge court) (per curiam) (award denied even though "there was a great need for such redistricting" and it was "accomplished solely as a result of this action").


76. *Kelly v. Guinn*, 456 F.2d 100, 111 (9th Cir. 1972) (affirming denial of attorney's fees when defendant was not obdurate in resisting plaintiff's demands and in complying with desegregation orders); *Felder v. Harnett County Bd. of Educ.*, 409 F.2d 1070, 1075 (4th Cir. 1969) (Sobeloff & Winter, J.J., dissenting from holding of the majority that appeal by defendant was of sufficient merit so as not to necessitate the award of counsel fees under Rule 38); *Rogers v. Paul*, 232 F. Supp. 833 (W.D. Ark. 1964) (defendants moved with enough deliberate speed so that counsel fees not awarded).

77. See text accompanying note 47 *supra*. 
The "Common Fund" Rationale: Of Class Benefits and Therapeutic Values

Cases in which the prevailing party created, increased or protected a common fund in the hands of a court for distribution to claimants present the most common situation in which extra-statutory fees have been consistently awarded to successful litigants. In the typical application, the plaintiff's suit results in recovery of a fund which is then distributed pro rata to all of the members of the plaintiff's class. The plaintiff is awarded attorneys' fees out of the fund, before distribution. Not to do so would be unjust to the plaintiff because it "would give to the other parties entitled to participate in the benefits of the fund an unfair advantage."79

It should be noted that this category of cases does not involve a shifting of fees from the prevailing party to the losing party. All the losing party pays, theoretically, are the damages, out of which are subtracted legal fees before the fund's distribution to the plaintiff's class. In other words, the theory behind these awards is to spread the costs of creating the fund proportionately among those sharing in the fund by charging the fund itself, prior to distribution.80

Despite this "cost spreading" language, these "fund" cases also effect a second policy consideration, based upon a recognition of both the incentive value of high fee awards and the necessity for litigation in certain important areas of the law. As explained by Hornstein, explicit recognition of the incentive value of a fee award led the courts to be generous in encouraging suits.81

80. As stated by the Supreme Court, the plaintiff "confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-94 (1970). The type of cases in which such awards have been made are varied indeed. They include taxpayer's suits, e.g. Council of Village of Bedford v. State ex rel. Thompson, Hine & Flory, 123 Ohio St. 413, 175 N.E. 607 (1931); utility rate refund cases, Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58, 65 (7th Cir.), cert. denied, 307 U.S. 648 (1939); suits to enjoin payment of corporate dividends, Harris v. Chicago, Great W. Ry., 197 F.2d 829 (7th Cir. 1952); and shareholder's derivative suits, Winkelman v. General Motors Corp., 48 F. Supp. 504 (S.D.N.Y. 1942). In these cases, funds were gathered for distribution, and courts spoke of "spreading the cost" among the financial beneficiaries as the primary justification for the awards.
81. Hornstein, at 662-64. This position is supported by the case law; see, e.g., the
of a salutary nature.

They are therapeutic, helping to maintain the health of our corporate system. In hundreds of suits which would not have been instituted without the allure of generous compensation, a miscarriage of justice has been prevented. At the same time the record of litigated cases is a prophylactic—a deterrent to future wrongdoing. Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit. There can be no doubt that these derivative suits have materially raised the standards of fiduciary relationships and of other economic behavior.\(^2\)

In recognition of these "therapeutic" effects, courts permitted fee awards in cases where no actual fund was created for distribution, but where obvious benefit accrued to others as a result of the litigation. Thus, in \textit{Sprague v. Ticonic National Bank},\(^3\) petitioner succeeded in placing a lien on the proceeds of certain earmarked bonds sold on behalf of a bank which had closed and gone into receivership and in having these proceeds applied to her trust account. This was not a class suit, but the stare decisis effect of her suit would benefit fourteen other trusts in situations precisely like petitioner's. The Court had little difficulty in finding justification for an award of fees, paid by the receiver and charged to the estate's assets; the Court drew the obvious analogy to the traditional "fund" theory:

\begin{quote}
[T]he formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through \textit{stare decisis} rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.\(^4\)
\end{quote}

Subsequent cases expanded this doctrine yet further to encompass at least some cases in which there was neither any fund created nor any class suit. Thus, in \textit{Mills v. Electric Auto-lite Co.},\(^5\) shareholders of Electric Auto-lite sought dissolution of a

\begin{footnotes}
\item[2] Id. at 663.
\end{footnotes}
merger with Mergenthaler Linotype because proxies had been solicited by a misleading proxy statement unlawful under the 1934 Securities Exchange Act. The district court found that the proxy statements were misleading and referred the case to a special master to fashion relief. The Seventh Circuit reversed, finding that, although the statements were false, the plaintiffs had failed to prove a causal link between the misleading statements and the merger. The Supreme Court reversed and reinstated the district court's order. The Court then ruled that interim attorneys' fees be awarded. In discussing the propriety of such an award, the Court seemingly based its decision both on the "benefit to the class" rationale so long associated with traditional "fund" cases and on the "incentive" rationale which it had earlier applied in Newman, but which it had never applied to extra-statutory cases:

In many suits under § 14(a), particularly where the violation does not relate to the terms of the transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders. Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. But regardless of the relief granted, private stockholders' actions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.

The difficulty with the opinion, of course, is that reliance on the "fund" rationale for decision seems misplaced because the "benefit to all shareholders" said to result from this case seems illusory. The district court's decision neither created a monetary


87. 396 U.S. at 396-97 (citations omitted).
fund nor fashioned a remedy of any form. The appeal was taken before any determination of relief by the special master. Therefore, given this status, how can it be clear that the stockholders directly benefited if the issue of damages and remedy is so murky? Given the lack of tangible benefit, it would seem that the real basis for the decision must have been the desire to encourage the bringing of suits which vindicate the statutory policy; the "fund" cases were used as a convenient, but fictional, analogy to reach that result.

Others read the Mills case in a similar fashion. The case has been cited for the "incentive" or "therapeutic" rationale by courts, and at least some commentators suggested that after Mills "the dominant element in the decision-making process may be the emergence of a consensus as to the societal benefits of encouraging private law enforcement." However, the Court has indicated its unwillingness to take so vigorous a step in Hall v. Cole, a case decided last term, which, while extending fee

88. E.g., Lee v. Southern Home Sites Corp., 444 F.2d 143, 145 (5th Cir. 1971) [hereinafter cited as Lee].

In Mills the Supreme Court sharply distinguished Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) (denying an award of attorney's fees under the Lanham Act where the particular statute under which plaintiff brought suit was silent on the award of attorney's fees) and limited Fleischmann to the situation where the specific statute sued under meticulously details the remedies available to a plaintiff and thus, by implication, limits the remedies to those so detailed. The district court in Yablonski v. United Mine Workers of America, 314 F. Supp. 616 (D.D.C. 1970), attempted to rely on Fleischmann to distinguish Mills. In Yablonski plaintiff brought suit under the Landrum-Griffith Act, 29 U.S.C. §§ 481(c), 482, 483, 501, 529 (1970), and asked for attorney's fees even though the specific acts challenged were prohibited by statutory sections which were silent on the question of fee awards. The district court had earlier granted a preliminary injunction, but in this proceeding dismissed these charges as moot. It denied attorney's fees on the rationale that plaintiff was seeking a private benefit and would not confer a benefit to a class. Moreover, for the district court the case was analogous to Fleischmann because the Landrum-Griffith Act specified remedies in a complex regulatory scheme. The circuit court reversed, first on the issue of mootness, 459 F.2d 1201 (D.C. Cir. 1972), and then on the issue of the denial of attorney's fees, 466 F.2d 424 (D.C. Cir. 1972). According to the circuit court, the question was whether Congress had precluded "the allowance of such fees." 466 F.2d at 428. Then, citing Mills, the circuit court stated:

Absent the positive interposition by Congress of a barrier to judicial allowance of attorney's fees, we note . . . the inherent power . . . to award attorney's fees where an individually initiated law suit has brought benefits to a wider group.

466 F.2d at 430.

This circuit court opinion in Yablonski was cited with approval by the Supreme Court in Hall v. Cole, 412 U.S. 1, 9, (1973) (discussed in text accompanying notes 90 et seq., infra).

89. Allocation, supra note 85, at 328. From Mills the Note draws obvious implications favoring fee shifting in a host of socially important areas such as civil rights, consumer protection and environmental cases. Id. at 331.

awards to a new substantive area, does so on a theoretical extension of the "benefit to the class" rationale and disavows any intention to adopt generally the "private law enforcement" rationale.

In *Hall* the Court affirmed an award of attorneys' fees made to a union member who had been expelled from his union in violation of Section 102 of the Labor Management and Disclosure Act. The Court affirmed the award on the basis of the "class benefit" rationale:

[B]y vindicating his own right of free speech . . . respondent necessarily rendered a substantial service to his union as an institution and to all its members . . . . Thus, as in Mills, reimbursement of respondent's attorney's fees out of the union treasury simply shifts the costs of litigation to "the class that has benefited . . . ".

The Court specifically refrained from passing on the applicability of the "incentive" or "therapeutic" or "private attorney general" rationale as a basis for the award:

Citing our decisions in *Mills* . . . and *Newman v. Piggie Park Enterprises, Inc.*, . . . respondent contends that the award of attorneys' fees in this case might also be justified on the ground that, by successfully prosecuting this litigation, respondent acted as a "'private attorney general' vindicating a policy that Congress considered of highest priority." . . . In light of our conclusion with respect to the "common benefit" rationale, however, we have no occasion to consider that question.

The difficulty here is, once again, the necessarily fictional basis of the purported benefits. As Justices White and Rehnquist point out in dissent, member-union litigation "often involves [no more than] private feuding having no general significance," a perception which is borne out by the fact that the Union members continued to elect those who had "harmed them" for the 5 year period in which the case was being litigated.

91. 29 U.S.C. § 412 (1970). Title I of the Act, under which suit was brought, is entitled the "Bill of Rights of Members of Labor Organizations."
92. 412 U.S. at 8.
93. *Id.* at 6, n.7. Two cases cited by the Court in this passage, *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972) and *Lee*, are examples of cases in which courts have gone beyond the "benefit" or "fund" rationale to base awards, explicitly, on an "incentive to private law enforcement" basis.
94. 412 U.S. 16.
Obviously, the "fund" category of cases has grown beyond its relatively modest origins in "common fund" cases to encompass, at least, all the cases in which the plaintiff confers some benefit on the members of an ascertainable class, even if that benefit is not monetary and the suit is not, technically, a class action. It is enough that the case "corrects or prevents an abuse which would be prejudicial to the rights and interests of those others" and that "the court's jurisdiction over the subject matter makes possible an award that will operate to spread the costs proportionately among [the members of the benefited class]."

In summary, the chief exceptions to the American rule are: awards of fees under either mandatory or discretionary statutes authorizing such awards; and awards of fees in a growing number of extra-statutory categories, developed as adjuncts to equity's power to fashion effective remedies, the most important examples of which are those awards granted under a punitive rationale or under the "common fund" rationale and its extension, the "class benefit" rationale. Despite the different theoretical foundations of these rationales, there is a common thread running through all these exceptional categories, which the Supreme Court has not yet explicitly accepted as an independent basis for fee awards. That thread is the fact that fee awards open access to courts for those whose financial resources or financial stake in the litigation otherwise limit access and, further, that creating this new access necessarily encourages litigation of a type thought sufficiently important that its encouragement is believed desirable.

**Fee Awards in Civil Rights and Constitutional Litigation: From Exceptions to the General Rule**

Many, but by no means all, civil rights and constitutional cases can be subsumed by some one or other of the presently accepted categories qualifying for awards. For example, many school desegregation, housing discrimination, and employment discrimination cases fall within the category of cases in which awards are authorized by statute. Similarly, awards may be available in some of these cases as a result of the application of the punitive equitable doctrines discussed earlier, or the appli-

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95. *Id.* at 6 n.7.
96. *Id.* at 5.
97. See note 42 *supra*.
cation of the "common fund" or "benefit to the class" doctrines. The dependence of awards on these theories, however, would result in lack of awards in too many important areas of private civil rights or constitutional enforcement. Statutory authorization of awards is spotty at best, and extra-statutory doctrines would have to be utilized to authorize awards in most cases. Neither the "common fund" doctrine nor its newest variant, the "benefit to the class" doctrine, could be expected to apply to most civil rights cases. Most awards in these cases would have to be made, if at all, pursuant to the equitable doctrines which are punitively oriented.

The punitive doctrine, because of its subjective nature and its unpredictable results, is a most unsatisfactory basis upon which to attempt to foster private enforcement of civil or constitutional rights. As has often been noted, it is no solace to the person deprived of his civil or constitutional rights that that deprivation was accomplished in good faith. Most extra-statutory awards in civil rights cases brought against private discriminators would probably have to be made from this category, since neither the "common fund" nor "common benefit" doctrines would be expected to be applicable to most cases. See notes 99-100 infra.

99. There have been instances in which suits to cure violations of civil rights have resulted in the creation of funds for distribution to those injured. See, e.g., Ojeda v. Hackney, 452 F.2d 947 (5th Cir. 1972), in which attorney's fees were awarded out of a fund of $2,519,000, which consisted of retroactively awarded welfare benefits. But given the injunctive nature of most civil rights and constitutional cases, and the lack of provable damages resulting from violations, the cases qualifying for awards under this category would be rare cases, indeed.

100. See text accompanying note 95 supra. Instances in which such awards could be made are illustrated by Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951). Black locomotive firemen successfully enjoined the operation of an agreement between the railroad and the union, which agreement had deprived plaintiffs of seniority rights. Id. at 481. The court held that fees could be taxed against the union. Although the court did not use the "common benefit" doctrine in so doing, the facts of the case would permit such an award under that doctrine by analogy with the Hall case, discussed in text accompanying note 90 supra. Again, however, instances of the application of this doctrine to civil rights cases could be expected to be rare. Most cases do not present instances in which the benefit would result to "members of an ascertainable class" and in which the "court's jurisdiction over the subject matter . . . makes possible an award that will operate to spread the costs proportionately among . . ." the members of that class. Hall, 412 U.S. at 5. Indeed, in most, if not all, civil rights cases brought against private parties, it would be manifestly impossible, and very often unfair where possible, to make the benefited class, rather than the losing party, bear the costs.

101. See notes 99 and 100 supra.

102. See text accompanying notes 69 and 25 supra.

103. "It is of no consolation to an individual denied the equal protection of the laws
to the would-be litigant to learn that he can afford to vindicate his civil rights if the deprivor is wantonly motivated, but that the same deprivation is beyond redress, because beyond his financial capacity, if the deprivor acts with a pure heart.

There is an alternative rationale upon which awards in civil rights and constitutional cases could legitimately be based, a rationale which is, at least, the partial, if implied, basis of many of the other exceptions: the "private attorney general" rationale.

This rationale would be the basis of a fee award in any case, whether it is a class action or not, whether the suit benefits others who can be made to bear the costs of litigation or not and whether the defendant acts in bad faith or not. All that would be required for its application is that the policy vindicated by the plaintiffs' successful suit be one which the court awarding the fees deems of "the highest priority." In other words, awards under this rationale would be made, not because of the defendant's bad faith, nor even because the suit benefited others who can, and should, bear their proportionate share of that benefit. Awards hereunder would be made simply because a court recognizes that such awards do create access and do encourage either litigation or the recognition of rights without litigation. Awards would be made in those cases simply to encourage litigation of a type sufficiently important that we wish to encourage persons to undertake the litigation. Hence, the only prerequisite for its application would be a judicial determination that the suit involves questions of sufficient importance that such encouragement and, therefore, such awards are desirable.

This "private attorney general" rationale has been explicitly applied by the Supreme Court in but one area—in cases arising under statutes specifically authorizing fee awards. In such cases, the Court has, quite properly, ruled that congressional authorization of fee awards in a particular statutory scheme is equivalent to congressional determination that the policies expressed by that statute are "of the highest priority" and that those vindicating them, in successful litigation, are therefore entitled to fee awards.

Thus far, the Court has declined to reach the question of application of the "private attorney general" rationale to cases

that it was done in good faith . . . ." Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

104. Newman at 402. For lack of a better term, and in accordance with usage (see Hall) the term "private attorney general" describes this doctrinal basis for fee awards.

105. See discussion note 93 and accompanying text supra.
arising under statutes which do not explicitly authorize fee awards, although civil rights and constitutional litigation seem to be two categories of cases in which the rationale could, and should, be uniformly applied despite the lack of statutory authorization.

That this rationale has been adopted in cases arising in a statutory context, but not otherwise, seems primarily a function of judicial deference to legislative policy making. In cases arising under statutes which authorize fee awards, unlike the case of purely extra-statutory awards, Congress has explicitly made clear the priority it assigns to certain policies. Courts often deem that assessment of the relative priority of public policies is best suited to legislative, rather than judicial, determination. It is for this precise reason that some courts have refused to extend the "private attorney general" rationale to extra-statutory cases. Such awards "will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination . . . ."


See Note, Civil Rights-Attorneys Fees, 4 Harv. Civ. Rights-Civ. Lib. L. Rev. 223, 225 (1969), discussed at note 52 supra, in which the author, characterizing the Newman Court's award of fees as "mandatory," states: "No logical imperative leads to the conclusion that Congress intended a mandatory fee. If Congress had so intended, it could have explicitly done so, as it has in a number of statutes."

The position is incorrect. The power to award fees is inherent in courts of equity. No grant of power to do so is necessary. In the limited number of circumstances described in this Note, the Court has held that equity should exercise this power to encourage litigation which is either of public importance, as in Newman (see discussion accompanying notes 47 et seq., supra), or which benefits others who can be made to bear their proportionate share of the cost, as in Mills and Hall (see discussion accompanying notes 90 et seq., supra). Of course, Congress can add to these exceptions by specifically mandating awards, as it has done in certain statutes (see discussion accompanying notes 34 et seq., supra).

Since the power to grant fees is inherent in equity's power to "adjust remedies," if equitable doctrines require the granting of awards in a given case arising under a statute which is silent on the question, that silence does not, of itself, render the court powerless to grant such awards. Congress does, indeed, have the power to circumscribe such equitable relief. For example, the Court held that the Lanham Act precluded fee awards in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), because the statute "meticulously detailed the remedies available" by provision "for injunctive relief, . . . recovery measured by the profits that accrued to the defendant, . . . costs of the action and damages which may be trebled . . . ." Id. at 719. This meticulous detailing obviously leads to the inference that these express provisions were intended "to mark the boundaries of the power to award monetary relief in cases arising under the Act," Id. at 721.

However, where the statute is silent about the question of fees, and the statute broadly authorizes the courts to grant such relief as may be appropriate, there is no basis to infer a congressional intent to deny the courts' power to grant any particular form of equitable relief, including the traditional power to award fees in appropriate cases. In
This position has more than passing merit. Short of complete abrogation of the prevailing American rule, it may well prove difficult to justify selection of one category of cases, rather than another, for application of the "private attorney general" rationale, without statutory guidance. When Congress enacts a statute, it presumably deems the policies expressed therein to be of some public importance. Thus, some courts perceive no basis for distinguishing the relative importance of actions under one federal statute from actions under another federal statute for the purpose of making fee awards and encouraging litigation. Notwithstanding that there is some merit in this position, there are some categories of cases in which a court's hesitancy to adopt the "private attorney general" rationale in the absence of an authorizing statute is misplaced. Courts can award attorneys' fees in all civil rights and constitutional litigation on the basis of the "private attorney general" or "private law enforcement" rationale, even in the absence of statute, in order to encourage litigation. In these types of cases courts can do so without fear that the rationale would require extensive revision of the American rule as it may apply to other kinds of cases. What distinguishes these cases from all others, for purposes of justifying extra-statutory fee awards, is that courts can assuredly conclude that the policies informing them are of unique public importance. The ease with which courts could find these cases to be so suited to fee awards appears with but a moment's reflection.

**Civil Rights Litigation**

Consider the category of civil rights litigation. As stated earlier, by civil rights cases this article refers to those cases challenging racial discrimination, whether the discriminator be a private party or a government agent. Although it might seem that these cases could be considered synonymous with constitutional litigation, there are two important distinctions. First, civil rights cases may involve, and frequently do involve, private parties only. That is, civil rights cases may challenge private discrimination, pursuant to statutory authorization, as well as public or governmental discrimination. Thus, in a large class of civil rights cases, the discriminator, and not the benefited class, would bear the attorneys' fee—there would be, and could be, no analogy to the "benefi-
fit to the class” rationale, although this analogy could be drawn in constitutional litigation.

Second, and perhaps more importantly, in civil rights cases the courts would not be operating independently of the legislative branch in determining the priority with which civil rights cases are vested. In other words, courts can easily hold that any suit vindicating the policies of the various anti-discrimination provisions of any statute is “of the highest priority” because Congress has itself so determined. Thus, to the extent that legislative assessment of priority is considered necessary before the “private attorney general” rationale can be applied, legislative assessment already exists. This distinguishes constitutional litigation, with reference to which no legislative determination exists.

The congressional assessment of the importance of encouraging private litigation to vindicate civil rights is contained in a large number of statutes. Congress has proscribed racial discrimination and encouraged suits to challenge discrimination, in housing, employment, education and public accommodations, by enacting statutes which specifically provide for awards of attorneys’ fees. Thereby, Congress has already declared that ending racial discrimination by resort to private litigation, given incentive through fee awards, is, indeed, of the “highest priority.”

The award of attorneys’ fees in suits seeking to redress racial discrimination on some basis other than these statutes is not subject to the objection of no congressional determination of priority. For example, suits to redress housing discrimination can be brought under the Open Housing Act of 1968, which specifically provides for awards of attorneys’ fees, or under the Civil Rights Act of 1866, which does not. The essential acts complained of in either suit are identical. The gravamen of either action is racial discrimination. It cannot be said that the priority assignable to one case may differ from that assignable to another by virtue of the fortuity of the technical choice to file suit under one statute rather than under another.

107. See note 42 supra.
110. The technical choice of one basis for suit rather than another is purely a matter of procedural or tactical advantage. It is of no substantive significance. Thus, for example, suits under the 1866 Act can avoid some of the administrative exhaustion necessities of the 1964 Act, and they may also, in some circumstances, enjoy a longer period of limitations. See James v. Hefler, 320 F. Supp. 397 (N.D. Ga. 1970). The technical choice of statutes is discussed in Chandler, Fair Housing Laws: A Critique, 24 Hastings L.J. 159 (1973); Comment, Racial Discrimination in Private Housing: Five Years After, 33 Md. L. Rev. 295-98 (1973).
Simply put, there is no difference in priority to be found between any cases, regardless of their technical foundation, involving racial discrimination. For this reason both the First\textsuperscript{111} and the Fifth Circuits\textsuperscript{112} have explicitly extended the "private attorney general" rationale, as a basis for fee awards, to cases successfully challenging housing discrimination, even though the suits had foundations in statutes not specifically providing for fee awards. The Fifth Circuit stated:

[H]ere as in Mills there is a strong congressional policy behind the rights declared in § 1982. Awarding attorney's fees to successful plaintiffs would facilitate the enforcement of that policy through private litigation.

[I]n fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. Courts work interstitially in an area such as this.

[T]he effective remedy for securing the rights declared in § 1982 should include the award of attorney's fees to successful plaintiffs such as provided in the Fair Housing Law, 42 U.S.C. § 3612(c). The same policies supporting Congress' provision for attorney's fees in that statute apply to fair housing suits under § 1982.

We think the factors relied on in Piggie Park in interpreting the provision for awarding attorney's fees apply also to suits under § 1982. The policy against discrimination in the sale or rental of property is equally strong. The statute, under present judicial development, depends entirely on private enforcement. Although damages may be available . . . in many cases there may be no damages or damages difficult to prove. To ensure that individual litigants are willing to act as "private attorneys general" to effectuate the public purposes of the statute, attorney's fees should be as available as under 42 U.S.C. § 3612(c).\textsuperscript{113}

The "policy against discrimination" in any actionable form is self-evidently "equally strong" as the policy against racial discrimination in housing, employment, public accommodations or

\textsuperscript{111.} Knight v. Auciello, 453 F.2d 852, 854 (1st Cir. 1972).
\textsuperscript{112.} Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971).
\textsuperscript{113.} Id. at 145-48.
education, areas in which specific statutes authorizing awards exist. By working interstitially from these statutes and the discretionary statutes to the silent statutes, courts are not presented with the problem of total congressional silence. Congress has expressed itself, in areas so closely analogous, as to dispel all rational doubt concerning its view of the priority assignable to the policy against all forms of racial discrimination, whether private or public. There is, therefore, no reason to doubt the priority of these policies, although there might be doubt with respect to non civil rights federal statutes in which there are no fee award provisions at all, either in the particular statute itself or in any statutes containing closely related legislation. Thus, awarding fees in civil rights cases would not require, nor even suggest awards in most or even all cases arising under other federal statutes.

Despite the current lack of general acknowledgement of the validity of the theoretical approach outlined above and the lack of any Supreme Court decision on point, many courts have, of late, made awards in cases for which the only basis was to encourage private law suits challenging racial discrimination. Thus, the principle of Lee has been extended to employment discrimination cases brought under the 1866 Act, to jury discrimination cases.

114. It is for this reason that the Fourth Circuit's holding in Bradley is surely wrong. The court reversed an award of fees in a school desegregation case because it felt that there was insufficient proof of the school board's bad faith and because it refused to adopt the "attorney general" rationale in school cases. Although its concern about a court's ability to assign priorities has merit, see discussion note 106 supra, its exercise of that concern in this case is inappropriate. There simply can be no doubt about the priority of school desegregation cases. Indeed, if the Fourth Circuit wished to have legislative determination of priority, that determination existed: Section 718 of the Emergency School Aid Act (Title VII of the Education Amendments of 1972), P.L. No. 92-318, 86 Stat. 235, provides for awards of attorney's fees in school cases. See note 42 supra. The Fourth Circuit discussed section 718, but refused to consider it applicable because the legal services for which fees were requested were performed prior to the effective date of section 718. Thus, the court viewed the sole issue, insofar as section 718 was concerned, to be what the court characterized as its "retroactivity". This is an unnecessarily restrictive reading of a statute for a court which, in the same opinion, recognized that "determining what is public policy [is] an issue normally reserved for legislative determination." 472 F.2d at 329. What the court failed to realize was that section 718 clearly set forth the "legislative determination" of the importance of school desegregation cases. Surely the Fifth Circuit's approach in Lee of incorporating remedies enacted in 1968 into the 1866 act, because of the inescapably close analogy of suits thereunder, was more appropriate to a court of equity than was the Fourth Circuit's refusal to consider the policy implications of a 1972 Act in connection with a fee award for legal work performed in the 1968-1970 period.

115. Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972) ("There is no relevant distinction between a section 1982 suit and a section 1981 suit such as this one."). See District of Columbia v. Carter, 409 U.S. 418 (1973) (discussion of both sections 1982 and 1983 in relation to the Civil Rights Act of 1866).
cases,\textsuperscript{116} to cases successfully enjoining the operation of segregated public housing,\textsuperscript{117} and to a miscellany of other racial discrimination cases.\textsuperscript{118} Although few of these opinions adequately articulate the unique position of racial discrimination cases, their results are surely correct.

\textit{Constitutional Litigation}

The same "private attorney general" rationale should also justify fee awards in all constitutional litigation. As noted earlier, by "constitutional litigation," this article refers to cases in which the conduct of public officials is challenged on constitutional grounds. Obviously, there are no general statutes authorizing awards of fees in these cases, and we are met, at the outset, with the necessity for making a judicial, not a legislative, determination that constitutional policies are of sufficient priority that successful litigants can be said to be performing a public service by vindicating those policies in private litigation. But is there any real difficulty involved in making this determination?

The Constitution itself is law. More, it is the supreme law, outranking ordinary statutes or common law doctrines. This is ancient learning, which at this date needs no defense.\textsuperscript{119} Additionally, one of the important, indeed the single most important, function of courts is to assure that public officials act conformably to the authority both given and limited them in the Constitution:

In 1803, Chief Justice Marshall, speaking for a unanimous Court, . . . declared in the notable case of \textit{Marbury v. Madison} . . . that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this

\textsuperscript{116} Ford v. White, --- F. Supp. ---, Civil No. 1230(N) (S.D. Miss. Aug. 3, 1972) ("The elimination of discrimination in the jury selection process is certainly a strong national policy . . . ").


\textsuperscript{118} See, e.g., Lyle v. Teresi, 327 F. Supp. 683 (D. Minn. 1971). Attorneys' fees were awarded after a jury verdict of $4,000 in a suit alleging police harassment of black musician. Attorneys' fees are allowed in 42 U.S.C. § 1983 cases "not simply to penalize litigants, but to encourage individuals injured by racial discrimination to seek judicial relief." 327 F. Supp. at 685.

\textsuperscript{119} The Constitution is the "fundamental and paramount law of the nation," \textit{Marbury v. Madison}, 1 U.S. (1 Cranch) 368, 389 (137, 177) (1803).
Court and the Country as a permanent and indispensable feature of our constitutional system.

Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery." United States v. Peter, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly restrained.120

The hesitancy to adopt the "private attorney general" rationale which has its origin in questions about a court's competency to "[determine] what is public policy"121 simply cannot arise when a court determines the legitimacy of a constitutional challenge to some public officials' behavior. Such cases are beyond argument "vindicating [policies] . . . of the highest priority,"122 for they are no less than constitutional policies.

There is yet another reason to adopt a rule generally authorizing awards of attorneys' fees in constitutional cases. Constitutional litigation is one area in which there is a close confluence of the "private attorney general" and "benefit to the class" rationales. The original Constitution placed prohibitions on the national government. And, as a result of the Civil War Amendments,123 the Constitution is now understood to prohibit much to both the national and state governments.124 All individuals have rights assertable against all levels of government, rights which are "of the very essence of a scheme of ordered liberty."125

The plaintiff and, more broadly, those who stand in the same relation to the successfully challenged activity as stood the plaintiff benefit when rights essential to a "scheme of ordered liberty"

120. Cooper v. Aaron, 358 U.S. 1, 18-19 (1958). See also C. Black, Perspectives in Constitutional Law 6 (1970) [hereinafter cited as Black]:

The judicial power is one of the accredited means by which our nation seeks its goals, including the prime goal, indispensable to political as to personal health, of self limitation. Intellectual freedom, freedom from irrational discrimination, immunity from unfair administration of law—these (and other similar) are constitutional interests which the Court can protect on ample doctrinal grounds. They often cannot win protection in rough-and-tumble politics.

Id. at 18-19.

121. Bradley at 329.


123. Particularly, U.S. Const. amend. XIV.

124. See Black at 74.

are vindicated in private litigation. In the broadest and most accurate sense the beneficiaries are all those who enjoy the protection of constitutional inhibitions on arbitrary government action. An award in these cases would serve to distribute costs to all beneficiaries—the taxpayers—and in these cases, therefore, awards of fees are supportable by both the “private attorney general” and “benefit” rationales.

Nor does this unnecessarily torture the “benefit” concept. Granted, the transient majority may, at different times, be opposed to different constitutional prohibitions. But no less opposed to enforcement of the Securities Act were the stockholders in Mills, who approved the merger, or the union members in Hall, who re-elected the union leadership. Indeed, there is even less torturing of the “benefit” concept in the constitutional area than there is in the statutory context of which Mills and Hall were decided. Statutory norms express, at best, policies of the moment. Their effect may or may not benefit those whom Congress intended to benefit thereunder. The statutes could be wrong. Or, although some of the “class” may benefit, not all may benefit, even over the long run. Constitutional norms, on the other hand, express nothing less than the policies undergirding our society. They too may be wrong. But, even so, they are all we have—and, ultimately, all the individual, any individual, has when faced with assertions of governmental right. Political change may or may not be a realistic goal in a given case, but the prospect of change is of no value to one faced with immediate assertions of arbitrary power. Individuals in this situation should be encouraged to institute litigation which successfully vindicates constitutional norms; from this individual vindication, all would benefit.

The reasoning of Hall is applicable here. Hall authorized an award of fees under that section of the LMRDA entitled the “Bill of Rights of Members of Labor Organizations.” As the Court pointed out, the successful party in Hall by vindicating his own right of free speech . . . necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by [the LMRDA], the rights of all members of the union are threatened. And, by vindicating his own right, the successful liti-
gant dispels the "chill" cast upon the rights of others.129

This point is correct. And it is not any the less correct that all citizens benefit when any one of them successfully vindicates his own rights protected by the Constitution. Just as it was in Hall with respect to the union member's defense of his rights, any defeat of attempted governmental curtailment of rights granted by the Constitution and any vindication of a litigant's constitutional rights "necessarily dispels the 'chill' cast upon the rights of others." This is especially so when the "rights" protected are those given in the Constitution, rather than in LMRDA.

Accordingly, reimbursement of the successful litigants' attorneys' fees out of the public treasury simply accomplishes the same shifting of the cost of litigation as did reimbursement of the successful litigants' fees out of the union treasury in Hall. In both situations, the class that has benefited from the litigation and that would have had to pay the fees had it brought the suit, ultimately bears this burden.

Despite the close analogy, however, the preferable basis for award would be frank adoption of the "private attorney general" rationale. This rationale seems to express more adequately the real purpose of such awards: to make access to courts in such important cases greater than it presently is and to utilize the incentive nature of fee awards to encourage the hearing of these important cases. In other words, even though sufficient analogy to the "benefit" rationale exists, there is no need to engage in "benefit" analysis when what is truly operating is a recognition of the desirable consequences of encouraging this type of publicly important litigation.

All that is required for adoption of the "private attorney general" rationale is that the successful party indeed vindicates policies of easily ascertainable importance. Whether the court can identify a benefited class specifically and tax costs to them is immaterial. Indeed, in many such cases, they should not be so taxed. The operative question should not be the existence of a taxable, benefited class, but the importance of the policy vindicated. When faced with cases which vindicate constitutional policies, courts should have little difficulty in assessing their importance.130

129. 412 U.S. at 8.

130. There are already a number of cases, albeit a small number, which seem to adopt this rationale in constitutional litigation. See, e.g., Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972) (in section 1983 action awarding attorney's fees to plaintiffs' successful
CONCLUSION

Attorneys' fees ought to be awarded, as a matter of course, in all cases in which the successful party vindicates civil or constitutional rights. In all such cases, the successful litigant is, indeed, acting as a "private attorney general" vindicating rights of the "highest priority." In the case of civil rights litigation, the courts need not make the determination themselves since they have before them the clear interstitial congressional example to rely upon. In the case of constitutional litigation, brought against public officials or agencies, the courts lack legislative determination of the importance of the policies vindicated. However, there is no need for legislative determination of the importance of constitutional policies. That is one determination the courts can make themselves, without fear of engaging in wholesale revision of the general American practice on fees, because of the unique position of the Constitution.

Lest it be understood otherwise, what is said here is not


131. Fees would have to be awarded on a basis consistent with the "private attorney general" rationale. Thus, fees should be awarded to the prevailing party and then only if the prevailing party successfully ended practices denying civil or constitutional rights. In other words, awards are justifiable only as an incentive to encourage these types of suits. This purpose would hardly be served by awarding fees to the successful defendant. Indeed, if awards were made to all prevailing parties, the very private enforcement sought to be encouraged might be chilled. This is especially the situation in cases, brought to test new statutes or doctrines, in which the outcome might be in doubt.

Limiting awards to prevailing plaintiffs does run the risk of encouraging nuisance suits. Cf. discussion at note 25 supra. This has been one fear in the corporate or derivative suit area, but the fear seems ill-founded in the area of civil rights and constitutional litigation. Suits against government officials, who are seldom at liberty to settle cases involving challenges to state statutes, do not present the danger of strike suits. Similarly, suits seeking an end to racial discrimination seldom involve the threat of large monetary damage awards that create the favorable context for strike suit settlement in corporate litigation.

To the extent that there is a danger of creating nuisance suits in this area because of the encouragement of suits by awarding fees to prevailing plaintiffs, this danger can be averted by the exercise of equity's power to award fees as a punitive measure, see discussion in text accompanying note 68 supra. By this standard, courts could award fees to prevailing defendants to the extent necessary to counterbalance the danger of frivolous, bad faith litigation by plaintiffs improperly encouraged by the prospect of fees.
intended to suggest that awards of attorneys' fees in extra statutory cases cannot or should not be extended to cases involving other than civil rights and constitutional litigation. The only point made here is that these latter are fundamentally different from all other types of private litigation, because of the ease with which courts can determine their policies to be of particular public importance, i.e., of the "highest priority". Therefore, courts ought not to hesitate to award fees in these cases if that hesitation is based on experienced or anticipated difficulty with fee awards in other categories of cases. Attorneys' fees ought to be awarded, as a matter of course, in all civil rights and constitutional litigation.