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AWARDING ATTORNEYS' FEES TO THE "PRIVATE ATTORNEY GENERAL": JUDICIAL GREEN LIGHT TO PRIVATE LITIGATION IN THE PUBLIC INTEREST

A new exception to the traditional refusal of the American legal system to award attorneys' fees to victorious litigants is currently emerging in the federal courts. Predicated upon the desire to encourage litigation aimed at vindicating strong national policies, a number of federal courts will now award counsel fees to those plaintiffs who have pursued certain types of public interest actions to a successful conclusion.¹

The implications of this new exception would seem to be of considerable significance. Traditionally, enforcement of those federal laws designed to protect broad public interests has depended almost exclusively upon the efforts of the United States Attorney General's office and various administrative agencies. Although considerable efforts have been channeled through these public instrumentalities, the inherent limitations of restricted funding, heavily centralized bureaucratic organization and, in many instances, direct conflicts of interest, have substantially impaired their overall effectiveness.² By eliminating the main obstacle to private litigation in the public interest—the prohibitive expense of hiring legal counsel—these federal courts have made it possible for public-minded individuals to supplement the efforts of public enforcement agencies, and to do so free of the constraints of those politically dependent bodies.

³. In addition to the monetary obstacle, two major legal hurdles may also effectively bar pro bono litigation by private individuals, namely, the question of "standing," see, e.g., Sierra Club v. Morton, 405 U.S. 727 (1972), and the question of whether the statute in question allows for a private, as opposed to public, right of action based upon its violation. Compare, e.g., Holloway v. Bristol-Myers Corp., 327 F. Supp. 17 (D.D.C. 1971), with J.I. Case Co. v. Borak, 377 U.S. 426 (1964).
The social value of encouraging pro bono litigation in this manner is manifest: substantially increasing the enforcement potential of our country's civil laws will naturally lead to an accelerated realization of the policies behind these laws, and, in the broader context, a far greater ability to respond to the perceived needs and desires of society. This note will examine the legal conceptualization and practical application of the still embryonic "private attorney general" fee shifting doctrine. Specifically it will chronicle the judicial generation of the new rule, examine the latest group of cases which have relied upon it to shift the plaintiff's attorney expenses to the losing defendant, suggest additional conceptual and substantive refinements which might facilitate effectuation of the rule's underlying policy, and analyze the reasoning of the only federal decision to date which has expressly eschewed its application.

Emergence of the New Fee Shifting Rationale

The Historical Backdrop of Fee Shifting in the Federal Courts

Traditionally it has been the rule in the United States that attorneys' fees are not assessable against the losing litigant either in the form of court costs or as part of the prevailing party's damages award. Rather, each party generally has been left to bear for himself the expenses of retaining legal counsel. As with most generalizations in the law, however, the rule against fee shifting has been riddled with various exceptions. These may be divided into two general categories: those exceptions promulgated by statute and those created by the courts pursuant to their general equity powers.

Statutory exceptions are patterned according to two basic prototypes. The first type of statute requires automatic transferance of fees and typically provides that "[i]f the petitioner shall finally prevail [in an action brought pursuant to the statute] he shall be allowed a reason-

4. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). In Fleischmann Chief Justice Warren pointed out that "[i]n support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. . . . Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration." Id. at 718. Many commentators, on the other hand, have argued in favor of the English practice of awarding attorneys' fees to the prevailing litigant in almost all civil suits. See Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CALIF. L. REV. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 IOWA L. REV. 75 (1963); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 COLO. L. REV. 202 (1966); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 VAND. L. REV. 1216 (1967).
able attorney's fee, to be taxed and collected as part of the costs of the
suit. In contrast to these mandatory provisions, several federal statutes confer discretionary power upon the courts to shift counsel fees to the prevailing litigant. Statutes of this later variety may in some cases restrict the court's discretion by detailing various guidelines on which the court must make its determination.

The second major source of exceptions to the basic no-fee-shifting rule has been the general equity powers of the federal judiciary. In commenting upon this inherent authority, Justice Frankfurter noted:

Allowance of attorneys' costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The suits "in equity" of which these courts were given "cognizance" ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress. . . . The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs "between party and party," but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs "between solicitor and client."  

Although this general power to award attorneys' fees has thus resided within the federal court system for some time, in practice it has been used relatively sparingly and usually only within the confines of certain well established exceptions to the general rule. In fact, until recently only two such exceptions have accounted for the great majority of cases in which the courts have deemed it appropriate to award fees. The first of these may be termed the vexatious or unreasonable conduct rule. Under this rationale the courts have awarded fees to a litigant where his opponent has pursued an unfounded action or defense and has done so "in bad faith, vexatiously, wantonly or for oppressive reasons." The obvious purpose for awarding attorney fees in such a case is to protect the honest litigant and to discourage abuse of the court system.


6. E.g., 15 U.S.C. § 77k(e) (1970) (Securities Act of 1933, allowing the court to award attorneys' fees if it "believes the suit or the defense to have been without merit . . . "); 35 U.S.C. § 285 (1970) (patent infringement suits, allowing the court to award attorneys' fees in "exceptional cases"); 42 U.S.C. § 3612(c) (1970) (Fair Housing Act of 1968, allowing the court to award fees provided that the plaintiff "in the opinion of the court is not financially able to assume said attorney's fees").


The second major court-created exception, customarily referred to as the "common fund" doctrine, is premised upon the desire to avoid the unjust enrichment of others at the sole expense of the person who has provided them with a benefit. The basic rule may be summarized as follows: Where an individual, through his own litigative efforts, has protected or created a fund in which others have a beneficial interest, he normally will be awarded litigation expenses, including attorneys' fees, either from the fund itself or from some kindred source over which the court has jurisdiction to assess the beneficiaries for a share of the expenses proportionate to their interests.\(^9\)

Application of the common fund doctrine is well illustrated by the frequently cited case of *Trustees v. Greenough*.\(^10\) There the plaintiff, a bondholder in the Florida Railway Company, brought suit on behalf of himself and all other holders of similar bonds against the present and former trustees of a fund which had been pledged *inter alia* for the payment of the interest accruing on the bonds. The bill charged that the trustees were wasting and destroying the fund by selling the trust property at a nominal price, and that in addition the trustees refused to provide for the payment of interest on the bonds. Plaintiff pursued the action to a successful conclusion and in so doing "secured and saved" a large portion of the trust fund. In addition, as the result of plaintiff's efforts, similarly situated bondholders were able to realize dividend payments which prior to the suit had been substantially in arrears. Against this background, then, the Court determined that it was appropriate to award the plaintiff attorneys' fees from the fund which he had protected:

[I]n a case like the present, where the bill was filed not only in behalf of the complainant himself but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction . . . and to bring it into court for administration according to the purposes of the trust: and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest . . . . It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.\(^11\)

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9. *Id.*
10. 105 U.S. 527 (1882).
11. *Id.* at 532.
The Movement Toward a New Fee Shifting Rationale

The three basic fee shifting exceptions discussed above—express statutory provision, the vexatious conduct rule and the "common fund" doctrine—have, until the emergence of the new "private attorney general" exception, with which this note is concerned, accounted for the great bulk of the fee transferring which has occurred in the federal courts. Thus, in the vast majority of cases, the courts have adhered to the general American rule of denying any award of fees to either of the litigants. The law was by no means completely rigid, however, and although the fundamental exceptions were retained as general guidelines, the courts managed to express their expanding notions of equity by increasingly liberalizing the bounds of these exceptions. Since these preliminary departures manifest much of the judicial sentiment which ultimately led to the "private attorney general" doctrine, it may be worthwhile to consider briefly a few of the more salient trends and cases.

Expanding Notions of Bad Faith

The expansion of the vexatious and unreasonable conduct exception is perhaps best illustrated by a series of relatively recent school desegregation cases. The primary introduction of fee shifting into the school desegregation area came in Bell v. School Board. In that case the lower court had granted plaintiff's request for injunctive relief aimed at preventing further racial discrimination in his school district but had denied an additional prayer for counsel fees. On appeal, the refusal to award fees was reversed. The appellate court reasoned that such an award was clearly justified in light of the school board's "long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiff for a desegregated education." Bell thus constituted a rather classic application of the unreasonable conduct rule.

In Clark v. Board of Education, decided three years after Bell, the desire for a more flexible fee shifting rationale was plainly evident. In that case, the court dealt with a pattern of resistance to school desegregation which was quite similar to that evidenced in Bell. The trial court in Clark, however, had granted plaintiff an award of attorneys' fees but only in the seemingly token amount of $250. The court of appeals reluctantly affirmed, stating that "[w]hile we believe additional fees were warranted, we do not believe that this is such an extra-

13. Id. at 500.
14. 369 F.2d 661 (8th Cir. 1966).
ordinary case that we could validly hold that the trial court has abused its discretion. . . ."\textsuperscript{13} The court then went on to express its general impatience with the injustice of forcing individuals into court in order to vindicate clearly defined rights. In conclusion the court stated:

If well known constitutional guarantees continue to be ignored or abridged and individual pupils are forced to resort to the courts for protection, the time is fast approaching when additional sanction of substantial attorney fees should be seriously considered by the trial courts.\textsuperscript{16}

Two years later, in \textit{Cato v. Parham},\textsuperscript{17} the admonition of the \textit{Clark} court was to some extent followed. In \textit{Cato} the court noted that although litigation aimed at ending the racial segregation in the defendant's school district had dragged on for nine years, it did not "impugn the Board's good faith in trying to carry out the [constitutional] mandate. . . ."\textsuperscript{18} Despite this fact, however, the court pointed out that it could not "be gainsaid that whatever progress has been made in the direction of desegregation . . . has followed judicial prodding,"\textsuperscript{19} and awarded attorneys' fees to the plaintiff in the amount of $700.\textsuperscript{20} At a minimum, \textit{Cato} stood for a substantial expansion of the vexatious conduct rule. Bad faith on the part of the defendant, a traditional prerequisite of fee shifting under this rationale, was largely dispensed with. Instead, all that the court appeared to require was a showing that the defendant had precipitated litigation which should not have been necessary. In making this implicit ruling, then, the court significantly liberalized fee shifting policy: emphasis was no longer to be placed exclusively on the misconduct of the defendant; rather fees might also be awarded to alleviate the patent unfairness in making a citizen incur a heavy financial burden in order to realize a clearly defined constitutional right. Beyond inaugurating this new shift in policy, however, the court also exhibited a prescience of the further fee shifting developments which were soon to take place by citing as "suggestive" the then very recent Supreme Court decision in \textit{Newman v. Piggie Park Enterprises}.\textsuperscript{21}

The question in \textit{Piggie Park} was what criteria should determine whether an attorney's fee award was justified in a suit under Title II of the 1964 Civil Rights Act.\textsuperscript{22} This act provides that:

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.} at 671.
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} 293 F. Supp. 1375 (E.D. Ark.), \textit{aff'd}, 403 F.2d 12 (8th Cir. 1968).
  \item \textsuperscript{18} \textit{Id.} at 1378.
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} This amount was intended to compensate the plaintiffs for counsel fees incurred only during the last several months of the suit. Fees incurred before September 1967 were apparently deemed to be nonrecoverable under the law which existed prior to that time.
  \item \textsuperscript{21} 390 U.S. 400 (1968).
  \item \textsuperscript{22} 42 U.S.C. § 2000a (1970). This title of the act prohibits discrimination or
In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.\(^\text{23}\)

The court of appeals apparently regarded the discretion to award fees granted by the statute as adding very little to the discretion which already existed in the courts under the traditional bad faith rule and instructed the district court accordingly.\(^\text{24}\) The Supreme Court, however, did not agree. Instead it found that the attorney's fee provision of Title II was meant not simply to penalize bad faith litigants, but also to encourage private enforcement of high priority congressional policies. The Court reasoned as follows:

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.

It follows that 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.\(^\text{25}\)

With this language, then, the Court gave birth to an entirely new fee shifting rationale. The fact that the opinion was extremely brief and that it was addressed solely to the Civil Rights Act may have initially obscured its full potential but, in any event, it was not long before its true germinal possibilities were in full bloom.\(^\text{26}\)

Expansion of the "Common Fund" Doctrine

As discussed previously, the "fund" doctrine received its impetus from the courts' desire to avoid unjust enrichments and under the segmentation in places of public accommodation based upon race, color, religion or national origin.

\(^\text{25}\) 390 U.S. at 401-02.
\(^\text{26}\) See text accompanying notes 36-92 infra.
Trustees v. Greenough formulation of the rule, the necessary ingredients were essentially a suit which devolved pecuniary benefits upon a class of persons and jurisdiction over a fund which made it possible for the court to spread the costs of litigation among the beneficiary class. In 1970 the Supreme Court, taking its cue from certain state court decisions, greatly expanded the scope of this exception by holding that the benefit accruing to the enriched class need not be monetary in nature.

Mills v. Electric Auto-Lite Co. was an action by shareholders of the Electric Auto-Lite Company to dissolve the merger of their company with the Mergenthaler Linotype Company. Plaintiffs alleged that the merger vote had been materially influenced by a misleading proxy statement which had violated rule 14(a) of the Securities Exchange Act of 1934. After successive appeals the Supreme Court found for the plaintiffs on the merits and remanded the case to the district court to determine what relief might be appropriate. In addition, however, the Court turned its attention to plaintiff's request for an interim award of attorneys' fees. The Court first reasoned that he request for attorneys' fees was not improper simply because plaintiffs had sued under a federal statute which made no express provision for such an award. Instead, the Court felt that the crucial inquiry was whether the common fund doctrine might be applied in a case where the benefit accruing from petitioner's action was not of a pecuniary nature. The Court decided that it could. Justice Harlan reasoned, in essence, that the unjust enrichment rationale of the "fund" rule was not rendered invalid merely because the benefit to the shareholders was not capable of monetary valuation; rather, the doctrine remained basically operative so long as any "substantial benefit" was passed on to the shareholders. In defining "substantial benefit" Justice Harlan initially re-

27. See text accompanying notes 10-11 supra.
30. In this regard pains were taken to distinguish the case of Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). In Fleischmann the Court had considered the appropriateness of awarding attorneys' fees in trademark infringement actions brought under the Lanham Act. This act "meticulously detailed" both the injunctive and compensatory remedies available in suits brought under its authority but made no mention whatsoever of attorneys' fees. 15 U.S.C. § 1117 (1970). The Court ruled that the thoroughness of the remedies which had been provided by the act manifested a congressional intent to limit the courts' remedial powers to those specific remedies. Accordingly, the Court held attorneys' fees could not be awarded. The Mills Court stated that it did not consider Fleischmann controlling since the express remedies provided by the Securities Exchange Act were, in comparison to the Lanham Act, only minimal. 396 U.S. at 391.
31. 396 U.S. at 392-95.
lied upon *Bosch v. Meeker Cooperative Light & Power Association*,\(^{32}\) where the Minnesota Supreme Court had held that:

>[A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholders' interest.\(^{33}\)

Nevertheless, in discussing the specific service which plaintiffs allegedly had rendered to the Electric Auto-Lite Company, the Court used language which seemingly possessed far greater import than the innocuous sounding test established by *Bosch*.

>Th[e] 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 stockholder's 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.\(^{34}\)

This rationale was indeed a far cry from the traditional fund doctrine. Not only was no fund protected or brought into being, but conceivably the corporation might have received no benefit whatsoever other than the "general therapeutics" of enhanced law enforcement, and this "benefit" was largely shared by stockholders of all corporations. As such, the award of fees in *Mills* may be construed as being based upon the conferral of benefits to the public at large and not merely to the shareholders of the Electric Auto-Lite Corporation; the language is somewhat ambiguous but the potential for such an interpretation clearly is present.\(^{35}\) Thus, while the Court may have intended to award fees on the basis of a somewhat liberalized common fund doctrine, its ultimate holding suggested a far different rationale.

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32. 257 Minn. 362, 101 N.W.2d 423 (1960).
33. Id. at 366-67, 101 N.W.2d at 427.
34. 396 U.S. at 396 [emphasis added].
35. The legitimacy of such an interpretation is further supported by one commentator who wrote: "In accepting the rulings of *Abrams* and *Bosch*, together with the Hornstein terminology, the *Mills* Court legitimized a stockholder's suit fee exception based solely on law enforcement policy considerations. The Court was concerned not with the benefit of this suit to these shareholders, but with the benefit of this type of suit to the public interest. . . ." Note, *The Allocation of Attorneys' Fees After Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316, 327 (1971). The same writer also pointed out that more than fifty percent of Electric Auto-Lite's shareholders were, in fact, opposed to the enforcement of the Securities Exchange Act's regulations. *Id.* at 333. See also *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 145 (5th Cir. 1971), which is discussed in the text accompanying note 47 infra.
Exactly how the lower courts would construe Mills, however, remained to be seen.

The Formal Break with Tradition

In Mills and Piggie Park the federal courts were confronted by two related departures from the traditional exceptions to the no-fee-shifting rule. That is, each case appeared to allot the prevailing plaintiff attorneys' fees based primarily upon his vindication of congressional policy. Granting that each case, on its face, operated within a relatively narrow ambit—Piggie applying directly only to the specific fee granting discretion provided by Title II of the 1964 Civil Rights Act and Mills only to shareholders suits brought under section 14(a) of the Securities Exchange Act—nonetheless, in juxtaposition the two cases strongly suggested a new rationale for a generally applicable exception. In a series of three cases decided shortly after Mills this suggestion was extensively considered and in at least two instances followed.

Bradley v. School Board36 was a school desegregation action which was originally decided on May 26, 1971, by the United States District Court for the Eastern District of Virginia. Although this opinion was later reversed by the Court of Appeals for the Fourth Circuit,37 it continues to merit scrutiny as the first decision to coalesce the Piggie Park and Mills rulings into an entirely novel fee shifting rule. Bradley was a class action which had continued over the course of sixteen years in an attempt to end racial segregation in the public schools of Richmond, Virginia. The attitude of the Richmond school board during those years was aptly characterized by the court as follows: "At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order."38 As a result of this type of opposition the plaintiffs were forced to maintain legal pressure on the school board members until they finally submitted an acceptable desegregation plan.

Following the court's implementation of this plan, plaintiffs filed a motion for the additional relief of attorneys' fees. Since the action had been brought under 42 U.S.C. section 198339 which made no express mention of such fees, the court was forced to consider its ability to grant plaintiffs' request on the basis of its general equity powers.

37. The opinion of the Fourth Circuit reversing the district court decision seems quite unsound; it is discussed separately in the text accompanying notes 105-135 infra.
38. 53 F.R.D. at 39.
In doing so it exhaustively reviewed the traditional equity tests for shifting fees and concluded first, that the fund theory was an inappropriate rationale for this type of suit:

School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming. This is a class suit to be sure, with class relief, but to say that the plaintiff class will actually in effect pay their attorneys if the school board is made to pay counsel fees entails a number of unproved assumptions about the extent of which pupils pay for their free public schooling.\(^4\)

The court next turned to the bad faith test and concluded that it was a valid basis for awarding fees in this case. The court stated that “[w]hen parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant’s conduct as obstinate and unreasonable. . . .”\(^4\)

The court was not content, however, to base its award of fees solely upon this finding. Rather, it went on to fashion an alternative ground for its holding. In creating this independent ground for awarding fees the court looked first to \textit{Piggie Park} and suggested that the same policy factors which had prompted the Supreme Court’s decision in that case often were present in even greater degree in school desegregation litigation.\(^4\) For example, desegregation suits are, like Title \(\Pi\) actions, of a quasi-public nature. This is so, the court implied, not only because school discrimination suits generally are brought as class actions and therefore affect the rights of many individuals but also because they serve to implement the “vital” governmental policy that civil rights in the schools “be protected” and in fact immediately vindicated.\(^4\) Furthermore, the court noted that although the national goal of school integration had been partially enforced by administrative proceedings, a large share of the burden of implementing school integration had fallen on the courts in the form of suits brought by private individuals.

Interestingly, the \textit{Bradley} court seemed to go beyond the basic rationale of the \textit{Piggie Park} holding—namely, that attorneys’ fees should be awarded to plaintiffs as a means of encouraging certain types of litigation—to apparently suggest that the attorneys who handle these actions should be considered primarily in the service of the court, instead of their respective clients, and therefore should not have to look to the private litigants at all for their compensation:

The private lawyer in \[\text{school desegregation suits}\] most

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\(^4\) 53 F.R.D. at 35-36.
\(^4\) Id. at 39.
\(^4\) Id. at 41.
\(^4\) Id. at 41-42.
accurately may be described as a "private attorney general." Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of non-discrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof.

Where the interests of so many are at stake, justice demands that the plaintiffs' attorneys be equipped to inform the court of the consequences of available choices; this can only be done if the availability of funds for representation is not left to chance. In Bradley, then, the court's position is apparently that plaintiffs' counsel should be compensated by the state rather than by either of the parties to the action. This was indeed a novel departure from standard concepts in fee shifting. Nevertheless, since a state agency was a defendant to the action, and hence, under traditional fee shifting, the state would also have sustained the burden of plaintiff's attorneys' fees, the full potential impact of the Bradley holding was not apparent. Aside from this fact, the district court opinion in Bradley did stand unequivocally for a broad application of the basic Piggie Park rationale. Regardless of whether statutory authority to shift fees existed, the policy of encouraging the vindication of strong governmental interests was an appropriate basis upon which to do so.

In Lee v. Southern Home Sites Corp., decided less than a month after Bradley, the United States Court of Appeals for the Fifth Circuit dealt with the question of attorneys' fees in the context of a suit brought under 42 U.S.C. section 1982. This statute, like section 1983 with which the Bradley court was faced, makes no express provision for awarding attorneys' fees. The facts of the case presented a clear cut instance of racial discrimination. Southern Home Sites, a Mississippi company engaged in the business of real estate development, was running a campaign to develop a site near Ocean Springs, Mississippi. As part of its campaign Southern had mailed form letters in which it had offered to sell to the recipient a lot purportedly worth $600 for $49.50 in cash; the only condition for eligibility was that the buyer "be a member of the white race." Lee, a black man, received one of the promotional letters and tendered an offer of $49.50 to Southern. Southern refused to accept and Lee brought suit.

In the district court Lee succeeded in securing an injunction against future discrimination by the defendant; however, his additional motion

44. Id. at 42.
45. 444 F.2d 143 (5th Cir. 1971).
46. This statute originally was enacted as part of the Civil Rights Act of 1866. It provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1970).
for an award of counsel fees was refused. The court reasoned that since the statute did not provide for such an award and since Southern's defense against Lee's suit had not been sufficiently "malicious, oppressive or so unreasonable and obdurately obstinate" to call the "vexatious conduct" rule into play, no award of fees was justified.

On appeal the district court's denial of fees was reversed. The appellate court noted in passing that in view of certain facts bad faith could be attributed to defendant's continued litigation after a certain point in the proceedings; however, it chose to base its holding upon a "broader ground"—namely, that awarding attorneys' fees is an appropriate means for the federal courts to use in effectuating congressional policy. In justifying this holding the court relied principally on Mills, Piggie Park and certain federal statutes which allowed the award of attorneys' fees and which the court felt embodied legislative policies which were closely analogous to those supporting section 1982. Looking first to Mills, the court acknowledged that, at least formally, the decision had spoken in terms of shareholder's suits and the unjust enrichment rationale. Nevertheless, by turning to the more expansive construction to which the Mills decision is susceptible, the court reasoned that the decision "is better understood as resting heavily on its acknowledgement . . . that private suits are necessary to effectuate congressional policy and that awards of attorney's fees are necessary to encourage private litigants to initiate such suits."\textsuperscript{47} The court then concluded that "here as in Mills there is a strong congressional policy behind the rights declared in section 1982. Awarding attorney's fees to successful plaintiffs would facilitate the enforcement of that policy through private litigation."\textsuperscript{48}

For additional support of its holding, the court looked to other federal acts which it regarded as embodying policies similar to those implemented by section 1982, and which expressly provided for the award of attorneys' fees. These included the Fair Housing Law\textsuperscript{49} and the Public Accommodations and Equal Employment Opportunities sections of the 1964 Civil Rights Act.\textsuperscript{50} The court argued that "[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."\textsuperscript{51}

\textsuperscript{47} 444 F.2d at 145.
\textsuperscript{48} Id.
\textsuperscript{49} 42 U.S.C. § 3612(c) (1970).
\textsuperscript{50} Id. § 2000a-3(b), § 2000e-5k (1970).
\textsuperscript{51} 444 F.2d at 146.
sure 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 [the Fair Housing Act]." Thus Lee, like the district court opinion in Bradley, proceeded upon the rationale that private suits were a valid and indeed necessary means of enforcing certain congressional policies and that awarding attorneys' fees therefore was justified as a means of encouraging such enforcement.

The third opinion to consider the new fee shifting rationale in some detail was the Fourth Circuit case of Brewer v. School Board. In this case plaintiffs had brought suit to contest the adequacy of a revised plan of desegregation which had been approved by the district court. The court of appeals dismissed all of plaintiffs' attacks on the plan except one: its failure to provide free bus transportation to pupils who were assigned to schools beyond walking distance from their homes. On this point the court was persuaded by plaintiffs' argument that such transportation was a necessary incident to any plan for school integration. Forcing the reassigned students to ride the public bus system, the plaintiffs had urged, would impose an "unreasonable, if not an intolerable burden" upon a substantial number of the affected families. In response to these arguments the court ordered the school board to provide free transportation for the students who were assigned to schools outside their neighborhoods.

The court next focused its attention on plaintiff's request for attorneys' fees. Since the section of the civil rights laws under which plaintiffs had sued did not provide for attorneys' fees awards, the court looked to the various equity rules. Application of the bad faith exception was rejected on the ground that the court found no "compelling circumstances" to overturn the district court's finding that the board had made "a good faith effort at desegregation." Also, in a lengthy footnote, the court said that the private attorney general doctrine would not seem to apply in school desegregation cases. In reaching this conclusion the court characterized Lee and Miller v. Amusement Enterprises, Inc., a case which essentially had duplicated the Piggie Park holding, as resting primarily upon a specific need to privately enforce certain statutory rights. For example, the court stated that the reason for the ruling in Lee "was that the right asserted by the complainant, though involving public policy, 'under present judicial development, depends entirely on private enforcement.'" In contrast

52. Id. at 148.
55. 456 F.2d at 950 n.22.
56. 426 F.2d 534 (5th Cir. 1970).
57. 456 F.2d at 950 n.22.
to Lee and Miller the court pointed out that in the school desegregation area the United States Attorney General was empowered to pursue any "meritorious" action on behalf of any person who, in the attorney general's opinion, was unable to "bear the expense of the litigation." Furthermore, the court noted, "the Department of Health, Education and Welfare has a responsibility to see that every school receiving any federal assistance (and, for practical purposes, it may be assumed all do) is desegregated." 58

Finally, however, basing its decision upon what it termed a "quasi-application of the 'common fund' doctrine," the court held that an award of counsel fees to plaintiff was in fact justified. The court delineated its reasoning as follows:

The students have secured a right [of free transportation] worth approximately $60 per year to each of them. This pecuniary benefit to the students involved would, under normal circumstances, warrant the imposition of a charge against them for their proportionate share of a reasonable attorney's fee incurred in securing such pecuniary benefit for them. It is not practical, however, to do this in this case and, too, to do so would defeat the basic purpose of the relief provided by the amendment in the decree, which was to secure for the student concerned transportation without cost or deduction. The only feasible solution in this peculiar situation would seem to lie in requiring the school district itself to supplement its provision of free transportation with payment of an appropriate attorney's fee to plaintiffs' attorneys for securing the addition of such a provision to the plan of desegregation. 59

This argument would indeed seem to stray far from the common fund theory. In fact, the court would appear to expressly negate any intent to achieve the basic purpose of the fund theory—the avoidance of unjust enrichment. Instead it apparently reasoned that since plaintiffs had, in effect, conferred a pecuniary benefit upon their class, they were entitled to have their attorneys' costs paid, if not by the beneficiary class, then by the defendant. Any nexus between this reasoning and the traditional fund doctrine is extremely tenuous to say the least.

In his special concurrence, Judge Winter, recognizing that there were "grave" conceptual difficulties with the majority's reasoning, looked to Piggie Park for a firmer basis for awarding fees. He asserted that the policy behind Piggie Park was directly applicable to school desegregation cases, and in response to the majority's argument that such policies were adequately protected by public enforcement agencies, Judge Winter noted that

[...]

58. Id. at 951-52.
59. Id.
Welfare and their immense resources, we know from the cases which come before us that they have been unable to shoulder the entire burden of litigation to make *Brown I* fully effective. The Department of Justice has not appeared in this stage of this very case.  

Judge Winter continued by observing that almost the entire financial burden of the suit had fallen on plaintiffs and the nonprofit organization which had provided plaintiffs with counsel. He concluded: “The time is now when those who vindicate these civil rights should receive fair and equitable compensation from the sources which have denied them. . . .”

Although it is apparent that the majority opinion in *Brewer* did not promote the conceptual clarity of the emerging attorneys’ fees law, it did provide additional proof of two significant facts: first, that a number of federal courts are strongly inclined to award attorneys fees to prevailing complainants in some circumstances which are not covered by the traditional fee shifting rules; and second, that the courts have been unable to settle upon a single fee shifting rationale which would accommodate all of these inclinations. The law thus awaited further developments.

**Recent Applications of the New Exception**

Against the background of *Bradley, Lee* and *Brewer*, four district court cases very recently have been decided which have added both clarity and new dimensions to the private attorney general concept in fee shifting. The first of these, *Sims v. Amos*, 62 was decided March 17, 1972 by the federal district court for the middle district of Alabama. There the question of attorneys’ fees arose in the context of an action to secure reapportionment of the state legislature. Plaintiffs had contended that the Alabama legislature was malapportioned so as to deny them their constitutional right to equal suffrage. The three judge district court ruled that plaintiffs had proved their allegation and accordingly ordered the implementation of plaintiffs’ proposed reapportionment plan.

The court found little difficulty in justifying an award of attorneys’ fees to plaintiffs under the traditional bad faith test. It noted that “[t]he history of the present litigation is replete with instances of the Legislature’s neglect of, and even total disregard for, its constitutional obligation to reapportion.” 63 In addition, the court pointed out

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60. *Id.* at 954.
61. *Id.*
63. *Id.* at 693-94.
that bad faith might be attributed to the defendant’s “submissions of obviously unacceptable” reapportionment plans. The court, however, chose to base its award of fees “on far broader considerations of equity.” Specifically, it looked to the precedents of *Piggie Park*, *Mills*, *Lee*, and *Bradley*, and rendered the following rule:

> If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendant's good or bad faith. Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits . . . and to carry out congressional policy.64

In applying these criteria to the case before it the court was fully satisfied that the plaintiffs had indeed functioned as private attorneys general.

No other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal sufferage. In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42 U.S.C. § 1983, and, more specifically, the protection of the right to a non-discriminatory franchise.65

Besides these considerations, the court also pointed out that courts should encourage this particular type of private litigation since the expenses are great and the chances of a substantial damage award are minimal. “Consequently,” the court concluded, “in order to attempt to eliminate these impediments to pro bono publico litigation, such as is here involved, and to carry out congressional policy, an award of attorneys’ fees is essential.”66

Sims' chief significance is found in the new formulation which it gives to the private attorney general doctrine. Choosing not to rely on any single precedent, the court apparently tried to coalesce the private attorney general concept of *Piggie Park* and the benefit language found in *Mills*. The conceptual success of the resulting hybrid formulation would seem to be open to considerable doubt. Requiring a showing of both statutory vindication and a class wide benefit, would seem to entail a largely redundant demonstration. That is, in most cases the act of vindicating congressional policy will ipso facto confer a benefit upon plaintiff's class. In *Sims*, for example, vindication and benefit both inhere in the single act of achieving equal apportionment.

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64. The court's reliance upon these cases was express: "The present case clearly falls among those meant to be encouraged under the principles articulated in *Piggie Park Enterprises, Inc.* and *Mills*, and expanded upon in *Southern Home Sites* and *Bradley*." Id. at 694.
65. Id.
66. Id.
67. Id. at 695.
Beyond this conceptual awkwardness, however, the absolute requirement that there be a class benefit, in addition to the general vindication of congressional policy, would seem to be an unnecessary restriction on the Piggie Park rationale. There the Supreme Court determined that awarding attorneys fees might be premised solely on the ground that it was in the public interest to encourage the enforcement of certain federal laws. No additional requirement that plaintiffs benefit a particular class of individuals was deemed necessary. The Sims formula, then, would seem to append a superfluous and unwarranted prerequisite to the Piggie Park test.

Exactly one week after Sims was decided a court from the same judicial district again used the private attorney general doctrine to award counsel fees to the prevailing plaintiff. In NAACP v. Allen, petitioners brought a class action alleging that the Alabama Departments of Public Safety and Personnel had followed “a continuous and pervasive pattern and practice of excluding Negroes from employment in the Department of Public Safety.” After finding for plaintiffs, the court ordered inter alia that the defendants employ one black trooper for every white trooper hired until approximately one-quarter of the Alabama state troopers were black. In addition to this relief, the court, in a supplemental order dated March 24, 1972, also taxed the cost of plaintiffs’ attorneys against the defendants.

The justification of this award followed very closely the pattern which had been set in Sims. Here, as in that case, the court first stated that the fees could be shifted on the basis of defendants’ “unreasonable and obdurate conduct”; but again it chose to base its holding on the broader foundation of the private attorney general doctrine. The court also used essentially the same formulation of the doctrine that had been used in Sims. Thus, it looked for, and found, both a benefit to plaintiff's class—i.e., increased employment opportunities and relief from the “badge of opprobrium which necessarily attaches to a group excluded” from particular types of employment on the basis of race—and the vindication of “strong” federal rights—namely, “the enforcement and protection of the right of equal job opportunities.” Finally, the court again sought to emphasize the need to positively encourage such suits by pointing to their generally unremunerative nature and their potential for subjecting plaintiffs' counsel to “social, political and community” ostracism. Allen thus constitutes a virtual duplication of the Sims

69. Id. at 704.
70. Id. at 707-08.
71. Id. at 709.
72. Id. at 709-10.
rationale. It reaches an admirable result, but again it does so on the basis of a redundant and unnecessarily restrictive statement of the private attorney general test.

The third decision to apply the private attorney general concept was *Wyatt v. Strickney*. In that case, an action was brought on behalf of residents of the Partlow State School and Hospital for the mentally retarded. Petitioners contended that the defendant hospital was being operated in a manner which deprived the residents of their right to have rehabilitative training and care which met minimum constitutional standards. The court sustained plaintiffs' allegations and in a long and detailed appendix to its holding delineated the minimum standards of care and training which were to be afforded at the Partlow facility. Then, in an opinion attached at the end of the appendix, the court considered the question of attorneys' fees.

Chief Judge Johnson, who had also written the *Allen* decision, began by holding that the evidence adduced at trial indicated sufficient bad faith on the part of defendants to justify an award of fees to the plaintiffs. Nonetheless, as in both *Sims* and *Allen*, the court went on to find its primary fee shifting rationale in the realm of more expansive policy considerations. Interestingly, in explicating the specific policy factors which purportedly justified awarding fees to the plaintiffs, Judge Johnson did not revert back to the hybrid tests of *Sims* and *Allen*. Instead he chose to break new ground by proceeding upon what he termed "a kind of benefit theory." He explained:

> Plaintiffs bringing suits to enforce a strong national policy often benefit a class of people far broader than those actually involved in the litigation. Such plaintiffs, who are said to act as "private attorneys general" . . . rarely recover significant damage awards.

... Consequently, in order to eliminate the impediments to pro bono publico litigation and to carry out congressional policy an award of attorneys' fees not only is essential but also legally required.

This formulation of the rule marked two significant departures from the test used in *Allen* and *Sims*. The first of these was an expansion of the court's inquiry into the benefits allegedly conferred by plaintiffs' action. In *Sims* and *Allen* the court had confined its examination to those benefits received by the class of persons actually involved in the litigation; in *Wyatt*, on the other hand, the inquiry was broadened to include a review of all societal benefits resulting from the

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73. 344 F. Supp. 387 (M.D. Ala. 1972). This action resulted from the expansion of an earlier suit of the same name which had been brought to upgrade the standards of care and rehabilitative training available at an Alabama mental hospital. See Wyatt v. Strickney, 344 F. Supp. 373 (M.D. Ala. 1972).

74. 344 F. Supp. at 409.
action. This shift in approach is particularly evident in the court’s discussion of the specific benefits flowing from plaintiffs’ suit:

By successfully prosecuting this suit, plaintiffs have benefitted not only the present residents of Bryce, Partlow and Searcy but also everyone who will be confined to these institutions in the future. Veritably, it is no overstatement to assert that all of Alabama’s citizens have profited and will continue to profit from this litigation. So prevalent are mental disorders in our society that no family is immune from their perilous incursion. Consequently, the availability of institutions capable of dealing successfully with such disorders is essential and, of course, in the best interest of all Alabamians.\(^7\)

Secondly, in focusing exclusively upon the general societal benefits of plaintiffs’ action, \textit{Wyatt} also stands for a movement away from the strict requirement of vindicating congressional policy per se. That is, the invocation of a federal statute which is supported by a “strong” congressional policy would not appear to be necessary under the court’s rationale since the \textit{Wyatt} suit apparently was predicated solely upon the due process guarantees of the Constitution. Thus, \textit{Wyatt} would seem to reduce the determinative criterion for fee shifting under the private attorney general doctrine to that of merely having provided a substantial benefit to a broad section of the public.\(^7\)

One final feature of \textit{Wyatt} also should be noted. In concluding its discussion of the “kind of benefit” theory, the court invoked the unjust enrichment reasoning of the common fund cases:

\[\text{[T]he expenses . . . incurred in vindicating the public good were considerable. To burden only plaintiffs with these costs not only is unfair but also is legally impermissible. . . . Considerations of equity require that those who profit share the expense. In this case the most logical way to spread the burden among those benefitted is to grant attorneys’ fees.}\]^7

Although the court failed to indicate the extent to which it relied upon this unjust enrichment argument, this rationale would seem to be intended as mere auxiliary support for the court’s primary encourage-
ment-of-public-interest-litigation rationale. This conclusion is supported by the fact that the court cited as authority \textit{Lee}\(^7\) where, as indicated above, attorneys’ fees were assessed against a private party defendant, so that there was no possible pretext of taxing the beneficiaries

\(^7\). \textit{Id.}

\(^76\). Seemingly, under such an approach the enforcement of a statute embodying a strong public policy would constitute but one of many possible avenues to achieving the broad public benefit necessary to shift fees. For a further discussion of the advisability of such an approach see text accompanying notes 93-99 infra.

\(^77\). 344 F. Supp. at 409. Since a state agency was the defendant in this action, and also the primary beneficiary of the suit, the state would have paid plaintiffs’ attorneys’ costs regardless of which fee shifting rationale the court ultimately used.

\(^78\). 444 F.2d 143 (5th Cir. 1971).
for the costs of the suit. Looking to the court’s primary rationale, then, Wyatt clearly would seem to offer a simplified, all purpose approach to the “private attorney general” doctrine.

Another case which quite recently has considered the new fee shifting doctrine is *La Raza Unida v. Volpe.* In this action, decided October 19, 1972, plaintiffs sued to recover litigation expenses incurred in an earlier action against the same defendants. In the prior case plaintiffs had brought a class action against, among others, the California Department of Highways for failing to comply with certain federal statutes in its pursuance of California Highway Project 238. Specifically, plaintiffs had alleged that the defendants failed to file with the Secretary of Transportation a statement relating to the environmental impact of the highway project as required by various regulations issued pursuant to section 4(f) of the 1966 Department of Transportation Act, and, further, that the state had violated various provisions of another federal statute by not having established an adequate relocation assistance program for persons who would be displaced by the project. Plaintiffs prevailed on the merits, and the court enjoined further land acquisition and resident removal in conjunction with the highway project until defendants had complied with the statutory requirements.

In the subsequent action for attorneys’ fees, Judge Peckham, after concluding that neither the obdurate behavior rule nor the common fund exception provided an appropriate rationale for shifting fees, turned to the private attorney general concept. Citing *Lee, Allen* and *Sims* as general authority, Judge Peckham articulated his version of the rule as follows:

> [W]hen there is nothing in a statutory scheme which might be interpreted as precluding it, a “private attorney general” should be awarded attorneys’ fees when he has effectuated a strong Congressional policy which has benefitted a large class of people, and where further the necessary and financial burden of private enforcement are such as to make the award essential.

Applying these criteria to the actual facts of the case, Judge Peckham first determined that a strong congressional policy had indeed been effectuated. He asserted that “[t]he Court could cite numerous judicial and legislative utterances that dramatically portray the strength of these public policies,” and, to illustrate, he provided three examples.

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84. *Id.* at 7.
On environmental protection, he quoted from Justice Black's concurring opinion in *Citizens to Preserve Overton Park v. Volpe* to the effect that section 4(f) of the Department of Transportation Act represented "a solemn determination of the highest law-making body of this nation" that public highways should not be allowed to encroach upon park lands without a prior policy evaluation by the Secretary of Transportation. And, on relocation assistance, he quoted policy statements from 23 U.S.C. section 501 and Title II of the Uniform Relocation Assistance Act which indicate that it was Congress's desire to insure that a few individuals do "not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

The deficiency of these examples is that they do not "dramatically portray" the strength of the policies in question; at most they merely indicate that the policies exist in a degree sufficient to warrant legislation. Thus, if the court's intent was, in fact, to provide some criteria or evidence which would justify differentiating federal statutes on the basis of the relative strength of their respective policy goals, it would not appear to have achieved its aim.

The second prerequisite for awarding fees suggested by the court was that the action benefit a large class of people. In contrast to the *Sims* and *Allen* requirement that the plaintiff specifically benefit the class he represented, the *La Raza* court adopted, in effect, the *Wyatt* approach of looking to the benefit to society in general. Accordingly, in finding that plaintiffs had also satisfied this requirement, the court noted several forms of benefit devolving from plaintiffs' action such as: the obvious benefit to "those 5000 people about to be uprooted from their homes," the benefit to the "200,000 residents of Hayward, Union City and Fremont" in being guaranteed that their parks will not be destroyed until appropriate policy determinations are made, and the state-wide "therapeutics" that result from the California Highway Department's compliance with the federal statutes and regulations.

Finally, the court turned to the questions of whether it was necessary to spur private enforcement of the laws invoked by plaintiff, and, if so, whether the financial burden on plaintiffs was sufficiently severe to make an award of fees essential. Here again the court responded affirmatively to both inquiries. The need for private enforcement was

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86. Id. at 421.
present, the court suggested, "because of the limited resources and potentially conflicting interests within and among governmental entities. . . ." \(^{90}\) Whenever such entities are involved as defendants, "only private citizens can be expected to 'guard the guardians.'" \(^{91}\) As to the need to alleviate the financial burden on plaintiffs, the court noted that:

exhortations toward citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospects of financial compensation for the efforts and expenses rendered. The expense of litigation in such cases poses a formidable, if not insurmountable, obstacle.\(^{92}\)

Based on all of these findings, then, the court concluded that an award of fees to plaintiff was appropriate as a means of effectuating strong congressional policy.

**Discussion: Achieving a Uniform Rule**

In tracing the progression of cases from *Piggie Park* through *La Raza*, it is readily apparent that a number of federal courts are quite willing to accept and utilize the general concept of the private attorney general as a basis for transferring the burden of litigation expenses. What is also readily seen, however, is that to date the application of this doctrine has been marked by a considerable amount of variation and seeming confusion. Specifically, the cases have reflected wide divergence as to (1) the underlying rationale of the doctrine—alternatively relying on "vindication of strong congressional policies," avoidance of unjust enrichment, promotion of general "societal therapeutics," or some combination thereof—and (2) the construction and degree of significance to be accorded the requirement of a "need for private enforcement." Some degree of judicial discordance undoubtedly is inevitable at the inception of any new doctrine or principle of law. Although such divergence manifests a healthy independence of thought within the federal court system, it may be useful to essay a comprehensive formulation of the private attorney general fee shifting doctrine in the hope of promoting a rule which is founded upon a sound analytical base and which concomitantly fosters a substantial degree of predictability in its application.

The initial task in attempting to devise such an all-purpose rule is that of appropriately identifying its underlying purpose. As indicated

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90. *Id.* at 9.
91. *Id.* at 10.
92. *Id.*
above, the cases which have dealt with this task to date seemingly have awarded attorneys' fees on the basis of three divergent, albeit overlapping, rationales, namely, encouraging the enforcement of strong congressional policies, avoiding unjust enrichments and, most expansively, encouraging the advancement of broad public interests.93

In looking toward the formulation of a single private attorney general rule, it appears that only the last of these rationales offers a fully workable policy base. The first rationale—encouraging the enforcement of strong congressional policies—would seem unacceptable in that it is both unnecessarily restrictive in one sense and overly broad in another. It is unnecessary limited because it requires that the action be brought pursuant to a federal statute. Such a requirement would seem to imply that policies codified by federal statutes possess some unique quality which makes them particularly suited to private enforcement. Nevertheless, it is difficult to conceive of what this quality might be, or how it generally would distinguish such suits from public interest actions brought, for example, to vindicate constitutional rights which are not otherwise codified.94 The Wyatt case appears to be directly in point in this respect. There the highly commendable result achieved by plaintiffs' suit rested solely upon the broad constitutional concept of due process. Thus the award of fees in that case may not, in fact, be attributed to the enforcement of congressional policy per se,93 but must be said simply to have reflected the court's determination that the plaintiffs' action was of such a socially desirable nature that similar suits also should be encouraged.

The second deficiency of the encouragement-of-strong-congressional-policies rationale is found in its apparent willingness to award fees in all suits brought to enforce certain federal statutes, i.e., those statutes allegedly infused with a strong congressional policy. The obvious drawback of this failure to discriminate among individual cases is that it may encourage the bringing of nuisance suits based upon mere technical violations of the favored statutes. Such a result would be

93. This latter rationale would seem to accurately characterize the Wyatt decision for the reasons discussed in the text accompanying note 76 supra.
94. It is also difficult to see how suits predicated on federal statutes are generally more deserving of attorneys' fees awards than many diversity suits which are based upon state statutes or common law. Admittedly a ruling pursuant to a federal statute has, in theory, nationwide legal significance. Yet, its practical significance may, due to the uniqueness of the fact situation involved, be wholly confined to a particular state or locality. Where this is the case, a diversity action involving state law conceivably could achieve the same beneficial result and, hence, would appear to be just as deserving of an award of fees.

95. It is interesting to note in this regard that the Wyatt court, at one point in its opinion, uses the phrase "national policy" in lieu of the standard term "Congressional policy." 344 F. Supp. at 409.
particularly unfortunate in the context of a rule supposedly designed to promote pro bono publico actions.

The second rationale mentioned in the private attorney general cases, that of avoiding unjust enrichment, also would seem to be an unsuitable basis for a comprehensive rule. Although the avoidance of unjust enrichment is certainly a valid policy consideration in itself, applicability is found in cases where the defendant is the actual beneficiary of the action, or where the court has jurisdiction over a fund which allows it to assess the ultimate beneficiaries for plaintiff's costs in bringing the suit. Because of this fact the only pro bono publico actions in which this rationale could be utilized to shift fees would be those in which the public, in the form of some governmental body or public instrumentality, had been named as a party defendant. Undoubtedly a large proportion of pro bono suits would satisfy this requirement, but there seems to be no valid reason for restricting the private attorney general doctrine to only these actions. Moreover, the ideal of the unjust enrichment principle—charging each beneficiary a share of the litigation expenses proportionate to his gain—rarely will be achieved in the private attorney general context to the degree which it is in traditional common fund cases. That is, it is highly unlikely that the benefits devolving from any particular pro-bono action will be apportioned among the beneficiaries according to their relative contributions to the public body involved in the suit. Thus it would seem that the unjust enrichment consideration should, at most, serve as a supplementary factor in determining whether the private attorney general should be awarded fees.

The conclusion suggested by the above considerations is that the courts should address themselves straightforwardly to the substantive public benefits which a plaintiff's litigative efforts allegedly have provided. The award of attorneys' fees should not turn automatically upon the invocation of certain federal statutes or upon the presence of

96. For a discussion of the common fund doctrine see text accompanying notes 9-11 supra.

97. The La Raza case is a good example of this proposition. There, as indicated previously, the court delineated the stratified benefits of the action as follows: the “most immediate impact” being on “those 5000 people about to be uprooted from their homes and deprived of the parks,” lesser but “substantial benefits” accruing to the 200,000 residents of Hayward, Union City and Fremont from the increased protection to their parks, the “very real impact” upon all citizens of the Bay Area in being protected from undue housing and environmental problems in connection with the highway project in question, and finally the benefit to all Californians of the increased likelihood of state agency compliance with federal statutes and regulations. La Raza Unida v. Volpe, Civ. No. C-71-1166 RFP at 8 (N.D. Cal. Oct. 19, 1972). Clearly there is no feasible way in which the costs of such an action could be transferred to the beneficiaries in proportion to their relative gains,
a public agency as a party defendant, but rather should depend in all cases upon the actual societal benefits which may be said to have resulted from the plaintiff's suit. This approach obviously would not preclude giving appropriate weight to policies which are in fact qualitatively favored by society. Nonetheless it would obviate the spurious shibboleth of purporting to find a strong congressional policy in any particular statute.

The adoption of such a benefit analysis approach to \textit{pro bono} fee shifting would, in addition to avoiding the pitfalls and limitations of the rationales discussed above, seem to provide other advantages as well. For example, much of the conceptual confusion and waste of judicial energy which has persisted to date would be eliminated by placing the doctrine upon a simple and common sense footing. Also, it would open the way for adoption of the private attorney general doctrine by the state court systems.\textsuperscript{98} That is, much of the public interest litigation which occurs in the state courts necessarily is based upon common law principles and, hence, in these cases no ready analogy to the strong congressional policy test would be present. "General public benefit," on the other hand, is a concept which works equally well in both state and federal courts.

The second area of disharmony among the courts is that dealing with the requirement of a need to encourage private enforcement. This requirement is, of course, based upon the proposition that if no such need exists in any particular case, then there is also no justification for awarding attorney's fees under the private attorney general doctrine. The problem presented is one of identifying those circumstances which effectively obviate the need to encourage private litigation. In this regard the courts have discussed two basic factors: the adequacy of public enforcement and the likelihood that the suit would have been brought regardless of the potential for a fee award. As to the adequacy of public enforcement, the cases discussed above run the gamut from \textit{Brewer}—which declined to apply the private attorney general doctrine on the ground that both the Department of Justice and the Department of Health, Education and Welfare were fully empowered to enforce the specific statute in question\textsuperscript{99} (even though neither had in fact intervened)—where fees were awarded despite the fact that the United States was actually a plaintiff in a suit consolidated with the action brought by the NAACP.

\textsuperscript{98} Although any discussion of state law is beyond the scope of this article it may be noted that at least one California trial court recently has awarded attorneys' fees expressly upon the private attorney general rationale. See Mandel v. Hodges, No. 427816 (Alameda Super. Ct., Feb. 14, 1973).

\textsuperscript{99} 456 F.2d at 950 n.22.
Viewing the question in a practical light it would seem that the mere fact that various public agencies are empowered to enforce a particular law should not significantly influence the decision of whether to award fees. The *empowerment* of a federal agency to bring suit does not overcome the agency's inherent restraints, noted in *La Raza*, of limited funding\(^{100}\) and, in some instances, conflicts of interest.\(^{101}\)

The practical significance of these factors is reflected in several of the closely analogous "standing" cases which recently have expanded that concept in the context of suits and hearings affecting public interests. In *Office of Communication of United Church of Christ v. FCC*,\(^{102}\) for example, where plaintiffs were found to have standing to intervene in an FCC television license renewal hearing, the court noted that the duties and jurisdiction of the FCC were vast and that the commission itself had acknowledged its inability to oversee completely the performance of every one of its thousands of licensees. In view of this fact the court then observed:

The theory that the Commission can always effectively represent the listener interests without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely upon it.\(^{103}\)

Seemingly, the only truly substantive consideration in regard to the potential of public enforcement is that of avoiding duplicated effort. It is patently unfair to a defendant to, in effect, make him pay twice for a wasteful overlap of efforts by the government and private plaintiffs. To avoid this possibility, however, by refusing fees in every case where the attorney general *might* have brought suit would be a solution more severe than the problem. A far better approach would seem to lie in employing some judicial means of efficiently coordinating the plain-
tiffs’ efforts. This might be done, for example, by staying the private attorney general’s suit until the completion of the action brought by the actual attorney general or other public enforcement entity or, alternatively, by consolidating the respective suits. Also, as a further safeguard, the defendant might be allowed to show that a needless duplication of effort had in fact occurred and that the private attorney general’s award should be reduced accordingly.

Either of these approaches seems preferable to an outright denial of fees on the highly speculative pretext that the action eventually would have been brought by the United States Attorney General.

Turning finally to the question of financial hardship on the plaintiff, the following points are worthy of note. First, the fact that a particular plaintiff is wealthy enough to absorb the cost of a public interest law suit without serious detriment to his financial security should not influence a court’s decision of whether to award fees. Since the purpose of the private attorney general doctrine is to encourage public interest litigation, and since the cost of such suits generally outweighs the resulting benefit to any single individual, there would appear to be no logical basis for excluding the wealthy from the ranks of the would-be private attorneys general.

104. Consolidation in the federal courts is governed by Rule 42 of the Federal Rules of Civil Procedure which provides in relevant part: “When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”


106. As pointed out by Judge Peckham in La Raza: “Absent foundation funding, it is simply not economically rational for any single individual or small group of individuals, to attempt to capture their minute portion of aggregate good by incurring large expense to enforce a widely held right.” La Raza Unida v. Volpe, Civ. No. C-71-1166 RFP at 14 n.10 (N.D. Cal. Oct. 19, 1972).

107. Where the plaintiff uses the gratis legal services of public interest or legal aid attorneys who receive their operating expenses from either private or public sources or both, two interrelated policy questions are raised: first, does the encouragement-of-litigation rationale continue to have sufficient validity to justify the awarding of attorneys’ fees and, if so, does it make any difference whether the legal organization receives its funding from public, as opposed to private, sources. These questions have not as yet received adequate attention from the courts. Three recent cases, however, do provide some insight into the initial, and apparently conflicting, responses which have so far been made. In Miller v. Amusement Enterprises, Inc., 426 F.2d 534 (5th Cir. the court awarded fees to plaintiff’s attorneys in spite of the fact that they had never intended to charge plaintiffs for their services. The court stated that “[w]hat is required is not an obligation to pay attorney fees. Rather what—and all—that is required is the existence of a relationship of attorney and client, a status which is wholly independent of compensation, as witness the effective service of counsel in the defense of criminal cases, the assertion of post-conviction habeas remedies and now wide-
On the other hand, a valid consideration would be whether a sufficient private interest is promoted concurrently with the public interest such that a court might conclude that the suit would have been brought regardless of any alleged public-mindedness on the part of the plaintiff. If such is the case, the additional incentive of transferred fees is not necessary.

**The Doctrine Is Placed in Issue: The Reversal of Bradley v. School Board**

On November 29, 1972, *Bradley v. School Board* was reversed by a two to one decision of the United States Court of Appeals for the Fourth Circuit. This decision, the first to directly reject the private attorney general doctrine as a proper basis for shifting attorneys' fees, gives rise to a direct conflict among the federal courts and, accordingly, would seem to presage ultimate intervention by the Supreme Court. Because of its unquestionable significance, and because it runs contrary to the fee shifting rationale advocated in the preceding section, the *Bradley* reversal clearly merits careful examination.

The majority opinion in *Bradley* is divided into three sections. The first deals with the district court's reliance on the unreasonable and obdurate conduct rule, the second is directed toward the private

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108. The district court's opinion in *Bradley* is discussed at the text accompanying notes 36-45 supra.


110. For a list of the major cases and jurisdictions in which the private attorney general doctrine has been adopted see note 1 supra.
attorney general doctrine and the third construes the applicability of the fee shifting provision of the recently enacted Emergency School Aid Act.\textsuperscript{111}

In addressing itself first to the question of whether the school board's litigative deportment might be characterized as being so unreasonable and obdurate as to justify an award of attorneys' fees, the court reviewed at some length the protracted course of the plaintiffs' suit and concluded that the board's conduct had not, in fact, been sufficiently culpable.\textsuperscript{112}

\textit{Bad Faith Revisited}

The court next turned to the private attorney general doctrine which had served as an "alternative ground" for the fees award in the district court. In beginning its analysis, the court first suggested that the lower court had apparently conditioned the doctrine's application upon a finding that "the rights of the plaintiff were plain and the defense manifestly without merit."\textsuperscript{113} In other words, the court attributed to the district court a formulation of the private attorney general doctrine which, in effect, incorporated the substance of the unreasonable conduct rule.\textsuperscript{114} On this construction the court simply referred to its reasoning in the first section of its opinion and held that if this were indeed the basis of the district court's holding, it did not support an award of fees.

\textsuperscript{111} Pub. L. No. 92-318, 86 Stat. 235. The attorneys' fees provision of this act, section 718, is quoted in note 122 infra.

\textsuperscript{112} The court summarized its findings as follows: "It is clear that the Board, in attempting to develop a unitary school system for Richmond during 1970, was not operating in an area where the practical methods to be used were plainly illuminated or where prior decisions had not left a 'lingering doubt' as to the proper procedure to be followed. Even the District Court had its uncertainties. All parties were awaiting the decision of the Supreme Court in \textit{Swann} v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)]. Before \textit{Swann} was decided, however, the parties were engaged in an attempt to develop a novel method of desegregating the Richmond school system for which there was not at the time legal precedent. Nor can it be said that there was not some remaining confusion, at least at the District level, about the scope of \textit{Swann} itself. The frustrations of the District Court in its commendable attempt to arrive at a school plan that would protect the constitutional rights of the plaintiffs and others in their class, are understandable, but, to some extent, the School Board itself was also frustrated. It seems to us unfair to find under these circumstances that it was unreasonably obdur- ate." Bradley v. School Bd., 472 F.2d 318, 327 (4th Cir. 1972).

\textsuperscript{113} Id.

\textsuperscript{114} The court expressly admits this fact: "If this is the basis for the [lower] Court's alternative ground, it really does not differ from the rule that has heretofore been followed consistently by this Court that, where a defendant defends in bad faith or in defiance of law, equity will award attorney's fees." Id. at 328.
The court’s error in considering such a formulation of the doctrine is manifest. In the first place, such a rule would be entirely superfluous; once a finding of bad faith had been made there would be no need to consider further questions of public policy since an award of fees would already be justified under the unreasonable and vexatious conduct rule. Moreover, the district court’s opinion quite clearly precludes any such interpretation of its “alternative ground.”

The private lawyer in [school desegregation suits] most accurately may be described as a “private attorney general.” Whatever the conduct of defendants may have been, it is intolerably anomalous that [such] counsel . . . should be compelled to look to himself or to private individuals for the resources needed to make his proof.\(^{115}\)

**Attack on the Private Attorney General Doctrine**

Conceding that its initial interpretation might not accurately represent the district court’s holding, the court next considered the private attorney general doctrine in a more realistic light, i.e., with no additional bad faith requirement. After reviewing various arguments and cases the court concluded that “if [fee] awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts.”\(^{116}\) The court proffered three basic arguments in support of its ruling: (1) there was evidence that Congress did not intend attorneys’ fees to be awarded in school desegregation cases, (2) the Mills and Lee decisions were inapposite to the present proceeding and (3) in any event, the private attorney general rule was not an appropriate judicial doctrine since it encroached upon the legislative sphere of governmental activity.\(^{117}\)

**A Finding of Implied Legislative Intent**

As to the purported finding of an implicit intention on the part of Congress to deny the recovery of attorneys’ fees in school desegregation cases the court made two specific offerings of evidence. The court first pointed out that legislation which would have authorized such fee shifting was introduced in Congress in 1971, as part of a bill designed to assist in the integration of schools, but was not favorably acted upon. In addition, the court pointed to the Civil Rights Act of 1964\(^{118}\) and indicated that “it expressly provided for such [a fee] award in both the equal employment opportunity and the public ac-

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115. 53 F.R.D. at 42 [emphasis added].
117. Id. at 328-29.
commodation sections but pointedly omitted to include such a provision in the public education section.”  

Although these arguments appear somewhat persuasive on their face, closer analysis reveals their utter lack of probative force. The legislation which was introduced in Congress in 1971 apparently was never acted upon in a manner which might justify an inference that Congress had any serious reservations concerning the advisability of allowing fees to prevailing plaintiffs in school integration actions. In fact, this very bill, along with its attorneys' fees provision, ultimately was carried into the 1972 session of Congress and enacted Title VII, “Emergency School Aid Act,” of the Education amendments of 1972. Secondly, with respect to the omission of a fees provision

120. In light of Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), it can hardly be doubted that legislative action which implicitly manifests a clear intent to restrict the availability of attorneys' fees awards will be recognized as such and given effect by the courts. The crucial inquiry which arises in this regard is whether the legislative action in question actually indicates a clear and unambiguous intent to restrict the court's fee shifting powers.
121. This opinion was expressed by Mr. Richard Smith, associate counsel to the Senate Subcommittee on Education, Committee on Labor and Public Welfare, in a phone conversation with the author on February 3, 1973.
As to the underlying rationale of the attorneys' fees provision itself, the following explanation was offered in a Senate Committee on Labor and Public Welfare report:

"[School desegregation] laws are not now being enforced throughout the nation. The Federal government is devoting neither the time, effort nor the financial resources necessary for adequate law enforcement. For example, the budget of the Justice Department's Civil Rights Division for education activities amounts to only $1 million a year. Only six school desegregation suits have been brought in Northern and Western states by the Justice Department. Only nine school districts in Northern and Western states have been required to file desegregation plans under Title VI of the Civil Rights Act of 1964. The Committee believes that funds should be made available to assure that Federal laws will be enforced throughout the country, while at the same time, under the policies and programs set forth in this bill, voluntary efforts to achieve quality education in stable integrated environments are assisted throughout the nation.

"Although litigation directed toward the enforcement of these laws is often time consuming and therefore expensive, litigation on behalf of those injured by breach of legal requirements remains the most effective and economical method of which the Committee is aware to obtain protection of legal rights." S. Rep. No. 92-61, 92d Cong., 1st Sess. 25 (1971).
122. Pub. L. No. 92-318, 86 Stat. 235. Section 718 of this act, relating to attorney fees, provides as follows: "Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring
in the public education section of the 1964 Civil Rights Act, the simple explanation appears to be that this section does not contemplate private actions but merely enables the United States attorney general to bring desegregation actions on behalf of persons he feels are unable to initiate their own suits. Accordingly, there is no reason for this section to provide for awarding attorney's fees to private plaintiffs.

An Attempt to Distinguish Mills and Lee

The court's next argument was that neither Mills v. Electric Auto-Lite Co., nor Lee v. Southern Home Sites Corp. was authority for awarding fees in the fact situation presented in Bradley. Any reliance on Mills, the court said, was misplaced "because conferral of benefits, not policy enforcement, was the Mills Court's stated justification for its holding." In fact, the award in Mills was based on the same concept of benefit as was used to support the award in Trustees v. Greenough.

These assertions do not appear to be well-founded. First, the decision in Mills was precisely that the federal courts, in their application of the common fund doctrine, were justified in departing from the Greenough requirement of a pecuniary benefit so as to require only that the benefit conferred be of a substantial nature. Second, the distinction which the Bradley court draws between "conferral of benefits" and "policy enforcement" in Mills is largely illusory since the principal benefit conferred in that case was, in fact, the enforcement of public policy. It would appear, then, that the only conceptual feature of Mills which prevents it from being direct authority for an award of fees in Bradley is the fact that, at least formally, Mills spoke in terms about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This provision had been modified from the form in which it was originally introduced which would have assessed plaintiffs' fees against the federal government rather than the defendant.

125. The public accommodations and equal employment opportunity sections, 42 U.S.C. §§ 2000a and 2000e respectively, on the other hand, expressly provide for private actions. 42 U.S.C. §§ 2000a-3(a) and 2000e-5(e) (1970).
127. 444 F.2d 143 (5th Cir. 1971). See text accompanying notes 45-52 supra.
129. See text accompanying notes 27-33 supra.
130. See text accompanying note 34 supra.
of the fund theory and its appurtenant unjust enrichment rationale.\textsuperscript{131} This obstacle, however, seemingly was overcome by the Fourth Circuit itself in \textit{Brewer v. School Board}.\textsuperscript{132} That is, if one were to combine the quasi-fund theory of \textit{Brewer}\textsuperscript{133} with the substantial benefit test of \textit{Mills}, there seemingly would exist a legal apparatus which would wholly justify an award of fees in \textit{Bradley}.\textsuperscript{134} Nonetheless, the court failed to utilize this unique potential provided by its earlier decision.

The \textit{Bradley} court's dismissal of \textit{Lee} is equally unconvincing. In essence the court's argument was that the \textit{Lee} court had justified its award of fees by noting that there existed a federal statute which authorized fee awards in suits closely parallel to the action before it, and that by analogy, fees should also be allowed in that action.\textsuperscript{135} In contrast to the \textit{Lee} situation, the \textit{Bradley} court implied that there was no statute allowing attorneys' fees to be shifted in school desegregation actions to which the court could analogize the action before it.

The deficiency of this summary dismissal of \textit{Lee} is that it fails to treat the true breadth of the \textit{Lee} rationale. The statutory analogy argument was but one pillar of the \textit{Lee} holding. The \textit{Lee} court also relied upon \textit{Mills}, construing it in exactly the sense which the \textit{Bradley} court refused to, and upon \textit{Piggie Park}.\textsuperscript{136} These portions of \textit{Lee}, which did, in fact, provide direct authority for an award of fees in \textit{Bradley}, were entirely ignored by the court.

\textbf{Congressional Silence and Separation of Power}

The final arguments in \textit{Bradley} were aimed directly at the roots of the private attorney general doctrine:

\begin{quote}
If, however, the rationale of \textit{Mills} is to be stretched so as to provide a vehicle for establishing judicial power justifying the em-
\end{quote}

\begin{itemize}
\item \textsuperscript{131} The substance of even this distinction is questionable, however, since \textit{Mills} is readily susceptible of a pure policy enforcement interpretation in spite of its formal adherence to the fund doctrine. See note 35 and accompanying text \textit{supra}.
\item \textsuperscript{132} 456 F.2d 943 (4th Cir. 1972). This case is discussed in the text accompanying notes 53-61 \textit{supra}.
\item \textsuperscript{133} See text accompanying note 59 \textit{supra}.
\item \textsuperscript{134} The argument would run simply that instead of providing plaintiffs' class with the benefit of free transportation, as was the case in \textit{Brewer}, the plaintiffs in \textit{Bradley} had conferred upon their class the "substantial benefit" of accelerated desegregation, or, in other words, the enforcement of the policies inherent in the equal protection clause and 42 U.S.C. § 1983, and hence, under the quasi-fund theory they were entitled to receive attorneys' fees from the school board.
\item \textsuperscript{135} For a discussion of this portion of the \textit{Lee} opinion see notes 49-51 and accompanying text \textit{supra}.
\item \textsuperscript{136} These aspects of \textit{Lee} are discussed in the text accompanying notes 47, 48 and 52 \textit{supra}.
\end{itemize}
ployment of award of attorney's fees to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general. 137

In addition, the court contended that "[c]ourts should not assume that Congress legislates in ignorance of existing law . . . " 138 Rather, they should interpret Congress's failure to provide for fee awards under any particular statute as constituting a purposeful expression of legislative intent that such awards "should be allowed only as they may be authorized under the traditional and long established principles . . . " 139

These pronouncements by the Bradley majority would seem to raise two fundamental questions: (1) Should federal courts regard legislative silence as a constraint against implementing any new fee shifting rationales, and (2) if not, should the courts still refrain from implementing the private attorney general rationale on the ground that it entails policy determinations which are more properly left to Congress? It is urged that each of these questions should be answered in the negative.

Inferring a legislative mandate based on Congress's failure to express itself would seem to entail a wholly unwarranted abdication of power which has long been recognized as properly residing within the federal judiciary. None of the leading cases which have discussed the inherent jurisdiction of the federal courts to award fees has ever suggested that this power is arbitrarily circumscribed, or that having once been an organic and flexible source of judicial authority it is now a mere collection of a few petrified rules. Indeed, as discussed earlier in this note, federal courts had undertaken considerable departures from the traditional fee-shifting exceptions even prior to the private attorney general doctrine. 140 Thus, it would seem that the reasoning

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138. Id. at 330.
139. Id.
140. See text accompanying notes 12-34 supra. Another case which clearly demonstrates the courts' willingness to depart from traditional fee-shifting exceptions when considerations of equity warrant it, and which, interestingly enough was decided by the Fourth Circuit, is Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951). There, black employees of defendant railroad company brought suit against the railroad and the Brotherhood of Locomotive Firemen and Engineers, a labor union, for negotiating a contract which allegedly prejudiced the continued employment of black firemen. The contract was in fact found to be racially discriminatory and hence void. In decreeing the relief to which plaintiffs were entitled the court upheld the lower court's
of the Bradley court could be applied just as persuasively to reach a directly opposite conclusion. That is, assuming that Congress does indeed act with full awareness of existing legal precedent, it arguably follows that legislative silence indicates, if anything, an intent to give full reign to the demonstrated expansiveness of the court's fee shifting powers.

The remaining question, then, is whether the courts should, as a matter of judicial discretion, refrain from implementing the private attorney general doctrine. The Bradley court suggests that they should on the ground that the doctrine allegedly requires the courts to make two types of policy determinations which are better left to Congress: namely, which laws effectuate public policy per se and which of such laws warrant the enforcement incentive of a fees award. This argument, however, would not appear to be particularly persuasive. To begin with, it is difficult to see how encouraging the enforcement of laws which by definition reflect public policy "as expressed by Congress or embodied in the Constitution" entails an independent determination by the courts as to the existence of such policies. Indeed, the simple fact remains that since all federal laws embody public policy, the vindication of any such law operates, to some greater or lesser extent, to advance the public interest. Hence, no judicial inquiry into the existence of public policy per se would seem to be involved in the determination of whether to award fees under the private attorney general doctrine.

It is true, of course, that the doctrine does require the courts to weigh and balance the conflicting policies which inhere in its applica-

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award of attorneys' fees. The court stated that: "Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed as part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. Id. at 481. It is apparent that this rationale comes within none of the traditional exceptions to the general rule, but rather is concerned only with basic principles of equity.

141. Cf. Note, The Allocation of Attorney's Fees After Mills v. Electric Auto Lite Co., 38 U. Chi. L. Rev. 316, 334 (1971). Such benefit to the public at large may, of course, be found in any of several forms: for example, in the deterence of similar violations of the law, in the clarification of vague and ambiguous legal rights and duties, or in the substantive therapeutics resulting from the individual suit.
tion, that is, the relative benefit accruing to the public from a particular type of law suit, on the one hand, and the general policy against fee shifting, on the other. This task, however, seems far more suited to the judicial branch of government than to the legislature. That is, congressional power is necessarily limited to providing for fees in broad generic terms. Therefore, any legislative action aimed at using attorneys' fees to promote *pro bono publico* litigation would be confined to either providing for mandatory fee awards under specific statutes, which, in effect, would predetermine that *all* suits brought pursuant to that statute were worthy of special enforcement, or requiring the courts to determine, in their discretion, which action merited fee awards.

The former alternative is of limited utility since statutes rarely are drafted in a way which guarantees that all suits brought under their auspices will promote the public interest to a certain predetermined degree. Moreover, this alternative would be even less useful in regard to broad, uncodified provisions of the Constitution. The concept of due process, for example, encompasses a range of potential actions far too expansive to be codified in a statute which, in effect, would predetermine that all due process suits were entitled to enhanced enforcement at the expense of the defendant. The second legislative alternative, that of authorizing the courts to shift fees in their discretion does no more than expressly place the burden of determining which suits justify fee awards where in most instances it must ultimately reside, *i.e.*, with the courts. Thus it would appear that neither of the policy determinations which the *Bradley* court characterizes as being "normally reserved for legislative determination" poses a substantial obstacle to the private attorney general doctrine. The first determination— that of which laws promote public policy—is in fact made by the legislature (or, alternatively, is embodied in the Constitution), and the second— that of which suits have sufficiently advanced the public interest to justify the transferring of plaintiff's legal expenses to the defendant—in most instances *must* be made by the courts.

In light of the above discussion, then, it would seem that the Fourth Circuit's repudiation of the private attorney general doctrine in *Bradley* is both an unsupported and unfortunate ruling which hopefully will not be followed.

**Conclusion**

The emergence of the private attorney general doctrine marks an extremely auspicious development within the federal court system. Firmly established on the traditional chancery powers of the federal
courts and motivated by strong considerations of equity, this doctrine provides the means by which private citizens may surmount the financial obstacle which has long impeded the bringing of actions designed primarily to protect broad public interests. Hopefully, the shadow which has been cast by the Fourth Circuit's opinion in Bradley will be eradicated by the Supreme Court. If so, the door will have been opened on a far healthier and more invigorated society.

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