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Zygmunt J.B. Plater

Boston College Law School, plater@bc.edu

Joseph H. King Jr

University of Tennessee College of Law

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THE RIGHT TO COUNSEL FEES IN PUBLIC INTEREST ENVIRONMENTAL LITIGATION

JOSEPH H. KING, JR.* AND ZYGMUNT J.B. PLATER**

I. INTRODUCTION

The successes of environmental protection law to date — limited though they are in the light of continuing systematic disregard of environmental values—can in large measure be attributed not to governmental or corporate sectors of our society, but to the public. Aroused citizens, operating without institutional power bases against immense odds, have forced their environmental concern on the legislatures and agencies, and have kept pressure on both polluters and the government through the courts. The National Environmental Policy Act of 1969,¹ for example, has become a significant force in compelling federal agencies to consider the best interests of the nation before promoting their various projects. Yet the Act's evolution was not the work of the agencies to whom Congress had directed NEPA, nor of the President and the Council on Environmental Quality who were to oversee the Act's operation.² Rather, the evolving statutory interpretations of NEPA's broad applicability and its requirements of extensive fact-finding, disclosure and adequately balanced decision-making have been hammered out in a series of public interest citizen suits, often, ironically, against the efforts

* B.A., Pennsylvania State University; J.D., University of Pennsylvania. Assistant Professor of Law, University of Tennessee College of Law. Member, Pennsylvania Bar. The opinions expressed herein are the author's own and are not intended to represent the opinions of counsel in litigation in which he may also have participated as counsel.

** A.B., Princeton University; J.D., Yale University; LL.M., University of Michigan. Assistant Professor of Law, University of Tennessee College of Law. A portion of the work presented herein was developed during an environmental law appointment to the University of Michigan Legislative Research Center, 1971-73.

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1. National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1970) [hereinafter cited as NEPA]. The Act was signed by President Nixon on January 1, 1970 and became effective on that date.

2. No sanctions to assure agency compliance appear on the face of the Act; the Council on Environmental Quality (CEQ) receives and reviews copies of all impact statements under sections 4322(c) [hereinafter referred to as section 102(2)(c)] and 4344(3) [hereinafter referred to as section 204(3)], but Presidential action is the only implicit sanction and appears never to have been exercised for environmental reasons.

of protesting agency defendants.³ Citizen environmental suits are equally important in other federal and state statutory areas, and in common law actions where courts today are successfully adapting traditional common law forms of action to the most modern environmental problems.⁴

The importance of citizen involvement in environmental protection continues to grow with the nation's recognition of environmental problems and commitment to solving them. If citizen suits are impeded, an important catalyst to the enforcement of statutory and administrative obligations is lost, and environmental offenses too numerous to be litigated by government are allowed to go unchecked.

The current revolution in citizen standing provisions,⁵ however, has not meant that public interest litigants have been able to solve the serious problems of environmental decision-making at any level of society. Private and governmental resource decisions continue, as a rule, to be made in narrowly insular terms, ignoring the full real external costs of each project.⁶ Citizen litiga-

3. See, e.g., *United States v. SCRAP*, 412 U.S. 669 (1973), *vacated and remanded on other grounds*, 42 U.S.L.W. 3305 (U.S. Nov. 19, 1973) (standing); *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir. 1972) (environmental impact statement [hereinafter referred to as EIS] preparation); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (alternatives that must be considered in an EIS); *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) (all of the above); *Sierra Club v. Froehlke*, 345 F. Supp. 440 (W.D. Wisc. 1972) (substantive effect); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971) (retroactivity).

4. See, e.g., Federal Water Pollution Control Act Amendments of 1972 § 505(d), 33 U.S.C.A. § 1365(d) (Supp. 1973); Marine Protection, Research and Sanctuaries Act of 1972 § 105(g)(4), 33 U.S.C.A. § 1415(g)(4) (Supp. 1973) (ocean dumping); Clean Air Act Amendments of 1970 § 304(3), 42 U.S.C.A. § 1857(h)-2(d) (Supp. 1973); Noise Control Act § 12(d), 42 U.S.C.A. § 4911(d) (Supp. 1973); 35 MICH. COMP. LAWS ANN. § 691.1201 *et seq.* (Supp. 1972). See the discussion of public nuisance and public trust doctrines in Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

5. See generally Sax, *supra* note 4. The most dramatic expansion of citizen standing in environmental cases came in *United States v. SCRAP*, 412 U.S. 669 (1973), where the Court granted standing to citizens who alleged a highly abstract injury no greater than that of the general public arising from a railroad rate hike that discriminated against recyclable resources. The Court thus went beyond its *Mineral King* holding which had restricted standing to plaintiffs alleging an individual injury. *Sierra Club v. Morton*, 405 U.S. 727, 735 n.8 (1973).

6. A basic problem in our nation's resource management systems is a general failure of decision makers (whether bureaucrats, corporate polluters, or private citizens) to consider consequences for which they are not held accountable (externalized costs). The goal of rational environmental management thus is identification and consideration of all

tion, despite its important role in making such projects account for themselves according to long-term public interest criteria,⁷ can be sustained in only a minority of the situations requiring judicial intervention. The character of our legal system poses inherent limitations upon comprehensive public interest litigation. The opportunity to litigate arises from a fortuitous combination of many uncertain elements. These include timely discovery of the issue, individual dynamism, adequate time to litigate, a sufficiently strong rule of law and clear factual question to make litigation practical, a supportive political climate, the availability of factual information and technical advice, and energetic legal services. Unfortunately the elements converge in too few cases.

In an area incapable of accurate quantification, we suspect that the predominant factor inhibiting meritorious public interest environmental litigation is the lack of money. Since in most cases plaintiffs are defending a diffuse public right instead of private interests and seek injunctions rather than damages, they cannot rely upon any financial recovery to defray the extensive costs of litigation.⁸ The money spent defending the public interest is their gratuitous and often sizeable gift to the public.⁹ The legal work may involve complex and novel questions requiring trial preparation, litigation time, and often elaborate expert testimony. Without independent wealth, outside sources of support, or the potential for monetary recovery, public interest plaintiffs must either find lawyers who can and are willing to donate large amounts of time, or else give up without a hearing.

economic and non-economic costs in the decision-making process, a goal only partly served by citizen litigation. See Note, *The Cost-Internalization Case for Class Actions*, 21 *STAN. L. REV.* 383 (1969).

7. Citizen intervention cannot ensure rationality in specific cases, as when agencies may proceed under NEPA with wasteful and injurious projects so long as they accurately document these effects according to section 102 procedures. See *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973) (Gillham Dam).

8. Damages are possible, notably in environmental litigation, under tort theories like private or public nuisance. Attorneys' fees are not necessarily barred in such situations if they are available under an established equitable exception. See note 218 *infra* and accompanying text. Damage recoveries, of course, have the unfortunate attribute of redressing people rather than the degraded environment itself.

9. Volunteered time is equally a private subsidy for the public interest. Nevertheless, billed time alone can amount to large sums. See note 216 *infra* and accompanying text.

The traditional American rule developed in private interest litigation over the years has been that litigation costs, including both attorneys' fees and expert witness' fees (which are subject to most of the reasoning and suggestions presented here)¹⁰ are not recoverable in the absence of statutory authority. The burdens of litigation costs lie where they fall and are not shifted to the losing party. The courts of equity, however, have developed several major exceptions to the general no-fee rule, and many public interest environmental cases appear to present a particularly compelling occasion for exercise of such equitable discretion. In a series of non-environmental cases allowing recovery of litigation costs without statutory authority, courts have held the no-fee principle inapplicable where certain general equitable principles apply. Such is often the case where the losing party has demonstrated bad faith or "obdurate behavior," where the litigation protects or creates a "common fund," or where plaintiffs have played the functional role of "private attorneys general."¹¹ While these categories are not exhaustive, they are the primary rationales for awarding litigation costs in environmental cases. Of the three, the last appears to offer the most comprehensive and compelling arguments.

Though litigation costs have been awarded in a variety of other areas of the law, notably civil rights and labor cases, the principle is only recently and tentatively being extended to environmental cases.¹² Despite the fact that environmentalists are relatively recent phenomena in the courtroom, they offer judges

10. Several cases indicate that expert witness' fees are equally available when attorneys' fees are awarded. *See, e.g.,* *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), or even more liberally, *Pyramid Lake Paiute Tribe v. Morton*, Civil No. 70-2506 (D.D.C. Memorandum opinion and order as to counsel fees, filed June 22, 1973) (It should be noted that the principal *Pyramid Lake Paiute Tribe* Opinion was reported in 4 B.N.A. ENVIRONMENT REP.—DECISIONS 1714 (D.D.C. 1972); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 102 (N.D. Cal. 1972). Note that 28 U.S.C. § 2412 (1970), which specifically authorizes recovery of fees against federal defendants, does not mention expert witness' fees. In view of the fact that counsel fees are expressly excluded from the statute, one could argue that the failure to similarly exclude witness fees implies that they fall within the authorization of the legislation and are recoverable. *But cf.* Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1250 n.162 (1973).

11. *See* Part II *infra*; *La Raza Unida v. Volpe*, 57 F.R.D. 94, 96 (N.D. Cal. 1972).

12. Most notably *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). Other major cases are *Sierra Club v. Lynn*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1745 (W.D. Tex. 1973); *Pyramid Lake Paiute Tribe v. Morton*, Civil No. 70-2506 (D.D.C., filed June 22, 1973).

sitting in equity convincing reasons to adjust an old rule to modern litigants in a modern natural setting.

Since the recent first appearance of non-statutory fee-shifting in environmental litigation, an increasing number of such cases has been thrown into the judicial hopper, with few reported out so far and many more to come.¹³ This article then must be a preliminary examination¹⁴ in the interim before a substantial case law has developed. The argument for environmental fee-shifting in many cases appears compelling. Without judicial efforts to facilitate public interest litigation, the environment may prove a threatening and unforgiving force in a more elemental forum.

II. COUNSEL FEES IN THE UNITED STATES IN THE ABSENCE OF STATUTORY AUTHORIZATION

As a general proposition, the American practice does not provide for the award of counsel fees to the prevailing party as a matter of course.¹⁵ The English system, on the other hand, does, subject only to the dispensations of the trial court's discretion.¹⁶ The American rule, like so many other American legal principles, may be explained best by reference to the contemporary English rule at the time the United States was growing out of its colonial status.

A. *Historical Perspectives*

1. The English Rule

In England, the award of costs (including attorneys' fees) was historically subject to the distinction between law and equity.¹⁷ No costs were awarded to the litigants in the absence of statute under the very early English common law.¹⁸ It was only in 1275

13. See note 145 *infra* and accompanying text.

14. It is beyond the scope of this article to consider the power of an administrative agency to award counsel fees in environmental litigation. See discussion in *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 425-27 (2d Cir. 1972).

15. See, e.g., *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); 1 M. SPEISER, *ATTORNEYS' FEES* § 12:3, at 464-66 & n.26 (1973), and cases cited therein.

16. 6 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 54.70[2], at 1302 (1972).

17. Goodhart, *Costs*, 38 *YALE L.J.* 849, 851 (1929).

18. See 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 597 (2d ed. 1898). Under the early common law, only the crown benefited from fee-shifting. "If the plaintiff

with the enactment of the Statute of Gloucester¹⁹ that a successful plaintiff was awarded his costs from the opposing party. By 1607²⁰ defendants were also entitled to recover costs to the same extent as plaintiffs. The final development came when the Supreme Court of Judicature Acts of 1873 and 1875²¹ were passed, which left the award of costs up to the discretion of the court. This legislation in effect meant that a successful litigant might be deprived of his costs "for good cause."²² Thus, costs in actions at law were usually awarded to the prevailing party unless circumstances warranted a departure from the usual practice. The English rules with respect to actions at law have not significantly altered in concept since the Judicature Act of 1875.²³

The English equity rule on costs and fees, however, varied from the common law. Even before the Acts of 1873 and 1875, fee-shifting in equity was discretionary and did not conform to the rule at law.²⁴ Thereafter, the rule for both courts was nominally the same—the award depended on the exercise of the court's discretion. Presumably, however, the historically broad base of the chancellor's equitable discretion and the long-standing tradition at law for the award to abide the result left the equity practice much closer to a true "discretionary" approach. This was especially the case since the Lord Chancellor's power, though not without statutory basis,²⁵ was probably inherent.²⁶

failed in his action, he was amerced *pro falso clamore*; if he succeeded, the defendant was *in misericordia* for his unjust detention of the plaintiff's right, but was not liable to the payment of any costs of suit . . ." Goodhart, *supra* note 17, at 852. See also HULLOCK, *LAW OF COSTS* 2 (1793).

19. 6 Edw. 1, c. 1 (1275).

20. 4 Jac. 1, c. 3 (1607). Professor Goodhart explains the delay in giving costs to the successful party as perhaps being due to the fact "that the amercement of the unsuccessful plaintiff was considered a sufficient punishment" though of little consolation to the victorious defendants. Goodhart, *supra* note 17, at 853.

21. 36 & 37 Vict., c. 66 (1873); 38 & 39 Vict., c. 77 (1875).

22. Goodhart, *supra* note 17, at 854.

23. See C. McCORMICK, *LAW OF DAMAGES* 234 (1955); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 620 (1931).

24. See, e.g., *Jones v. Coxeter*, 2 Atk. 400 (1742) and note 26 *infra*.

25. See 17 Rich. II, c. 6 (1394).

26. See Goodhart, *supra* note 17, at 854. The power of American courts sitting in equity, while deriving some authority from express statutory grants of power to award counsel fees in particular litigation, is as a general matter inherent in the court. See, e.g., *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939).

2. The American "No-Fee" Rule

Perhaps the most intriguing aspect of the relationship of the American and English rules is the fact that American developments so closely tracked the English model yet ultimately produced such a different result. At the time of the American Revolution, the English practice regarding costs became part of our early common law.²⁷ Thus, there were no attorneys' fees on the law side recoverable in the absence of statute, which is still the general rule in the United States.²⁸ Possibly out of deference to the English approach, a number of American jurisdictions thereafter enacted statutes codifying what was essentially the English statutory approach.²⁹ These statutes, however, evidenced one major dissimilarity from the English prototype—they prescribed a fixed fee for the services of counsel. This divergence of the two systems became manifest as gradual economic changes were not accompanied by increases in the prescribed counsel fees.³⁰ Ultimately, mere passage of time rendered the fixed attorneys' fees little more than nominal sums. This development led one writer to attribute the emergence of the American no-fee rule to a "gradual forgetting rather than [to the result of] a deep-seated moral judgment."³¹

3. Evaluation of the "No-Fee" Rule and Its Economic Bias

Perhaps the emergence of the unique³² American rule can be

27. 6 J. MOORE, *supra* note 16, at ¶ 54.70[2], at 1303.

28. See authorities cited in note 15 *supra*.

29. See DEL. CODE ANN. tit. 10, § 8710 (1953); MASS. ANN. LAWS ch. 261, § 23 (1968); N.H. REV. STAT. ANN. ch. 525, § 13 (1955); N.Y. REV. STAT. ch. 10, § 4 (1829); Act of Feb. 22, 1821, Pub. L. No. 50, § 2 PA. STAT. ANN. tit. 17, § 1635 (1962); Act of 1694, 2 SOUTH CAROLINA COOPER'S STATUTES 86. The attorneys' fees prescribed in the above statutes ranged from a \$1 fee under the New Hampshire act to \$3.75 for certain specific services ("arguing every cause") under the New York legislation. For a discussion of these early statutes see Goodhart, *supra* note 17, at 874; McCormick, *supra* note 23, at 620-21; Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1218-19 nn.13-16 (1967).

30. See *Manko v. City of Buffalo*, 271 App. Div. 286, 302, 65 N.Y.S.2d 128, 143 (1946), *aff'd*, 296 N.Y. 905, 72 N.E.2d 623 (1947), where the court recognized that the New York statutory limit for costs does not realistically compensate a party, and acknowledged the existence of the fiction that "it has been the public policy of this State from time immemorial, to regard them as adequate."

31. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 799 (1966).

32. It appears that the United States is one of the few industrialized nations of the

explained as historical accident. Others surmise that it is a reflection of the nineteenth century American distrust of lawyers,³³ or possibly a product of an intense colonial American idealism and the belief in the right to sue without the *in terrorem* effect of the threat of an adverse award of counsel fees.³⁴ These explanations may account for the origin of the rule, but not its continued vitality.³⁵

Arguments, usually of questionable validity and soundly criticized, can be made that the American rule has survived because of its inherent merits. It is said that the no-fee rule encourages litigation by not threatening litigants with their adversary's counsel fees;³⁶ that counsel fees are too remote, too difficult of ascertainment, and potentially too exorbitant;³⁷ and that the use of fee shifting to penalize and deter bad faith litigation might be lost if fees were awarded as a matter of course.³⁸ A rash of criti-

world, certainly one of the only leading common law or civil law countries, that rejects the award of counsel fees as a general rule. *See id.* at 797. *See also* McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 *FORDHAM L. REV.* 761, 782 nn.108-14 and authorities cited therein. *See generally* 1962 *PROCEEDINGS OF THE ABA SECTION ON INTERNATIONAL AND COMPARATIVE LAW* 119-31 (1963).

33. *See* Goodhart, *supra* note 17, at 873.

34. *See* Note, *supra* note 29, at 1220. *See also* *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 236 (1964) (Goldberg, J., concurring).

35. Counsel fees are generally still not recoverable in the United States today. The state of Alaska is a notable exception. *See* *ALASKA STAT.* § 9.60.010 (1973).

36. This argument was rejected in Ehrenzweig, *supra* note 31, at 797; Kuenzel, *The Attorney's Fees: Why Not a Cost of Litigation?*, 49 *IOWA L. REV.* 75, 82 (1963); McLaughlin, *supra* note 32, at 782-83. At the outset it has been observed that if the English rule would in fact reduce the amount of litigation, that factor alone would not be a valid criticism. On the contrary, such a reduction in the American courts would be welcomed. *See, e.g.*, McLaughlin, *supra* note 32, at 783. A more likely consequence of adopting the English rule might be a desirable shift in the identity of some parties bringing the litigation, with greater participation by the poor. *See* Goodhart, *supra* note 17, at 874-76, and text accompanying notes 49-52 *infra*. Moreover, one might argue persuasively that the threat of an award of counsel fees might have the further therapeutic effect of encouraging amicable settlements. *See* Kuenzel, *supra*, at 78-80.

37. For criticism of most of these speculations see McCormick, *supra* note 23, at 639-41; McLaughlin, *supra* note 32, at 780-81 nn.96-98 and cases cited therein. Determination of a reasonable attorney fee presents no more of a barrier to the finder of fact than any other difficult question requiring resolution. The fear that attorneys might be tempted to charge an exorbitant fee ignores the fact that the court would determine not only the right to the fee, but its amount.

38. This argument takes into account the deterrent or penal aspect of the "obdurate behavior" exception to the no-fee rule which is discussed at pp. 36-43 *infra*. The fact that attorneys' fees might be awarded as a matter of course, however, would not necessarily exclude consideration of a party's bad faith when setting the amount of the fee or the use of the court's contempt powers. Furthermore, the award of counsel fees as a matter of

cism³⁹ of the no-fee rule began a half a century ago,⁴⁰ inspired by Professors Goodhart⁴¹ and McCormick,⁴² but was little heeded or regarded until the last ten years when the commentators again spoke out in favor of the English rule.⁴³ The most popular reasons for adoption of the English rule are that it fully compensates the successful litigant by allowing him to recover for his often substantial expenses for counsel,⁴⁴ it discourages specious claims⁴⁵ and encourages meritorious ones by the threat or promise of reimbursement of one's counsel fees.⁴⁶

The consistency of the attack on the no-fee practice leads one to ask whether there might be another more elusive explanation for the rule. A naive and superficial inquiry might assume that the two systems, though different, are nevertheless equally just in that they operate uniformly as they affect individual litigants within their respective systems. Thus, under the English rule, either party is chargeable with costs, while in the United States neither party is. This reasoning is a tautology, however. The two systems appear strikingly different in their grossly disparate treatment of the rich and poor classes of society.

As a general proposition it should be stated that in significant litigation most defendants are solvent or they would not be defendants. If the poor participate in the judicial process at all

course would in any event discourage dilatory conduct by a party since the higher costs incurred by his opposition would inevitably increase the extent of his ultimate liability. Thus, under the English rule, the deterrent effect of threatened fee-shifting remains, but is simply less selective in its effect.

39. See, e.g., Avilla, *Shall Counsel Fees be Allowed?*, 13 CALIF. ST. B.J. 42 (1938); Ehrenzweig, *Shall Counsel Fees be Allowed?*, 26 CALIF. ST. B.J. 107 (1951); Goodhart, *supra* note 17; McCormick, *supra* note 23; Note, *Attorney's Fees as an Element of Damages*, 15 U. CIN. L. REV. 313 (1941). *But see* Note *supra*; Satterthwaite, *Increasing Costs to be Paid by Losing Party*, 46 N.J.L.J. 133 (1923).

40. The first widely publicized objection to the American rule is generally attributed to the *First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 7 (1925). See Note, *supra* note 29, at 1216.

41. See generally Goodhart, *supra* note 17.

42. See C. MCCORMICK, *supra* note 23, at 255-59; McCormick *supra* note 23.

43. See generally Ehrenzweig, *supra* note 31; Kuenzel, *supra* note 36; Stirling, *Attorney's Fees: Who Should Bear the Burden?*, 41 CALIF. ST. B.J. 874 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202 (1966); Note, 65 MICH. L. REV. 593 (1967); Note, *supra* note 29.

44. See, e.g., *Rodulfa v. United States*, 295 F. Supp. 28 (D.D.C. 1969); 6 J. MOORE, *supra* note 16, at ¶ 54.70[2], at 1304.

45. See, e.g., Goodhart, *supra* note 17, at 876; Kuenzel, *supra* note 36, at 78-80.

46. See, e.g., 6 J. MOORE, *supra* note 16, at ¶ 54.70[2], at 1304.

(aside from criminal cases), it is usually as plaintiffs. These tendencies take on major significance when evaluated in the context of the no-fee rule. Some courts have observed (or perhaps rationalized) that the American rule could be supported on the ground that under the English rule 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."⁴⁷ This supposition, however, at best ignores reality. The poor plaintiff without prospect of a large damage award to spawn a contingent fee arrangement⁴⁸ cannot realistically consider invoking the judicial process. Even if they embark on such an improvident course, such plaintiffs' chances of success in wars of attrition against an affluent defendant are often remote at best. And, assuming the two preceding obstacles are overcome, any reward for plaintiff's perseverance is usually largely consumed in legal fees.

The converse English rule provides a contrast to the bleak picture for the underprivileged painted under the American no-fee rule.⁴⁹ There, it is the wealthy defendant who laments that, if he loses on the merits (which, assuming plaintiff's greater access to the judicial process and enhanced longevity in the litigation context, becomes at least a credible prospect), he will be taxed with plaintiff's counsel fees. On the other hand, if defendant prevails against a poor plaintiff, he may find plaintiff judgment-proof when he seeks to recover attorneys' fees.

It might be argued, simplistically, that since both systems have their inherent inequities, why not, out of concession to the power of the actual, simply adhere to the present rule? This approach ignores two basic considerations. First, the English rule is self-policing to the extent that not many attorneys will take an unmeritorious case for an impoverished plaintiff since counsel fees would not then be forthcoming from either party. More importantly, under the English system, at least the wealthy individ-

47. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

48. For a comprehensive discussion of the contingent fee device see F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964). It has been suggested that the unwillingness of some lawyers to give up contingent fees may account in part for the reluctance to adopt the English rule which would presumably obviate the need for contingent fees. See Note, *supra* note 29, at 1226. Cf. Comment, *Are Contingent Fees Ethical Where Client is Able to Pay a Retainer?*, 20 OHIO ST. L.J. 329 (1959); Note, *Lawyer's Tightrope—Use and Abuse of Fees*, 41 CORNELL L.Q. 683, 699-700 (1956).

49. See Goodhart, *supra* note 17, at 874-76; Stoebuck, *supra* note 43, at 202.

ual can still avail himself of effective participation in the judicial process, a benefit not shared by the poor plaintiff under the American rule and against which the hardships posed by occasional judgment-proof plaintiffs pale into insignificance.⁵⁰

It is apparent that the present no-fee practice offers little solace for the plight of the poor⁵¹ or even middle classes⁵² who face increasingly impenetrable barriers to effective participation in the legal process. Despite proposals for change,⁵³ there are no signs that significant legislative innovations in the basic no-fee rule are imminent. When we consider this against the backdrop of the growing unresponsiveness of big government, the correlative need for public interest litigation by private citizens becomes even more compelling. It is in this setting that we evaluate a number of rapidly developing exceptions to the no-fee rule that have evolved in response to the growing need for public interest litigation.

50. Untoward effects, often resulting in self-help, have resulted from a systematic exclusion of the populace from the judicial process. See Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 *MICH. L. REV.* 847, 873 (1971).

51. See Carlin & Howard, *Legal Representation and Class Justice*, 12 *U.C.L.A. L. REV.* 381 (1964); Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right to Free Access to the Courts*, 56 *IOWA L. REV.* 223 (1970); O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 *OHIO ST. L.J.* 1 (1967); Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 *J. URBAN L.* 217 (1969); Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 *GEO. L.J.* 253 (1968); Note, *The Right to Counsel in Civil Litigation*, 66 *COLUM. L. REV.* 1322 (1966); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 *GEO. L.J.* 516 (1968); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 *YALE L.J.* 545 (1967). See also McLaughlin, *supra* note 32. The effect of the no-fee rule on the plight of the poor in America must be read against our stated national policy which is aimed at the elimination of the "paradox of poverty in the midst of plenty . . . by opening to everyone the opportunity . . . to live in decency and dignity." Economic Opportunity Act of 1964 § 2, 42 *U.S.C.* § 2701 (1970).

52. See Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, The Duty, and A Solution*, 26 *U. PITT. L. REV.* 811 (1965).

In recent years commentators have also expressed growing concern about the financial barriers to effective public participation in the regulatory process. See, e.g., Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 *GEO. L.J.* 525, 537-46 (1972); Howell, *Financial Barriers to Public Participation in the Regulatory Process*, 14 *WM. & MARY L. REV.* 567 (1973); Lazarus & Onek, *The Regulators and the People*, 57 *VA. L. REV.* 1069, 1096-1105 (1971).

53. See authorities cited in notes 39-43 *supra*. For one example of a proposed statute altering the no-fee rule see Stoebuck, *supra* note 43, at 211-18.

B. Exceptions to the No-Fee Rule

The Supreme Court in *Fleischmann Distilling Corp. v. Maier Brewing Co.*⁵⁴ recently reiterated the no-fee rule and two of its older exceptions: "[A]ttorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor."⁵⁵ There have developed, especially in the last few years, a number of widely recognized exceptions to this general no-fee rule. The most pervasive exceptions have been statutory. These include provisions for a mandatory award of counsel fees in favor of successful plaintiffs⁵⁶ and in some situations where plaintiffs seek only to enforce orders of administrative agencies.⁵⁷ Other statutes give the court discretion to award fees to the prevailing parties in certain instances regardless of whether they are plaintiffs or defendants.⁵⁸

54. 386 U.S. 714 (1967).

55. *Id.* at 717.

56. See Clayton Act, 15 U.S.C. § 15 (1970); Truth in Lending Act, 15 U.S.C. § 1640(a) (1970); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Civil Rights Act of 1964, 42 U.S.C. § 2000a-3b (1970); Ship Mortgage Act, 46 U.S.C. § 941(c) (1970); Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970); Communications Act of 1934, 47 U.S.C. § 206 (1970); Interstate Commerce Act, 49 U.S.C. § 908(b) (1970); Housing and Rent Act, 50 U.S.C. § 1895(a), (b) (1970); Defense Production Act, 50 U.S.C. § 2109(c) (1970). For a discussion of the statutory exceptions to the no-fee rule that are cited *supra* and in notes 57-8 *infra*, see 6 J. MOORE, *supra* note 16, at ¶ 54.71[2], at 1378-85. A number of state statutes that provide for the award of counsel fees are collected in Stoebeck, *supra* note 43, at 209-10 nn.56-69.

57. Packers and Stockyards Act, 7 U.S.C. § 210(f) (1970) (Secretary of Agriculture); Perishable Commodities Act, 7 U.S.C. § 499g(b) (1970) (Secretary of Agriculture); Railway Labor Act, 45 U.S.C. § 153(p) (1970) (Railway Adjustment Board); Shipping Act of 1916, 46 U.S.C. § 829 (1970) (Federal Maritime Commission); Interstate Commerce Act, 49 U.S.C. §§ 16(2), 908(b) (1970) (Interstate Commerce Commission).

58. Securities Act of 1933, 15 U.S.C. § 77k(e) (1970) (cost may be assessed against either party where court believes suit or defenses were without merit); Trust Indenture Act, 15 U.S.C. § 7700o(e) (1970) (court may in certain cases assess reasonable attorneys' fees against either party, "having due regard to the merits and good faith of the claims or defenses made by such party litigant."); Securities Exchange Act, 15 U.S.C. §§ 78i(e), 784(a) (1970) (attorneys' fees in cases involving manipulation of security prices and misleading statements); Copyright Act, 17 U.S.C. § 116 (1970) (reasonable attorneys' fees may be awarded in favor of the "prevailing" party in an action for copyright infringement); Patent Act, 35 U.S.C. § 285 (1970) (reasonable attorneys' fees may be awarded to the prevailing party in exceptional cases); Serviceman's Readjustment Act, 38 U.S.C. § 1822(b) (1970) (reasonable attorneys' fees may be awarded to the successful party).

Certain provisions of the Federal Rules of Civil Procedure also permit the award of counsel fees for failure to make discovery. See Rules 26(b)(3)(c), 30(d), 33(a), 34(b), 36(a), and 37(c). Other statutory provisions permit the court to award costs in certain situations

In addition to the purely statutory exception to the no-fee rule, a number of time-honored exceptions have evolved where the parties have provided for attorneys' fees by a valid contractual provision,⁵⁹ in certain admiralty cases,⁶⁰ civil contempt proceedings,⁶¹ divorce actions,⁶² and in some cases where the prior wrongful conduct of the defendant has caused plaintiff to incur legal expenses in defending or prosecuting an otherwise unnecessary lawsuit against a third party.⁶³

The most dynamic exceptions to the American rule, however, derive from an exercise of the courts' inherent equitable powers⁶⁴ with which the American courts were endowed as a result of their English heritage.⁶⁵ Equitable exceptions to the no-fee rule have been sanctioned "when overriding considerations of justice seemed to compel such a result."⁶⁶ These exceptions have been

to avoid other abuses of the judicial process. *See, e.g.*, 28 U.S.C. § 1447(c) (1970) (providing for the payment of costs where a case was removed from a state court improvidently and without justification); Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 926 (1970) (a party who prosecutes a suit without reasonable ground will be liable for costs).

59. *See, e.g.*, *United States v. Standard Oil Co.*, 156 F.2d 312, 315 (9th Cir. 1946); *C. McCORMICK*, *supra* note 23, at 253; *McLaughlin*, *supra* note 32, at 769 n.44, and cases cited therein.

60. Usually, where attorneys' fees are awarded in admiralty they are included as an item of compensatory damages. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

61. *See, e.g.*, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); 1 M. SPEISER, *supra* note 15 at § 12.10, at 483-85; *Andrews, The Recovery of Attorneys' Fees and Damages in Civil Contempt Proceedings in Illinois*, 47 CHI.-KENT L. REV. 211 (1970); *Annot.*, 43 A.L.R.3d 793 (1972).

62. *See C. McCORMICK*, *supra* note 23, at 241; *Note*, *supra* note 29, at 1228 n.61, and cases cited therein.

63. *See C. McCORMICK*, *supra* note 23, at 246-53; *McLaughlin* *supra* note 32, at 768 n.37, and cases cited therein.

64. In *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939), the Court stated that "the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation."

65. *See, e.g.*, *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-65 (1939). For an extensive scholarly treatment of the English derivation of the inherent equitable powers of the American courts sitting in equity see *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 240-46 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930).

66. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). The *Fleischmann* opinion went on to note, however, that the "recognized exceptions to the general rule were not . . . developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies." *Id.* at 719. Today, in light of the developments in the obduracy, common fund, and private attorney general exceptions, it is clear that their underlying rationales present such "overriding considerations" as to justify bypassing the no-fee rule and its purported advantages. *See generally* notes 36-81

invoked in three general situations which some courts have characterized as the "obdurate behavior," "common fund," and "private attorney general" exceptions⁶⁷ to the no-fee rule. The scope of equity's power, determined according to the historical traditions of equity as an institution,⁶⁸ is "broad indeed."⁶⁹ Apart from possible statutory limitations⁷⁰ the tendency has been for the court to regard its equitable power essentially as an "instrument for nice adjustment and reconciliation between public interest and private needs as well as between competing private claims."⁷¹

The foregoing equitable exceptions developed both independently and by cross-fertilization, beginning with the obdurate behavior cases and culminating in the enlightened notion of the private attorney general. The evolution, though incomplete, serves as an ongoing tribute to the responsiveness and ingenuity of private litigants to a sorely felt need in the judicial process.

1. Obdurate Behavior

a. *The Traditional Equity Policing Rule*

The "obdurate behavior" principle necessarily grew out of

supra and accompanying text.

67. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 96 (N.D. Cal. 1972).

68. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring); *Holmberg v. Ambrecht*, 327 U.S. 392, 395-96 (1946).

69. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring). See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). In *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946), the Supreme Court observed that "the comprehensiveness of [the district court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."

70. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), the Supreme Court was called upon to consider whether to award petitioners reasonable attorneys' fees based on an exception to the no-fee rule that had developed in trademark infringement cases. Apparently, under the Lanham Act, 15 U.S.C. §§ 1051-1127 (1970), a number of cases had established precedent to support the award of counsel fees in the absence of any express authorization. After a thorough review of the statutory scheme and its "meticulously detailed . . . remedies," 386 U.S. at 719, the Court held:

[W]hen a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied.

Id. at 720. Notwithstanding the *Fleischmann* Court's holding that the remedial provisions of the Lanham Act had marked "the boundaries of the power to award monetary relief in cases arising under the Act," 386 U.S. at 721, the Supreme Court in later cases appears to have recanted somewhat and awarded fees despite the relevant statute's silence on that point. See *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

71. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944).

the equity court's broad supervisory powers to police its lawsuits and its inherent powers to prevent injustice. Thus, the power to award counsel fees has been recognized both when "gross charges of fraud and misconduct have been made and not sustained . . . [and] where the main ground of the suit is false, unjust, vexatious, wanton, or oppressive."⁷²

The long-standing history of the obdurate behavior exception, rooted in the tradition of the English Chancery,⁷³ rendered the exception more palatable to the no-fee-minded American courts. Despite its inherent limitations, it has been instrumental in conditioning judicial attitudes for acceptance of other more universal and therapeutic principles to ameliorate the no-fee rule. Following wide recognition of the obdurate behavior principle, some courts began to look to considerations other than the obduracy of one of the parties for guidance in determining when to shift counsel fees.

A case illustrating the traditional obdurate behavior rule is *City Bank of Honolulu v. Rivera Davila*.⁷⁴ After debtor defaulted, the bank demanded payment and upon the guarantor's refusal to pay the bank sued the guarantor. Following a judgment for the bank, the district court ordered defendant to pay attorneys' fees in the amount of \$15,000, charging him with "obstinacy." The court of appeals affirmed the award, noting that it had been found that defendant had "greatly and necessarily prolonged the trial by injecting irrelevancies, by refusing to admit facts patently true, and by making statements and later contradicting himself."⁷⁵

b. *Antecedents of the Therapeutic Rules*

The *Rivera* case is typical of one line of cases based on the traditional "bad faith" rule designed to penalize a party for his disregard of the legal process.⁷⁶ Other modern cases, however,

72. *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 241 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). See 6 J. MOORE, *supra* note 16, at ¶ 54.77[2], at 1709, and cases cited therein; Note, *Attorneys' Fees: What Constitutes a "Benefit" Sufficient to Award Fees from Third Party Beneficiaries?*, 1972 WASH. U.L.Q. 271, 272-73 n.6, and cases cited therein.

73. See authorities cited in note 65 *supra*.

74. 438 F.2d 1367 (1st Cir. 1971).

75. *Id.* at 1371.

76. See, e.g., *Universal Oil Products Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946),

have evidenced a trend toward a more outward-looking approach, precursing the therapeutic concepts of the common fund and private attorney general rather than embodying the classic obdurate behavior notions. In *Rolax v. Atlantic Coast Line Railroad Co.*,⁷⁷ plaintiff, a union member, sued his employer railroad and his union to have a collective agreement, allegedly depriving plaintiff and other black firemen of seniority and employment rights, declared void. The court of appeals, upholding the award of attorneys' fees against the union, cited the classic obdurate behavior cases,⁷⁸ but then went on to reason 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 interest. 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.⁷⁹

The *Rolax* case is significant in marking a departure from a purely "internal" frame of reference vis-a-vis the lawsuit. Instead, the court shifted its focus away from the culpability of the party litigants qua litigants to consider also the relevance of defendants' extrajudicial conduct in the extended public interest context. This "external" focus weighed not only the particular plight of plaintiff in incurring disproportionately high counsel fees in relation to his interest in the lawsuit, it also embraced the beneficial effect the litigation promised to other union members.

This overview perspective was also present in a number of school desegregation cases, typified by *Bell v. School Board of Powhatan County, Virginia*.⁸⁰ There the district court disallowed attorneys' fees, despite its granting of plaintiff's request for injunctive relief. The court of appeals, reversing, cautioned that

we must take into account the long continued pattern of evasion

where the Court observed that if a fraud were practiced on it, "the entire cost of the proceedings could justly be assessed against the guilty parties." For a thorough discussion of the obdurate behavior rule as it is traditionally applied to supervise litigation see Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953).

77. 186 F.2d 473 (4th Cir. 1951).

78. *Id.* at 481.

79. *Id.*

80. 321 F.2d 494 (4th Cir. 1963) (en banc).

and obstruction which included not only the defendants' unyielding refusal to take any initiative [to end school desegregation] . . . but their interposing a variety of administrative obstacles to thwart the wishes of the plaintiff for a desegregated education.⁸¹

These cases,⁸² and similar ones challenging voting malapportionment,⁸³ while retaining a gloss of the "obdurate behavior" mantle like *Rolax*, presaged the application of the "private attorney general" concept in fee awards.⁸⁴

The "obdurate behavior" exception to the no-fee rule helped to prepare the courts for socially-conscious applications of the common fund approach and for the emergence of the private attorney general theory. These developments, however, were more offshoots of the obdurate behavior principle, than manifestations of its complete metamorphosis. The obdurate behavior exception continues to offer a viable but limited exception to the no-fee rule in its own right and on occasion may even justify fee-shifting where nothing else will.⁸⁵

2. The Common Fund

a. *Development of the Rule*

Fee-shifting based on a "common fund" theory, unlike obdurate behavior, does not arise among a lawsuit's adversaries *inter se*. Rather, it represents an allowance of fees more akin to that "as between solicitor and client."⁸⁶ The rule is invoked where an individual has taken it upon himself to protect or create a fund or a property right in which others have a legal interest. Under such circumstances it has been thought only fair that such a person should be reimbursed by the others for his reasonable counsel fees.⁸⁷

As the fund cases evolved, there was an expansion of the

81. *Id.* at 500.

82. *See, e.g.,* *Monroe v. Board of Comm'rs*, 453 F.2d 259 (6th Cir. 1972); *Hill v. Franklin County Bd. of Educ.*, 390 F.2d 583 (6th Cir. 1968); *Cato v. Parham*, 293 F. Supp. 1375 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968); *Clark v. Board of Educ.*, 369 F.2d 661 (8th Cir. 1966).

83. *See, e.g.,* *Dyer v. Love*, 307 F. Supp. 974 (N.D. Miss. 1969).

84. *See* discussion at pp. 48-57 *infra*.

85. *See generally* note 163 *infra*.

86. 307 U.S. at 165.

87. *See* 6 J. MOORE, *supra* note 16, at ¶ 54.77[2], at 1705.

nature of the *benefit* that had to be conferred on the other beneficiaries before fee-shifting was justified. The traditional application of the common fund doctrine appears in the original fund case of *Trustees v. Greenough*.⁸⁸ A bondholder sued the trustees of a fund on behalf of himself and other bondholders similarly situated. The fund had been pledged to cover interest on the bonds and certain installments. Plaintiff, alleging that the trustees wasted and destroyed fund property by disposing of a large part of the fund's land, was successful in setting aside some of the conveyances. Thus, plaintiff's action benefitted other bondholders by protecting the fund. The Supreme Court approved the allowance of counsel fees to plaintiff's attorney, basing its decision upon essentially two considerations. First, the Court enunciated an unjust enrichment rationale, stating that to do otherwise "would not only be unjust to [plaintiff] . . . , but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage."⁸⁹ The Court also reasoned that plaintiff had served as an agent of the class.⁹⁰

In the later case of *Sprague v. Ticonic National Bank*,⁹¹ plaintiff sued individually to protect her interests in certain trust deposits held by the bank's receiver. Here it was held that the *stare decisis* benefit of plaintiff's successful lawsuit to other bank depositors was sufficient to invoke the doctrine. Despite some differences, both *Greenough* and *Sprague* had a single overriding element in common—in both cases there was a tangible fund from which the plaintiff could draw his counsel fees. Soon, however, the pressures exerted by the inherent inequity of the no-fee rule began to force a mutation in the traditional common fund approach. The courts, suffering under the constraints of the American rule, not only looked backward to draw on obdurate behavior principles, but also forward in anticipation of the private attorney general rule. The common fund theory thus spawned two hybrid fund-type theories to support fee-shifting, perhaps thereby further diluting the stark lines that once circumscribed the traditional exceptions to the no-fee rule.

88. 105 U.S. 527 (1881).

89. *Id.* at 532.

90. *Id.* at 533-35.

91. 307 U.S. 161 (1939).

In *Kahan v. Rosenstiel*,⁹² named plaintiff, a minority shareholder in Schenley Industries, sued individually and on behalf other similarly situated shareholders, alleging misleading representations concerning the value of an offer to acquire plaintiff's stock in violation of section 10b of the Securities Exchange Act of 1934⁹³ and Rule 10b-5 promulgated thereunder.⁹⁴ Defendants included Glen Alden Corp., which was attempting to acquire a controlling interest in Schenley, and Rosenstiel, Schenley's controlling shareholder, who was also chairman and chief executive officer. Plaintiff alleged that while Rosenstiel refused an offer from another company because it would not pay a premium for his stock, he accepted an offer from Glen Alden which met his terms. Plaintiff also alleged that the Glen Alden offer to the other shareholders did not match the price it paid to Rosenstiel. Before the case reached trial, Glen Alden raised its offer to the remaining shareholders to a level comparable to the price paid to Rosenstiel, thus, in effect, settling the controversy. Plaintiff moved for counsel fees from Glen Alden, which was not a member of plaintiff's class. In denying plaintiff's motion, the district court held *inter alia* that plaintiff had "failed to benefit the class" and "sought counsel fees from the defendants rather than from a fund created by his efforts."⁹⁵

The Court of Appeals for the Third Circuit recognized that plaintiff sought the "highly unusual relief of having counsel fees paid [under a fund theory] by an adverse party."⁹⁶ It nevertheless reversed the district court and held that plaintiff's pleadings stated a sufficient cause of action if proved to support an award of counsel fees. The court not only reasoned that the common fund exception was "not limited to circumstances in which there is monetary fund,"⁹⁷ but also looked to the conduct of the corporate defendant to support the award. The court agreed that if defendants had unilaterally settled the action "brazenly ignoring Rule 23(e)"⁹⁸ thereby foreclosing the creation of a fund from

92. 424 F.2d 161 (3d Cir.), *cert. denied*, Glen Alden Corp. v. Kahan, 398 U.S. 950 (1970).

93. 15 U.S.C. § 78j(b) (1970).

94. 17 C.F.R. § 240-10b-5 (1972).

95. 424 F.2d at 164. *See Kahan v. Rosenstiel*, 300 F. Supp. 447 (D. Del. 1969).

96. 424 F.2d at 167.

97. *Id.* at 166.

98. Federal Rule of Civil Procedure 23(e) provides:

which counsel fees could be recovered, the district court might find it inequitable to deprive plaintiff of counsel fees.⁹⁹ In so holding, the court of appeals created an unusual alliance of obdurate behavior and common fund concepts to justify fee-shifting against an adversary unrelated to plaintiff's class.

The union of the common fund with notions of societal benefits reaching beyond the class has produced another and even more significant "quasi-application"¹⁰⁰ of the common fund theory. It has found its greatest expression thus far in shareholders' derivative suits,¹⁰¹ and is clearly in evidence in the much-discussed¹⁰² case of *Mills v. Electric Auto-Lite Co.*¹⁰³ In *Mills*, plaintiffs were minority shareholders who brought a derivative suit under the 1934 Act¹⁰⁴ challenging a corporate merger on the grounds that shareholder approval had been influenced by a misleading proxy statement. Although, when plaintiffs moved for award of counsel fees, they had succeeded in establishing their cause of action, the Court recognized that the lawsuit "had not yet produced and may never produce, a monetary recovery from which the fees could be paid."¹⁰⁵ Nevertheless, the Court, relying in part on dicta from *Greenough*,¹⁰⁶ observed that reimbursement had been permitted where three ingredients were present: (1) the

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

99. 424 F.2d at 168.

100. *Brewer v. School Bd.*, 456 F.2d 943, 951 (4th Cir.), cert. denied, 409 U.S. 892 (1972).

101. See, e.g., Cole, *Counsel Fees in Stockholders' Derivative and Class Actions—Hornstein Revisited*, 6 U. RICH. L. REV. 259 (1972); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956).

102. Note, *Securities Regulation—Allowance of Attorneys' Fees in 14(a) Derivative Suits*, 49 N.C.L. REV. 204 (1970); Note, *Mills v. Electric Auto-Lite Co.: Proxy Violations—The Causation Question and the Award of Attorney's Fees*, 65 NW. U.L. REV. 854 (1970); Comment, *The Allocation of Attorney's Fees after Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971).

103. 396 U.S. 375 (1970).

104. Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970). Plaintiffs also relied on Rule 14a-9, 17 C.F.R. § 240.14a-9 (1972), which was promulgated under section 14(a) and prohibits misleading proxy statements.

105. 396 U.S. at 392.

106. 105 U.S. 527, 532-33 (1881). There the Court noted that if for some reason plaintiff "cannot be reimbursed out of the fund itself, [the others entitled to participate in the fund] . . . ought to contribute their due proportion of the expenses which he has fairly incurred."

litigation confers a "substantial benefit"¹⁰⁷ to the class; (2) the class is an "ascertainable" one; and (3) the court's jurisdiction over the subject matter of the suit makes possible "an award that will operate to spread the costs proportionately" among the members of the class.¹⁰⁸ The Court thus approved the award of counsel fees despite the possibility that a monetary fund might never reach fruition and that it might be impossible to assign monetary value to the benefit received by the shareholders.¹⁰⁹ Fee-shifting was thought justified to encourage "'corporate therapeutics,'"¹¹⁰ thereby vindicating the statutory policy in insuring fair and informed corporate suffrage.

The exchange of the hard "fund" approach of the earlier cases for the more far-ranging "therapeutic" perspective of *Mills* now finds adherents not only in subsequent securities litigation,¹¹¹ but also in other areas like the labor field. In *Hall v. Cole*,¹¹² the Supreme Court in a recent 6 to 2 decision affirmed the lower court's award of counsel fees in a lawsuit under section 101(2)(2) of the Labor Management Reporting and Disclosure Act.¹¹³ Plaintiff had introduced a resolution at the regular meeting of his union alleging various instances of undemocratic action and shortsighted policies. The resolution was defeated and shortly thereafter plaintiff was expelled from the union. In upholding the award of counsel fees to plaintiff, the Court concluded that "by vindicating his own right of free speech guaranteed by [the Act, plaintiff] . . . necessarily rendered a substantial service to his union . . . and to all of its members . . . [and also] dispels the 'chill' cast upon the rights of others."¹¹⁴

107. The "substantial benefit" test originated in *Bosch v. Meeker Cooperative Light & Power Ass'n.*, 257 Minn. 362, 101 N.W.2d 423 (1960).

108. 396 U.S. at 393-94.

109. *Id.* at 392, 396.

110. *Id.* at 396, quoting Hornstein, *supra* note 101, at 659, 662-63.

111. *See, e.g.*, *Bright v. Philadelphia-Baltimore-Washington Stock Exch.*, 327 F. Supp. 495 (E.D. Pa. 1971).

112. 412 U.S. 1 (1973). *Hall* has been followed in other recent labor cases. *See, e.g.*, *Yablonski v. United Mine Workers*, 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

113. 29 U.S.C. § 412(a)(2) (1970).

114. 412 U.S. at 8.

b. *Limitations of the Common Fund Approach*

Despite the broad public policy strokes of the Court in *Mills* and *Hall*, and in their progeny, the true common fund cases are by definition limited in their capacity to reach many goals in the public sector. Notwithstanding the liberal "substantial benefit" test signifying a move away from a monetary fund, the requirement that there be an ascertainable class to whose members the courts might look for reimbursement has survived. Thus, for whatever else the recent common fund cases signify in their outward-looking perspectives, the underlying concept remains inextricably tied to its self-regarding roots—the mechanism that produces the counsel fees must ultimately always look inward for the source of the fees.

Conceptually, too, the dual objectives of some of the fund cases in benefitting an identifiable and limited membership and the vindication of human rights suggest a potentially mutually-hampering effect retarding the accomplishment of either or both objectives. Only by sheer coincidence can the degree of benefit to a circumscribed class correspond to the quantum of societal benefits generally. Thus, in fund cases like *Mills*, which adopt a broad frame of reference transcending the boundaries of the instant class, the source of the justification for equity's private attorney general rationale may be confused by the presence of two benefitted entities. In effect, the microcosm of the fund and the societal macrocosm, where both are recognized as justifications for a departure from the no-fee rule, may exert competing forces to shape the particular exercise of the court's equitable discretion. In such instances, the interests of neither group receives proper consideration under the common fund theory.¹¹⁵

3. The Private Attorney General

a. *Origins of the Rule*

Although the obdurate behavior and common fund rules served a useful purpose in conditioning the move away from the strict no-fee rule, they nonetheless fell short of many worthy objectives of fee-shifting. The obduracy exception could even be,

115. Cf. *Brewer v. School Bd.*, 456 F.2d 943, 952 (4th Cir.) (Winter, J., concurring), cert. denied, 409 U.S. 892 (1972).

and often was, a two-edged sword. Some courts, even in recent cases,¹¹⁶ have sometimes been persuaded to deny counsel fees in the absence of the requisite obduracy without considering the other available justifications for fee-shifting. The common fund cases likewise might draw on the obduracy of the parties for support,¹¹⁷ despite the fact that obduracy was not an essential element in the fund cases,¹¹⁸ thus confusing the rules. Even with the broad policy-based opinions like *Mills*, the inherent limitation of the fund concept, tied as it was to the requirement for the deep pocket of an accessible class, was beginning to be felt.

Smarting under the inherent and often arbitrary constraints of the obdurate behavior and common fund rationales, the federal courts sought a more direct justification for fee-shifting. Oddly enough, they found it in a case construing an express statutory grant of authority to award counsel fees. In *Newman v. Piggie Park Enterprises, Inc.*,¹¹⁹ plaintiff instituted suit under Title II of the Civil Rights Act of 1964, which gives the court discretion to allow the prevailing party a reasonable attorney fee.¹²⁰ The court of appeals denied plaintiff's request for attorneys' fees, apparently construing the statutory prescription as merely a codification of the obdurate behavior exception, limited to instances where defenses had been asserted "for purposes of delay and not in good faith."¹²¹ The Supreme Court reversed, holding:

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

116. See, e.g., *Bradley v. School Bd.*, 472 F.2d 318 (4th Cir. 1972), cert. granted, 412 U.S. 937 (1973); *Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1972).

117. See, e.g., *Kahan v. Rosensteel*, 424 F.2d 161 (3d Cir.), cert. denied, *Glen Alden Corp. v. Kahan*, 398 U.S. 950 (1970), discussed in the text accompanying note 92 *supra*.

118. In *Hall v. Cole*, 412 U.S. 1, 15 (1973), the Court pointed out that "neither the presence nor absence of 'bad faith' is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff under the 'common benefit'"

119. 390 U.S. 400 (1968) (per curiam).

120. 42 U.S.C. § 2000a-3(b) (1970).

121. *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433, 437 (4th Cir. 1967), rev'd per curiam, 390 U.S. 400 (1968).

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.¹²²

Although the "private attorney general" rule was not a completely novel concept in 1967,¹²³ *Piggie Park* was its first explicit application in a fee-shifting situation. The rule, as applied, relied for its policy justifications upon neither the bad faith of the defendant nor upon the bestowal of some benefit upon an identified class that might serve as the source of a fund for counsel fees. Rather, the Court looked to the enforcement and vindication of congressional policies "of the highest priority."

b. *Further Development and Articulation of the Doctrine*

While the public policy rationale of *Piggie Park* was persuasive, its precedential effect was somewhat limited by the express statutory basis for the award. Nor did the public policy underpinnings of *Mills* with their inherent class-based limitations achieve

122. 390 U.S. at 401-02. The *Piggie Park* rationale was reaffirmed by the Supreme Court in the recent case of *Northcross v. Board of Educ.*, 412 U.S. 427 (1973), which also involved an express statutory authorization for fee-shifting.

123. *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), illustrates the early application of the private attorney general concept in suits against the government. The court, discussing "standing to sue," stated:

While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring suit for judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can . . . enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers [T]here is nothing constitutionally prohibiting Congress from empowering any person . . . to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Id. at 704 (footnotes omitted); cf. Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 *YALE L.J.* 574 (1949).

Another example of the private attorney general concept is present in the *qui tam* actions. In such cases plaintiff sues a violator of a statute to recover a penalty for the violation. The statute provides that the penalty shall be shared by any informer [the plaintiff] who institutes such an action and the state. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (upholding constitutionality of federal informer's statute); *Grover v. Morris*, 73 N.Y. 473 (1878); *In re Barker*, 56 Vt. 14 (1884); Kafin & Needkman, *The Use of Qui Tam Actions to Protect the Environment*, 17 N.Y.L.F. 130 (1971). See also Zirkle, *Standing to Bring Environmental Actions: Qui Tam and the Refuse Act of 1899*, 39 *TENN. L. REV.* 459 (1972).

the broad universality of scope contemplated in the private attorney general rule. Yet, despite the limitations of *Piggie Park* and *Mills*, the combined chemistry of the two cases resulted in a serendipitous synergy.

Although other cases both before¹²⁴ and after¹²⁵ *Lee v. Southern Home Sites Corp.*¹²⁶ espoused a private attorney general approach, *Lee* is perhaps the best expression to date of the potentiating phenomenon of *Piggie Park* and *Mills* out of which the private attorney general grew. In *Lee*, a black citizen sought an injunction and other relief against a private real estate developer who had refused to sell him a parcel of land because of his race. The district court entered judgment for plaintiff but failed to award attorneys' fees. The court of appeals affirmed on the merits but remanded the case for consideration of plaintiff's request for counsel fees.¹²⁷ On remand the district court denied attorney fees

124. See, e.g., *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir. 1970) (civil rights action based on police conduct in obtaining an involuntary confession and unlawful detention); *Moore v. Knowles*, 333 F. Supp. 53 (N.D. Tex. 1971) (involving alleged denial of due process to a suspended teacher); *Brown v. Ballas*, 331 F. Supp. 1033, 1037 (N.D. Tex. 1971) (racial discrimination in housing; court relied on first *Lee* case: *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970)); *Hammond v. Housing Authority & Urban Renewal Agency*, 328 F. Supp. 586 (D. Ore. 1971) (discrimination against welfare recipients in public housing case); *Lyle v. Teresi*, 327 F. Supp. 683, 686 (D. Minn. 1971) (conspiracy to deprive Black citizens of civil rights by repeated arrests for alleged traffic violations).

125. See, e.g., *Donahue v. Staunton*, 471 F.2d 475, 482 (7th Cir. 1972), cert. denied, 410 U.S. 955 (1973) (wrongful discharge of chaplain at state mental hospital in violation of First Amendment—freedom of speech—rights); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972) (rejection of plaintiff's application for a position as golf pro on racial grounds); *Callahan v. Wallace*, 466 F.2d 59, 62 (5th Cir. 1972) (lawsuit to stop *inter alia* justices of the peace from trying traffic cases because of official financial interest in the outcome); *Ross v. Goshi*, 351 F. Supp. 949, 955 (D. Hawaii 1972) (attacked county ordinance proscribing political signs as violative of first and fourteenth amendment rights); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (action to secure better medical and psychiatric treatment for inmates at state mental institutions); *NAACP v. Allen*, 340 F. Supp. 703, 709-10 (M.D. Ala. 1972) (exclusion of Blacks from employment in Department of Public Safety); *Sims v. Amos*, 340 F. Supp. 691, 695 (M.D. Ala. 1972) (reapportionment); *Shull v. Columbus Municipal School Dist.*, 338 F. Supp. 1376 (N.D. Miss. 1972) (class action to force school district to permit unwed mothers to attend school).

For a detailed summary of a number of the more significant private attorney general cases that both preceded and followed *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), see Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 *HAST. L.J.* 733, 742-55 (1973). See also Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 *N.Y.U.L. REV.* 301, 321-31 (1973).

126. 444 F.2d 143 (5th Cir. 1971).

127. 429 F.2d 290 (5th Cir. 1970).

and the court of appeals reversed. Relying on the reasoning of *Mills* and *Piggie Park*, the court stated:

The policy against discrimination in the sale or rental of property is equally strong [as the policy underlying the statute involved in *Piggie Park*]. The statute, under present judicial development depends entirely on private enforcement. Although damages may be available . . . in many cases there may be no damages or damages difficult to prove. To insure that individual litigants are willing to act as "private attorneys general" to effectuate the public purpose of the statute, attorney fees should be . . . available¹²⁸

The forceful reasoning of the decision in *Lee* has served as a rallying point for other public interest cases where fee-shifting rationales do not fit neatly into the obdurate behavior or common fund molds. The eradication of racial and other class-based discrimination, taken as a national goal, was felt to present sufficiently compelling "overriding considerations" to warrant fee-shifting even in the absence of a statutory prescription. The very magnitude and intractability of the problem, both in terms of sheer numbers as well as in its moral dimensions, called for exceptional measures to encourage "private attorneys general." Fee-shifting was the device chosen.

There is a basic similarity between the fund and private attorney general exceptions in that each is based on an exchange of a salutary piece of litigation for the reimbursement of counsel fees. The difference lies in the class benefitted. In the fund cases, it is a clearly defined and identifiable class from whom counsel fees are readily extractable. In the private attorney general cases, while there may be an ascertainable class, as in the racial discrimination cases, the benefit in large measure is held to accrue to the society at large. The settings of the fund cases, in effect, are thus from the standpoint of the benefitted class, microcosms of the private attorney general; the latter simply operates on a wider, nationwide scale.

This analysis also serves to highlight a basic difference between the obdurate behavior exception to the no-fee rule and many of the fund and private attorney general cases. In the obduracy situations, the award of counsel fees bears a direct rela-

128. 444 F.2d at 147-48.

tionship to conduct deemed to be antisocial, and the violator pays. The fund and especially the private attorney general cases may also grow out of undesirable conduct; yet, in these cases it is often the class—perhaps a corporation in a shareholder derivative action or a governmental citizenry in an environmental case—whose interests are vindicated and which bears the burden of the fees. Under such circumstances, “fee-shifting” may strictly speaking be a misnomer. “Fee-spreading” would be more accurate. This distinction illustrates a unique aspect of numerous common fund and private attorney general cases—they are based on what is essentially an involuntary attorney-client relationship. This raises basic questions as to how far an equity court should engage in fee-spreading that threatens to preempt participatory democracy in institutions (or ascertainable classes) such as corporations, unions, or governments. One might also inquire as to the efficiency of fee-spreading in redistributing benefits to a class member or citizen for his contribution to the counsel fee award.

Articulation of the questions here does not presuppose an easy solution. Empirical data, if available at all, might only complicate the calculus of the questions further. It would seem that one possible answer may lie in adopting a less restrictive view of participatory self-rule. On balance it appears that the fact of voluntary membership in a corporation, union or governmental constituency may itself be a sufficient expression of assent to justify an involuntary participation in the costs of vindicating the inherent interests and aspirations of the institution in question. And more important, until the institution itself becomes responsive to its stated interests and goals, incentives to private attorneys general in the form of fee-shifting (fee-spreading) may be a necessary if not a perfect solution in an imperfect society.

Notwithstanding the conceptual sameness of the fund and private attorney general rules, the latter, in view of its public orientation, confers upon the court greater latitude in utilizing the fee-shifting device. Thus, courts of equity “may, and frequently do, go much farther to give and withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are involved.”¹²⁹

129. *Virginia Ry. v. System Fed'n*, 300 U.S. 515, 522 (1937).

c. *The Uncertainty of Bradley*

The emergence of a direct means of fee-shifting responsive to the need for vindication of strong congressional policies as typified by *Lee* was challenged in a recent desegregation decision brought under 42 U.S.C. § 1983,¹³⁰ which contains no provision for attorneys' fees. In *Bradley v. School Board of Richmond, Virginia*,¹³¹ after tortuous attempts by public-minded citizens to end racial segregation in Richmond public schools, the school board finally implemented a satisfactory desegregation plan. Plaintiffs then moved for the award of counsel fees. The district court rejected the application of the common fund approach to school desegregation cases.¹³² Instead, in awarding fees, the district court looked to the obstinacy and unreasonableness of defendant's conduct¹³³ and the important governmental policy¹³⁴ advanced by the litigation.

The Court of Appeals for the Fourth Circuit reversed the lower court's allowance of counsel fees on essentially two grounds. First, the court held that an element of bad faith was essential to the award of counsel fees in desegregation cases,¹³⁵ and that the record did not support such a conclusion in the instant case.¹³⁶ Secondly, the court rejected the private attorney general approach, distinguishing *Mills, Piggie Park* and *Lee—Mills* because it was a fund case, *Piggie Park* because there was a statutory prescription, and *Lee* because it was based on a civil rights statute similar to one containing a counsel fees provision.¹³⁷ The court's arguments consistently misapprehend the substance of the private attorney general concept. Unless the presence of bad

130. 42 U.S.C. § 1983 (1970).

131. 472 F.2d 318 (4th Cir. 1972), *cert. granted*, 412 U.S. 937 (1973).

132. 53 F.R.D. 28, 35-36 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), *cert. granted*, 412 U.S. 937 (1973), where the district court observed:

School desegregation cases, or any suits against governmental bodies, do not fit this fine model without considerable cutting and trimming. This is a class suit . . . 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 to which pupils pay for their free public schooling.

133. *Id.* at 39.

134. *Id.* at 41-42.

135. 472 F.2d at 320; *see Brewer v. School Bd.*, 456 F.2d 943, 949-51 (4th Cir.), *cert. denied*, 409 U.S. 1892 (1972), and cases cited therein.

136. 472 F.2d at 320-27.

137. *Id.* at 329-30.

faith is extraneous to the private attorney general rule, the latter rule has no effect in and of itself. Disposing of *Mills* as a "fund" case totally ignores the broad public policy foundation of the opinion as well as its potentiating effect when combined with the realism of *Piggie Park*. The court's treatment of *Lee* is simplistic. Of course all civil rights statutes are not fungibles and the statutes in *Lee* and *Bradley* are not the same, but that does not negative the obvious—that *Lee* approved fee-shifting in the absence of a statutory authorization, an ascertainable class from which fees might be drawn, or manifest bad faith on the part of defendant.

d. Future Prospects for the Private Attorney General

The immediate future of the private attorney general will in large measure be ordained by the manner in which the Supreme Court disposes of *Bradley*. Based upon the tenor of the Court's recent decision in *Hall v. Cole*,¹³⁸ where obdurate behavior was not an element at issue, as well as the perseverance of the lower federal courts (guided by *Piggie Park* and *Mills*), it is unlikely that the Supreme Court will arrest what has been an arduous beginning for the private attorney general principle in the past decade.

The past year alone has witnessed the reach of the private attorney general fee rule beyond the civil rights cases. One such area is the environmental field where the doctrinal recidivism of *Bradley*¹³⁹ has been ignored by the courts. The sentiment¹⁴⁰ is

138. 412 U.S. 1 (1973), discussed in text accompanying notes 112-14 *supra*.

139. 472 F.2d at 329 (footnotes omitted; emphasis added), where the court said:

If . . . the rationale of *Mills* is to be stretched so as to provide a vehicle for establishing judicial power justifying the employment 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 [*inter alia*] . . . 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. *Counsel in environmental cases would claim such a role for their services* [citing, with trepidation, the strip mining case of *West Va. Highlands Conservatory v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971), where, incidentally, plaintiffs never asked for counsel fees].

140. See, e.g., Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222 (1973); Note, *supra* note 125, at 753-55; Comment, *Allocation of Attorneys' Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 329-30 (1971).

perhaps best expressed in *La Raza Unida v. Volpe*,¹⁴¹ where class action plaintiffs succeeded in obtaining a preliminary injunction halting the construction of a federal highway because the state and federal agencies had failed to comply with *inter alia* NEPA and section 4(f) of the Department of Transportation Act of 1966.¹⁴² The court, in a closely reasoned opinion by Judge Peckham, held that plaintiffs were entitled to counsel fees, and relied solely upon the private attorney general theory. This approach has been followed in three other very recent environmental cases, *Pyramid Lake Paiute Tribe of Indians v. Morton*,¹⁴³ *Sierra Club v. Lynn*¹⁴⁴ and *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*.¹⁴⁵

The fate of the private attorney general exception promises to carry with it not only the vigor of public rights in a burgeoning catalogue of public interest cases, but will perhaps affect the future of the American no-fee rule. As such, the private attorney general rule deserves the continuing attention of the courts and commentators, and energetic application by the public interest litigants.

4. Application in Nonfederal Cases

To date, the most innovative equitable departures from the no-fee rule have occurred almost exclusively in federal courts in cases directly or indirectly involving federal statutes. The question may arise whether the principles developed there must be

141. 57 F.R.D. 94 (N.D. Cal. 1972).

142. 49 U.S.C. § 1634 (1970). See *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971).

143. Civil No. 70-2506 (D.D.C., filed June 22, 1973); cf. *Committee to Stop Route 7 v. Volpe*, 4 B.N.A. ENVIRONMENT REP.—DECISIONS 1681 (D. Conn. 1972) (recognizing the private attorney general concept but refusing to award fees on other grounds).

144. 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1745 (W.D. Tex. 1973).

145. 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1891 (1st Cir. 1973). Although there was, according to the court, statutory authorization for the award, the court appeared to rely exclusively on the private attorney general concept to justify its departure from the no-fee rule. Perhaps this was a reflection of the court's uncertainty of its statutory construction. See discussion in note 271 *infra*.

In other environmental cases, the counsel fees question is presently awaiting decision. See e.g., *Environmental Defense Fund v. Tennessee Valley Authority*, Civil No. 73-8174 (6th Cir., filed July 5, 1972); *Harrisburg Coalition Against Ruining the Environment (CARE) v. Volpe*, Civil No. 71-143 (M.D. Pa. 1973); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1973); cf. *Tenants & Owners in Opposition to Redevelopment (TOOR) v. HUD*, Civil No. 69-3245 AW (N.D. Cal. 1973).

restricted to the federal courts.¹⁴⁶ Although it is beyond the scope of this article to undertake a thoroughgoing review of state equity courts' jurisdiction, it appears that the answer is "no."

The basis of equity jurisdiction in both state and federal courts is the same: there are not two separate pools of equity principles upon which the courts draw nor two separate trains of decisions arising from the common base.¹⁴⁷ On any given point some state courts may happen to be in advance of the federal courts or vice versa, but the differences are a product of circumstances rather than an essential distinction. In practice, moreover, the same equitable principles that support the federal fee-shifting decisions can be discerned in various state decisions awarding counsel fees where bad faith exists, in common fund situations, and in cases where a public interest is vindicated by private litigants.¹⁴⁸ Most of these cases are based upon general statutory authorizations to award costs or damages, but since the statutes involved do not specifically authorize attorneys' fees, the judges' decisions to expand the statutory language and award fees are directly on point. Though the principles in state decisions are not as fully articulated as in federal decisions, they are basically the same. The arguments developed by the federal courts should be equally applicable *mutatis mutandis* to cases arising under state statutes and (where the same criteria are met) under the common law.¹⁴⁹

III. FEE-SHIFTING THEORIES IN THE ENVIRONMENTAL SETTING

Though all three of the major rationales by which litigation

146. See Note, *supra* note 125, at 756 n.94.

147. That the federal as well as state courts draw from the common heritage of English law and equity is evident on the face of the U.S. Const. art. III, § 2. See also H. McCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* 12 (1948).

148. See, e.g., *Fletcher v. A.J. Industries*, 266 Cal. App. 2d 313, 72 Cal. Rptr. 146 (1st Dist. 1968); *Wilmington Trust Co. v. Coulter*, 208 A.2d 677 (Del. 1964); *Mencher v. Sachs*, 164 A.2d 320 (Del. 1960) (common fund); *Baya v. Central & S. Florida Flood Control Dist.*, 184 So. 2d 501 (Fla. 1966); *G.M. Dykes Iron Works, Inc. v. Dehenffe*, 131 So. 2d 760, 762 (Fla. 1961); *Ready v. Ready*, 33 Ill. App. 2d 145, 178 N.E.2d 650, 656 (1961) (bad faith); *Indianhead Truck Line, Inc. v. Hivdsten Transp., Inc.*, 268 Minn. 176, 128 N.W.2d 334 (1964). See also the non-pecuniary fund state cases cited in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 391, 395 n.22 (1970); *Gilbert v. Local 701, Hoistings & Portable Eng'rs*, 237 Ore. 130, 390 P.2d 320 (1964); *Channell v. N.C.R. Employees' Independent Union*, 28 Ohio App. 2d 260, 277 N.E.2d 85 (1971) (union therapeutics); *Mandel v. Hodges*, Civil No. 427816 (Alameda Super. Ct., filed Feb. 14, 1973) (private attorney general) cited in Note, *supra* note 125, at 758.

149. See authorities cited in note 148 *supra*.

costs are awarded have potential application in the environmental law field, the first two—the obduracy and common fund theories—will in fact often be superfluous owing to the availability and force of the private attorney general principle.

A. *Obdurate Behavior*

Obdurate bad faith may often appear in situations where polluting corporations or obstinate administrative agencies have manifested a continuing disregard for clear legal mandates, within or outside the subject court proceedings.

In the *Pyramid Lake Paiute Tribe* case,¹⁵⁰ for example, the District Court for the District of Columbia found that the Secretary of the Interior had violated his trust over native American lands in permitting the deleterious commercial diversion of 378,000 acre feet of water away from the Paiute's sacred Pyramid Lake. Although the principal opinion noted that "the Secretary's good faith is not in question,"¹⁵¹ it based recovery of costs upon the fact that during the course of the case his representatives

acted in an obdurate and intransigent manner refusing in good faith to carry out the court's directives, and . . . unnecessarily extended the litigation to the detriment of the tribe.¹⁵²

The agency's conduct outside the instant litigation was also considered relevant to the question of bad faith. The court noted the department's evasions of the requirements of water-allocation decrees in other cases, and certain general administrative fact-finding duties that were not conscientiously undertaken.¹⁵³ The elements of this example—an administrative agency circumventing certain limiting legislative directives in order to implement its primary promotional objective—are sufficiently frequent in environmental situations to provide occasions for consideration of the obduracy principle.¹⁵⁴

150. *Pyramid Lake Paiute Tribe v. Morton*, 4 B.N.A. ENVIRONMENT REP.—DECISIONS 1714 (D.D.C. 1972); *Pyramid Lake Paiute Tribe v. Morton*, Civil No. 70-2506 (D.D.C., filed June 22, 1973).

151. 4 B.N.A. ENVIRONMENT REP.—DECISIONS at 1716.

152. Civil No. 70-2506 at 2.

153. 4 B.N.A. ENVIRONMENT REP.—DECISIONS at 1716-17. The court did not explicitly recognize the internal-external distinction; it is left open to question whether defendants' bad faith in similar circumstances outside the instant litigation, without more, would be enough to ground a finding of obduracy.

154. Other evidence of obduracy might be found in an agency's decision to work

Likewise in the case of private defendants, evasion of environmental controls has been a common phenomenon over the years. Corporate delays, variance attempts, and obstruction of enforcement characterized a large percentage of state administrative control efforts until very recently,¹⁵⁵ and such history will often constitute grounds for application of the obduracy principle. Common law actions may present the same elements. In *Reynolds Metals Co. v. Lampert*,¹⁵⁶ one of a series of aluminum plant air pollution tort cases, defendant corporation had been knowingly discharging fluoride emissions and refusing to install available control devices. The court was prompted to levy punitive damages by the unusually forthright admission of one company executive that over the years "it is cheaper to pay claims than it is to control fluorides."¹⁵⁷ This posture alone, the court felt, justified application of punitive damages; the factors recommending that exercise of judicial discretion would seem to apply equally well to the award of litigation costs in similar situations.¹⁵⁸

The shortcomings of the obduracy rationale for environmental cases lie in considerations of procedure, policy and tactics. In the *Reynolds* case above, for example, the problems of proof of bad faith were substantially diminished by that polluter's unusual indiscretion in stating the evasive corporate policy for the record. In most circumstances the plaintiffs' evidentiary burden in proving bad faith would be much more difficult to establish.¹⁵⁹

round-the-clock shifts to pour concrete in a dam or to channelize a river so that environmental alteration is irreversible by the time judicial review commences, or the construction of a highway right up to the boundaries of a disputed natural site in order to strengthen the case for building through the site.

155. Few comprehensive surveys have been made of state enforcement efforts against private polluters, but the limited evidence available indicates that corporate recalcitrance to clean up discharges may span as much as twenty years, with repeated refusal to implement effluent limitations, violation of compliance schedules, etc. MICHIGAN ENVIRONMENTAL LAW SOCIETY, SURVEY OF MICHIGAN WATER RESOURCES COMMISSION (Spring, 1970) (unpublished research report). Note the typical case history reflected in *GAF Corp. v. Environmental Protection Agency*, 2 B.N.A. ENVIRONMENT REP.—DECISIONS 1458 (Illinois Pollution Control Bd. 1971).

156. 324 F.2d 465 (9th Cir. 1963).

157. *Id.* at 466.

158. The discretionary basis for finding bad faith for purposes of fee awards would seem to be even stronger than for purposes of punitive damage awards since the latter may be held to incorporate a requirement of malice.

159. A reluctance to commit questionable policy positions to written or recorded memoranda is discernible in both corporate and governmental circles, and the availability of records in general is accordingly often restricted. *Cf.* 5 U.S.C. § 552(b)(4)-(5) (1970).

Moreover, in the case of administrative defendants the burden is multiplied by the broad range generally given to official discretion and presumptions of validity for administrative actions. Where legal questions are complicated, official duties unclear, or official conduct ambivalent, plaintiffs will ordinarily find diminishing returns in trying to produce evidence of bad faith.¹⁶⁰

As to policy, it does not seem desirable to rely upon an equity rationale so heavily redolent of moral fault. Beyond the practical and subjective problems of proving bad faith, the moral tone of self-righteousness necessary to plead for the award of costs in order to "punish" defendants clouds the more straightforward argument that public interest plaintiffs deserve costs on their own merits, quite independent of the goodness or badness of the defendants. In the same way that defendants' "fault" is increasingly irrelevant in divorce proceedings, it is a difficult and unnecessary importation into environmental litigation.¹⁶¹ This approach misses the real point, and thus costs in some cases would not be granted to plaintiffs who might otherwise merit them.

The obduracy rationale offers further tactical disadvantages. The most significant is its potential for backfiring since it can operate against any party to litigation. Defendants can often be heard challenging the legitimacy and good faith of environmental plaintiffs' motives.¹⁶² If their complaints can constitute grounds for fee recovery against plaintiffs, the obduracy principle might operate to *deter* rather than encourage some desirable public interest litigation, as well as doubling the potential for unedifying litigation over alleged bad faith.

Since there are only a few situations covered by the obduracy rationale that cannot be better handled by alternative theories,¹⁶³

160. Cf. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 96 (N.D. Cal. 1972).

161. Besides the extra cost in time required in any "fault" inquiry, the divorce example demonstrates that such an inquiry also imports an unnecessary element of individual bitterness into judicial proceedings.

162. See, e.g., *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972), where codefendant Humbolt Fir, Inc. counterclaimed for compensatory and punitive damages due to plaintiff's disruption of a contract with a government agency to log a wilderness area. The court held that the first amendment guarantees the right to petition a government agency and that the Sierra Club cannot be required to compensate defendant for losses caused by agency compliance with statutory duties.

163. The primary occasion for award of fees where the common fund and private attorney general principles do not apply would appear to be in cases where individual damages are recovered, as in a private nuisance action, in which case the defendant's obduracy might allow a plaintiff to make himself whole by recouping attorneys' fees.

an approach that turns on the merits of plaintiffs' efforts seems more practical and rational in the circumstances.

B. Common Fund

In the wake of *Mills v. Electric Auto-Lite Co.*¹⁶⁴ the common fund approach has theoretically expanded in its potential application to public interest litigation. There are, however, persuasive arguments in most cases that judicial reliance should be placed elsewhere. Insofar as the result of litigation is to create or defend an existing or implied pecuniary fund, the principle may be useful. Where, for example, a public utility violates environmental mandates by overcharging consumers according to a rate structure that promotes wasteful use of energy, costs after successful litigation might properly be levied against the implicit common fund thus created.¹⁶⁵ Damages recovered in class action and public nuisance suits may likewise constitute such common benefit funds out of which cost recovery is eminently justified.¹⁶⁶

Where the common benefit fund is *not* pecuniary, however, (and *Mills* held that the common fund approach was not restricted to pecuniary benefit funds)¹⁶⁷ the definition of the nature, volume and recipients of litigation benefits becomes increasingly subjective.¹⁶⁸ If a citizen stops an economically and environmentally wasteful dam project, for instance, must the common fund label be stretched to capitalize the public's environmental amenities thereby saved? And how in theory does the stalemated dam-building defendant draw upon such a fund in order to pay plaintiffs' costs?¹⁶⁹ In many such cases, even if the litigation may be

164. 396 U.S. 375 (1970).

165. This is the type of fund referred to by Mr. Justice Marshall in the *SCRAP* case where he found "provision for an accounting and 'refund' to the people of our nation for the irreversible ecological damage that results from [an environmentally wasteful] rate increase . . ." in the Interstate Commerce Act's requirement that carriers "maintain detailed records of monies received due to [a rate] increase . . . to compel payment of refunds if a rate increase was ultimately found to be unreasonable." 412 U.S. at 730-31. Similar funds may be found in electric utilities' promotional rate structures.

166. Indeed, class actions already embody the principle of allowing recovery of counsel fees out of common fund damage recoveries. See *Lindy Bros. Bldg., Inc. v. American Radiator Standard Sanitary Corp.*, 42 U.S.L.W. 2249 (3d Cir. Nov. 31, 1973).

167. 396 U.S. 375, 393 (1970).

168. Noted by the *La Raza* court, 57 F.R.D. at 96-97.

169. If the benefitted class is drawn so broadly as to include all consumers or the general American public, then the ability of corporate defendants to pass on costs to consumers or of the government to pass on in taxes what it does not pay out of pork barrel

held to have benefitted an identifiable class, the beneficiaries may not be coterminous with the losing defendants who are asked to pay, and the "fund" itself, if one exists, could be beyond the defendants' reach. The utility of the common fund approach appears limited to situations involving more institutionalized classes where these failings are minimized. And even there the recovery of costs may well be better approached by other routes.

It would seem from consideration of *Mills* that the primary reason for making the semantic contortions of the common fund rule is to implement the simple conclusion that plaintiffs deserve compensation for defending a significant point of public interest. This process is more frankly and efficiently addressed by the third approach to nonstatutory award of litigation costs. Though the law is more comfortable with dollar quantifications of benefits and costs, a nonpecuniary public benefit deserves recognition in equity on its own merits.

C. *Private Attorney General*

The private attorney general rationale produces the most widely useful cost recovery theory for environmental cases, which are usually well suited to that particular approach. In fact there is not only a nascent line of cases in the fee-shifting context, but also an established body of case law applying the principle to various other aspects of environmental cases. Moreover, the private attorney general theory avoids the indirection and practical difficulties of the previously considered approaches.¹⁷⁰

To date, the private attorney general principle in environmental cases has been applied primarily to the standing question and to a lesser extent to the question of the merits and remedies in public interest cases. In a series of suits challenging administrative actions, the lower federal courts found that environmental groups could be "aggrieved" under the standing provisions of the Administrative Procedure Act and other relevant statutes by vir-

funds, allows fee payments for purposes of semantics at least to be drawn out of a "benefitted class fund." Cf. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1891, 1893 (1st Cir. 1973). Yet, so broad a scope makes any distinction between the common fund and private attorney general theories indiscernible, in which case the latter approach seems more direct.

170. The most important practical advantage is that the private attorney general theory is *not* a two-edged sword since it cannot be turned in retribution against environmental plaintiffs.

tue of their "special interest" in the public issues involved.¹⁷¹ Like plaintiffs in civil rights and other fields,¹⁷² they then could seek relief in court as private attorneys general, raising public issues that often were not being adequately advanced by public agencies.

The Supreme Court dampened the standing revolution somewhat in 1972 in the *Mineral King* case¹⁷³ by saying that specific injury, rather than a mere special interest in the matter, was necessary to render the organization sufficiently aggrieved to present the question.¹⁷⁴ Whatever the merits of the Court's standing test,¹⁷⁵ environmentalists have not been excluded from court as a result, since in virtually every case they can allege some specific injury to meet the standards and that injury need not be different from that of the general public.¹⁷⁶ Significantly, the Supreme Court in *Mineral King* did not withdraw the environmental plaintiffs' special status as private attorneys general by requiring more traditional tests of standing. As the Court noted, though such plaintiffs must establish their standing to sue in private injury terms, they are then also vested with a much broader standing as private attorneys general to assert the rights and interests of the general public in seeking their relief on the

171. *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *See also* *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Washington Dept. of Fish & Game v. FPC*, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954); *Natural Resources Defense Council, Inc. v. Grant*, 355 F. Supp. 280 (E.D.N.C. 1973); *Izaak Walton League of Am. v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970).

172. *See* note 122 *et seq. supra* and accompanying text.

173. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

174. *Id.* at 739 n.14 *et seq.* This inquiry, of course, need not be economic. *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970).

175. Injury seems a poor candidate as the major test for standing since it is only one of the factors that may characterize an adequate "case or controversy" under the policy reasons underlying standing requirements. *See* K. DAVIS, *ADMINISTRATIVE LAW* § 22.07, at 431 n.12 (3d ed. 1972). This narrow focus is especially weak when one considers the limited degree and specificity of injury required to establish standing. *United States v. SCRAP*, 412 U.S. 669, 683 *et seq.* (1973), *vacated and remanded on other grounds*, 42 U.S.L.W. 3305 (U.S. Nov. 19, 1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

176. As the Supreme Court noted, public interest plaintiffs usually can find sufficient injury in the fact situations litigated. The *Sierra Club* subsequently easily established standing by alleging individual injury to its hiking members. *Sierra Club v. Morton*, 348 F. Supp. 219 (N.D. Cal. 1972). The practical drawbacks of the rule appear in litigation over, for instance, an isolated portion of arctic tundra in which no Eskimo resident is a *Sierra Club* member.

merits.¹⁷⁷ This result parallels the situation in typical environmental public nuisance and public trust actions, where plaintiffs first must establish their private standing but then can base their case upon public rights and draw upon general public injury in seeking injunctive remedies.¹⁷⁸ The private attorney general rationale, then, continues to have a broad base in both administrative and common law environmental actions on the question of plaintiffs' standing, claims on the merits, and remedies. Although the private attorney general theory has only recently been extended to fee recoveries, as in *La Raza*, its noteworthy prior development in the environmental field argues strongly for its continuing applicability to the specific area of fees.

1. Equity Guidelines for the Private Attorney General

The private attorney general principle today is still only a descriptive concept rather than a fixed term of art. The concept offers guidance to courts in handling public interest litigation, but it lacks full articulation as a legal rule. Though a group of plaintiffs may be recognized as private attorneys general, it is not clear what consequences necessarily follow as to fee recovery. The court in *La Raza* accordingly found it advisable to review the equities of awarding counsel fees to private attorneys general in terms that replicated the elements of the theory itself.

The *La Raza* court identified several criteria¹⁷⁹ favoring the award of attorneys' fees, drawing upon the private attorney gen-

177. 405 U.S. at 737 n.12, citing 3 K. DAVIS, ADMINISTRATIVE LAW § 2205.07 (1958).

178. The traditional public nuisance rule is that plaintiffs may draw upon public rights if they first can establish special private injury different in kind from the public at large. RESTATEMENT (SECOND) OF TORTS § 821 C(1) (Tent. Draft No. 17, 1971), though statutes and judicial circumlocutions have diluted this requirement. *Id.* § 821 C(2). Note the semantics in *Karpisek v. Cather & Sons Constr., Inc.*, 174 Neb. 234, 117 N.W.2d 322 (1962); *Wilcox v. Henry*, 77 P. 1055 (Wash. 1904). Standing in public trust actions is unclear, sometimes seeming to require special injury, *Marks v. Whitney*, 6 Cal. 3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971), at other times seeming to grant standing as in traditional trust law to any beneficiary. *Gould v. Greylock Reservation Comm.*, 350 Mass. 410, 215 N.E.2d 114 (1966). *Qui tam* actions, which could serve to encourage public citizen enforcement of legal standards, unfortunately have received rather restrictive treatment in the courts. See *Bass Anglers Sportsman Soc'y v. U.S. Steel Corp.*, 324 F. Supp. 412 (N.D. Ala.), *aff'd sub nom.*, *Bass Anglers v. Koppers*, 447 F.2d 1304 (5th Cir. 1971). See also *Zirkle*, *supra* note 123.

179. 57 F.R.D. at 99. See *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972).

eral principles of the civil rights cases. Each area of concern touched upon the definition of private attorneys general and their importance to the system: Whether the suit concerns a strong public policy, benefits a wide-spread public, in circumstances in which private enforcement is both necessary and financially burdensome.¹⁸⁰ While these inquiries are not dispositive in awarding or refusing to award fees,¹⁸¹ they offer important guidance to equity courts, and in most environmental cases each is readily fulfilled.

2. A Strong Public Policy

Since equity will not create exceptions to established common law rules for trivial reasons, the justification for judicial waivers of the no-fee rule must be found in "overriding"¹⁸² public policies. Analytically, it could be argued that enforcement of any law serves public policy. Yet the private attorney general cases in environmental law and other areas have made clear that something more is required, that some laws present a more compelling case for judicial encouragement of citizen enforcement than others.¹⁸³

Environmental policy certainly possesses the stature required for such exercises of discretion. The past several years have made it abundantly clear that protection of environmental quality is a high-ranking public priority amply justifying such judicial encouragements as the fee-shifting decision. At every level of government, new statutes, administrative systems and litigation emphasize our seriousness in addressing both local and systemic environmental problems. In the vast majority of environmental cases, therefore, there should be no question that a strong public policy is intimately involved.¹⁸⁴ In practice, the method for establishing the point has been simply to cite what-

180. "The rule briefly stated is that whenever 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 benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." 57 F.R.D. at 98.

181. See notes 66 *supra* and 227 *infra* and accompanying texts.

182. See note 66 *supra* and accompanying text.

183. Cf. *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 146 (5th Cir. 1971).

184. Under the equitable principles embodied in the cases, there appears to be no reason to apply the private attorney general rubric only to congressional enactments; strong state policies should be equally instrumental in these cases. Cf. cases cited note 148 *supra*.

ever statutes bear upon a question to indicate the presence of active public policy.¹⁸⁵

Several points require further comment. First, a court should not in any circumstances attempt to discount the presence of a strong public environmental policy in the light of other countervailing public policies. The nature of the inquiry is whether a suit serves to raise and explore important public policies. The ultimate balancing of interests is a separate question on the merits and has no direct relevance to the social utility of commencing litigation. Second, the required strong public policy need not be the same policy underlying the cause of action. The suit in *Citizens Committee for the Hudson Valley v. Volpe*,¹⁸⁶ for example, was based upon the Rivers and Harbors Act of 1899, which controlled navigational obstructions. Yet the court had no hesitation in acknowledging plaintiffs' status as private attorneys general for environmental policy reasons, noting that similar environmental threats were the subject of serious national concern expressed in various statutes and regulations that had no applicability in the given fact situation.¹⁸⁷ On the other hand, equity courts must exercise their discretion in excluding the award of costs where environmental protection policy is a purely incidental element in the context of the case and merely serves as a tangential bootstrap to recovery of costs. Such broadranging waivers of the no-fee rule should await the occasion of reforms specifically addressed to the particular subject matter of the lawsuit or to a general reconsideration of the no-fee rule.

3. Public Benefit

The public benefit embodied in citizen suits goes to the very heart of the reasons for equity's encouragement of private attorneys general. The nature and magnitude of the benefits required

185. See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 99 (N.D. Cal. 1972); In *Pyramid Lake Paiute Tribe*, Civ. No. 70-2506 (D.C.D., filed June 22, 1973), when the court merely took judicial notice of "national policy" of environmental protection and "declared congressional policy" for Indian welfare. Civ. No. 70-2506 at 2. Cf. *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970) and note 187 *infra*.

186. 425 F.2d 97 (2d Cir. 1970).

187. *Id.* at 104-05 nn. 8, 9, citing the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1970); Fish and Wildlife Coordination Act, 16 U.S.C. § 662(a), 742a *et seq.* (1970); Hudson River Compact, 80 Stat. 847 (1966) and Corps of Engineers regulations.

to trigger the equity courts' fee-shifting discretion, however, are not correspondingly clear.

It could be argued that a finding of strong public policy automatically includes a finding of the requisite degree of benefit. The two questions are similar—the mere fact of enforcing a statute, for instance, is probably equally insufficient to justify fee-shifting in either case.¹⁸⁸ The benefit inquiry, however, goes a step further. While the policy questions require that an important public issue be involved, the benefit inquiry would seem to require that citizen suits actually serve that policy in some significant fashion—that the results of the given litigation be publicly important in and of themselves.¹⁸⁹

There is an indication on the face of the *La Raza* decision that a judicial inquiry as to benefits might go even further, requiring that the actual number of beneficiaries be large. The court there explained that it was moved by the fact that the suit “has benefitted a large class of people.”¹⁹⁰ In light of other case law and the dangers involved in judicial numbers games, however, it seems reasonable to adopt the more general “public benefit” notion to evaluate the equitable inquiry. In other environmental cases, courts have required only that the litigation benefit be “widespread” or result in “a significant implementation of national policy . . . [that] enhance[s] the public interest,”¹⁹¹ focusing upon the service aspect of the private attorney general's role. Attempts to quantify beneficiaries thus provide a poor alternative to this approach, unless numbers per se represent some special policy concern in the law, which is not evident in the cases. The benefit question should turn on the effect of private attorneys general, and physical numbers are only one method of gauging that effect. To rely upon quantification as a standard would afflict courts with the nebulous task of stipulating how many people must be directly and/or indirectly affected by an

188. The private enforcement of some statutes—the technical record-keeping of some regulatory act, for instance—presents very different levels of public policy and benefits from more substantive statutory schemes. See Note, *supra* note 125, at 756-58.

189. For purposes of analogy, note the Supreme Court's discussion of “substantial benefit” (in that case to the corporation) in *Mills*, 396 U.S. at 395, focusing upon the conceptual “therapeutic” benefits of plaintiff's litigation.

190. 57 F.R.D. at 98. The court further noted that 5000 people were directly affected and 200,000 indirectly. *Id.* at 100.

191. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1891, 1892 (1st Cir. 1973).

issue, and to what degree, in order to constitute a sufficiently large beneficiary class. It is a task the courts would do well to steer clear of.¹⁹² Quantification approaches to public benefit also might tend to raise the difficult and not necessarily relevant question of the magnitude of the subject matter objectives of litigation.¹⁹³

Net benefit is also a misleading inquiry. As in the case of assessing social policy,¹⁹⁴ any process of discounting public benefit by weighing allegedly detrimental consequences against it misplaces the balancing process (which should properly take place during the hearing on the merits) and applies it retroactively so as to diminish the incentive for private attorneys general to defend the public interest.

It is far more practical and consistent with the private attorney general principle to assess an action's public benefit in process terms: the utilitarian importance of the private litigation as it prompts a review of an important legal question or accomplishes a "therapeutic" effect.¹⁹⁵ The environmental private attorney general standing cases reflect this conclusion—citizens were treated as private attorneys general to litigate over the meaning of one small word ("dike" in the *Hudson Valley Expressway* case)¹⁹⁶ because the case raised environmental issues with far-

192. The *La Raza* court itself used a broad conceptual description of benefits far more abstract than its prior quantification language in finally noting that "almost all of society is better off when public policies in these areas have been strengthened." 57 F.R.D. at 100.

193. Measurement of the value of any particular litigation in terms of the size of the stream being polluted or the diminutive weight of a single controverted statutory word is absurd on its face. See, e.g., note 182 *supra* and accompanying text. A case that demonstrated an important application of the Michigan Environmental Protection Act dealt with only one roadside pile of salt. *Water Resources Comm'n v. Chippewa County*, Civil No. 71-1255 (Cir. Ct. Chippewa Cty., Mich., filed May 27, 1971).

194. See note 185 *supra* and accompanying text.

195. "[I]t is difficult to conclude that the filing of the suit did not help to ensure that adequate precautions would be taken to protect South Texas' very valuable water resources and that the measures taken would be made available to the scrutiny of the public eye." *Sierra Club v. Lynn*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1745, 1746 (W.D. Tex. 1973). Cf. *La Raza Unida v. Volpe*, 57 F.R.D. 94,100 (N.D. Cal. 1972); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 395 (1970).

196. The authority to construct the expressway turned upon the question whether its landfill was a dike; the court there held that it was, and thus no construction could proceed without specific congressional approval under the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.* (1970); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 100 (2d Cir. 1970).

reaching legal implications in public works cases; others were held to have produced public benefit despite the fact that the project they attacked eventually proceeded exactly as planned,¹⁹⁷ or with modifications.¹⁹⁸ Sufficient benefit depends on whether the suit itself substantially serves a strong public policy or raises and explores questions that are important to a wider range of analogous cases, or whether to the contrary its effects are merely restricted to the specific terms of a minor local situation.¹⁹⁹

4. Necessity of Private Enforcement

The most basic utility of public interest citizen suits lies in the pragmatic truth that for many and various reasons public officials and agencies do not and perhaps are not capable of policing the system adequately.

In many cases, governmental inadequacy in environmental protection arises from practical physical limitations. In comparison to polluters and other degraders of the environment, government enforcement agencies have severely limited resources in time, funds, personnel and political backing. Public interest plaintiffs can operate as allies, expanding the number of cases that can be brought before the courts by adding their resources to those of the established law enforcers. In recognition of this necessary function Congress has recently begun inserting citizen suit provisions in even the most sophisticated major pollution control statutes, courts have expanded the common law standing rules, and numerous states have enacted citizen standing statutes to permit enforcement of environmental standards.²⁰⁰

NEPA's evolution emphasizes the point. "As in the civil rights area," the *Sierra Club v. Lynn* court wrote, "the burden of

197. *Sierra Club v. Lynn*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1745 (W.D. Texas 1973).

198. See *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), noting the improvements made during the course of litigation. The same arguments could be made by plaintiffs in the *Alaska Pipeline* case for prompting research, disclosure, and major engineering safeguards against oil spills and other ecological damage that would not have been added to the project but for the pressure of court suits against the inadequate environmental impact statement originally prepared. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

199. Most individual private nuisance suits, for example, would fail to embody sufficiently broad public benefits, even though they might be colorably "environmental," since they would merely apply a familiar rule of law to their particular local facts.

200. Cf. note 4 *supra*.

complying with the national environmental policy, as expressed by Congress through the National Environmental Policy Act of 1969 . . . has fallen upon concerned citizens."²⁰¹ The CEQ, which can only spot check the majority of environmental impact statements since it has a staff of less than twenty to review hundreds of statements each year, publishes the 102 MONITOR on its own initiative as a pragmatic attempt to enlist public involvement in federal environmental reviews.²⁰² The practice is a dramatic indication that even well-intentioned government agencies lack adequate resources and sanctions to do their job, requiring the support of citizen plaintiffs as in the present situation and more.

In other situations, official inadequacy in enforcing environmental mandates can only be explained in more disingenuous terms: the agency is not energetic in prosecuting violations or fails to act altogether because of political pressure, alignment with the special interests it was intended to regulate, or because the agency is itself promoting the activity that threatens the environment.²⁰³ In such cases public interest plaintiffs are less likely to be greeted as allies, but the necessity for their intervention is even greater. Without them, enforcement actions might not be brought at all. The courts, applying the private attorney general principle, have recognized the governmental necessity for private litigation as a policy basis for encouraging public interest citizen suits. Where

[t]he only public entities that might have brought suit . . . [are] named as defendants . . . and vigorously [oppose] plaintiffs' contentions, . . . only private citizens can be expected to guard the guardians.²⁰⁴

In regard to the Federal Air Pollution Act's enforcement one court noted that

[t]he "regrettably slow" progress in controlling air pollution is blamed on [both] a scarcity of skilled personnel available to enforce control measures and on a lack of aggressiveness by EPA's predecessor agency. . . . The public suit seems particu-

201. 5 B.N.A. ENVIRONMENT REP.—DECISIONS at 1746.

202. Council on Environmental Quality, 102 MONITOR.

203. Cf. J. GOULDEN, THE SUPERLAWYERS 39-42, 146, 180-224 (1971).

204. 57 F.R.D. at 101.

205. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1891, 1892 (1st Cir. 1973).

larly instrumental in the statutory scheme [in cases forcing agency compliance] for only the public—certainly not the polluter—has the incentive to complain if the EPA falls short

. . . .²⁰⁵

The necessity rationale, however, may be applied in ways that hamper its usefulness. A court, for instance, might require more than evidence that there is a need for enforcement litigation in a given field. It could require instead that to prove necessity in a particular case, plaintiffs must prove that no officials would have prosecuted that specific question. Such reasoning could draw upon the rationale of statutes which restrict private enforcement to cases where officials are not “diligently prosecuting” environmental violations.²⁰⁶

This approach is inadvisable on both policy and technical legal grounds. The number of cases potentially requiring enforcement is so great that there are more than enough for everyone who wants to prosecute. The speculative argument that an agency might well have prosecuted an action on its own fails to recognize the benefits of voluntary citizens’ efforts in freeing agency resources for other situations meriting enforcement.²⁰⁷ Determination of necessity in isolated case-by-case terms that ignore the overall need for enforcement efforts misses the point of the private attorney general policy.

The inquiry is also mistaken in more technical terms. Inspection of the specific need for private enforcement in each case, in terms of lack of diligent prosecution or whatever, is preempted long before the question of fee recovery is raised. Such defenses are raised, argued and disposed of at the initial stages of litigation in the standing and primary jurisdiction reviewability inquiries. If a court has overruled them to reach the merits, that ruling should be persuasive as to necessity at the later stage of determining cost recovery.

5. Financial Burden of Private Enforcement

Limitation on financial resources can place tremendous stra-

206. See, e.g., Clean Air Act Amendments of 1970 § 304(b)(1)(B), 42 U.S.C. § 1857h-2(b)(1)(B) (1970).

207. One of the ironies of administrative enforcement is that the agencies that argue most strenuously (on primary jurisdiction grounds) against allowing citizen enforcement suits, regularly pose the excuse of insufficient resources and manpower to explain their own laxity in prosecution.

tegic constraints upon public interest plaintiffs. The courts have raised the issue, but have not required proof of severe financial burden as an element of the private attorney general approach. Nevertheless, in most cases, environmental plaintiffs can make a showing of financial necessity that provides a strong additional argument for fee awards.

Money is often the determining factor in sustaining public interest litigation. An illustration of its importance can be found again in the litigation history of NEPA's section 102. Federal agencies produce about one thousand impact statements annually, and recent studies have indicated that a large percentage of these fail to satisfy statutory requirements.²⁰⁸ Yet the public has been able to prosecute NEPA litigation in response to only a small number of inadequate impact statements, averaging approximately 30 per year.²⁰⁹ Part of the explanation of the limited number of NEPA challenges may lie in the fact that many projects are substantively commendable notwithstanding flaws in their procedural compliance with section 102, and therefore do not attract private enforcers. But the cases that do reach court result in such large bills that they strongly indicate that fee burdens must present forceful deterrents against commencing litigation even where the facts richly merit judicial review. NEPA cases, though generally turning on comparatively straightforward procedural questions and rarely involving the complex factfinding and statistical analysis common in corporate litigation, nevertheless routinely absorb a thousand hours of attorneys' time in pretrial hearings and trial on the merits.²¹⁰ If preliminary injunc-

208. COUNCIL ON ENVIRONMENTAL QUALITY, *FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY* 244-246; COMPTROLLER GENERAL OF THE UNITED STATES, *ADEQUACY OF SELECTED ENVIRONMENTAL IMPACT STATEMENTS PREPARED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969*, REP. NO. B-170186 TO THE SUBCOMM. ON FISHERIES AND WILDLIFE CONSERVATION OF THE HOUSE COMM. ON MERCHANT MARINE AND FISHERIES (1972). The GAO found *none* of the sampled EIS's fully adequate under NEPA.

209. A review of the NEPA cases reported in 3 B.N.A. Environmental Reporter reveals, for instance, approximately 40 district court decisions in a twelve month period in 1971-72. The disproportionate difference between the small number of statements actually challenged and the number potentially challengeable emphasizes the necessity for private enforcement, and even more so when it is noted that a number of NEPA cases each year are brought against projects outside the annual EIS total, for projects where no impact statement was prepared.

210. Telephone interview with member of Environmental Defense Fund legal staff, November 16, 1973. See also Tennessee Citizens for Wilderness Planning Newsletter, October 29, 1973, at 2-3.

tions appear necessary—as they do in large numbers of federal projects where impending actions threaten irretrievable commitments of resources²¹¹—the potential counsel time swells proportionately. These prospects do not even consider the time involved in appeals which are substantially certain to follow a successful trial.²¹²

Unlike plaintiffs in some classes of environmental tort actions,²¹³ NEPA plaintiffs have no opportunity for damage recoveries and are in most cases not litigating to preserve any income-generating resource.²¹⁴ Nor, unlike government and corporate litigants, are their expenses borne as normal incidents of a tax-funded or profit-making enterprise. Thus, every dollar contributed to the defense of the public interest is a philanthropic expenditure, often spent merely to maintain nature's non-profit status quo.²¹⁵ Under such circumstances, there is little wonder that potential litigants do not freely undertake public interest NEPA actions and other environmental litigation²¹⁶ whenever the

211. In one recent case, the expense and logistical burden of presenting motions and arguments for a preliminary injunction were so great that the opportunity to halt construction was lost; the pouring of concrete for a dam was commenced and completed between the time of filing and time of hearing of the NEPA complaint. In such situations it is doubtful that NEPA can be applied by citizen plaintiffs so as to assure rational decision-making. *Environmental Defense Fund v. TVA*, Civil No. 1130 (E.D. Tenn. 1973) (Duck River Normandy Dam). Telephone interview with member of Environmental Defense Fund staff, November 16, 1973.

212. Approximately one-half of the NEPA decisions noted annually in the B.N.A. *Environmental Reporter* are appealed.

213. Unless, of course, a NEPA claim is incorporated with other claims posing the potential for damage recovery.

214. The exceptions, like one of the plaintiffs in the *Tongass Forest* case who was a backwoods guide, *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971), are usually the result of building arguments for standing. Such exceptions are so insignificant in magnitude as not to constitute a bar to the financial burden argument.

215. In light of the booming use of wilderness resources by citizens from a broad range of society, the old argument that environmentalists are a small well-to-do elite who can afford litigation falls flat. On the other hand, the fact of broad environmental use does not imply that environmentalists should be able to compete in the litigation marketplace. Popular use of the environment is generally not taxable or chargeable in money terms while the development-construction forces are supported directly through the economic system, an unequal confrontation wherever it arises.

216. A recent Michigan case attempting to forestall a developer's damming and diversion of a small stream via the state environmental protection statute consumed \$15,000 with no financial benefit to plaintiffs; a challenge against a wetlands subdivision consumed \$45,000. *Tanton v. Department of Natural Resources*, 71-13859-C (Cir. Ct. Ingram City, Mich., Dec. 8, 1971); *Irish v. Green*, 4 B.N.A. ENVIRONMENT REP.—DECISIONS 1402 (Ingram City, Mich., April 12, 1972). Letter from John H. Tanton to Zyg Plater August 31, 1973, on file in the TENNESSEE LAW REVIEW office.

public interest requires.

The financial burden inquiry, however, should not require that plaintiffs would be rendered destitute in the absence of fee recovery. Such a test would far exceed the requirements of the private attorney general rationale. Rather, the question is whether by the absence of fee recovery in one case the plaintiffs or groups like them would be discouraged from bringing similar actions in the future. This approach follows from the reasoning in *Mills, Hall, Lee*, and other civil rights cases that such litigants should not be burdened with expense, "in order to encourage suits that so clearly enhance the public interest."²¹⁷ The main function of the private attorney general financial burden inquiry, then, may be to exclude fee-shifting in the situations noted above where plaintiffs' commercial interests in profit-generating elements of the case would induce them to litigate the public question with or without a potential fee recovery.²¹⁸ Where the fact situation does not provide positive and unmistakable economic incentives for the plaintiff, the financial burden element of equity's private attorney general fee-shifting theory would seem to be fulfilled.

In the minds, however, of many polluters, bureaucrats, reporters and politicians, and in popular mythology, environmental plaintiffs often appear to be a part of a monolithic force perfectly capable of financing and prosecuting actions on a sufficiently broad scale to threaten all forms of national progress. From this perspective, environmental litigants do not need any financial encouragement to litigate. Indeed they could use some active disincentive. Besides ignoring the very real value of environmental litigation, such arguments fail to appreciate the extremely small number of environmental cases filed annually in relation to the volume of continuing pollution and environmental degradation. The significant impact of environmental litigation is a tribute to the judicious litigation choices made by environmental groups. Cases have been targeted where they will have the most substantial impact, making strategic points of law or findings of fact with maximum multiplier effects.²¹⁹

217. *Pyramid Lake Paiute Tribe v. Morton*, Civil No. 70-2506 (D.D.C., filed June 22, 1973), citing *Wyatt v. Stickney*, 344 F. Supp. 373, 409 (M.D. Ala. 1972).

218. Neither the obduracy nor common fund approaches, however, would necessarily be excluded in that situation. The equitable considerations involved in applying the private attorney general theory to cases involving damage recoveries will inevitably vary according to the circumstances of each case. Suffice it to note that fee awards are not *ipso facto* precluded, since plaintiff's ability to pay fees has been held no bar in other cases, including contingent fee cases. *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971).

219. See cases cited in note 3 *supra*.

Major environmental litigation today relies upon the efforts of three large national groups—the Environmental Defense Fund, the Sierra Club, and the Natural Resources Defense Council²²⁰—which have developed substantial litigation budgets through the support of private citizens and foundations. The equity arguments for fee recovery, however, are not rendered inapplicable by the presence of such economic support for litigation. These relatively modest funds²²¹ are often a *sine qua non* for public interest suits; they permit citizens to undertake public interest litigation that otherwise would never occur, particularly if it involves appellate review.

Absent foundation funding, it is simply not economically rational for any single individual or small group . . . to attempt to capture their minute portion of aggregate good [in environmental preservation] by incurring large expense to enforce a widely held right.²²²

The equity theory recognizes that fee-shifting facilitates such important litigation and need not be deterred by the tax-exempt nature of the plaintiff. As the First Circuit noted in regard to a statutory fee-shifting case, “if [the theory for] award of fees [is to] encourage meritorious litigation . . . the identity of the party, and the source of its counsel, would be of little moment.”²²³ And, as the *La Raza* court further noted:

220. The three, between them, account for approximately 15 percent of the first named plaintiffs in NEPA cases reported in the most recent B.N.A. Environmental Reporter Indices.

221. Whereas a large corporation can easily spend a million and a half dollars in a single antitrust suit, the three organizations combined have litigation budgets less than that to cover all legal actions in the hundreds of projects and environmental problems that arise nationwide each year. Interviews with representatives of environmental groups' legal staffs in Knoxville, Tennessee, November 21, 1973.

222. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972), citing M. OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION, PUBLIC GOODS AND THE THEORY OF GROUPS* (Harvard Econ. Series #124, 1965).

223. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1891, 1895 n.7 (1st Cir. 1973), where the defendant had argued that tax exempt plaintiff groups formed for the purpose of litigating should be barred from recovery. In rejecting the defense, the court cited *La Raza*, *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539-39 n.14 (5th Cir. 1970), and *Woolfolk v. Brown*, 358 F. Supp. 524, 536 (E.D. Va. 1973). The reasoning would seem to apply equally well to plaintiffs funded by government grants. Any inherent conflicts of interest would be disposed of in the initial stages of litigation. Government funded budgets are as fixed as private foundation budgets, and both groups can serve the public interest equally well through litigation of the same nature.

The fact that [plaintiffs' attorneys] . . . receive tax-exempt foundation money is not german [sic] to their status as private attorneys-general We cannot presume that Congress intended to rely on tax-exempt foundations to fund costs of litigation in order to effectuate its policies, nor that such funding will continue in the future²²⁴

Finally, it appears that the element of financial burden is a less important part of the necessity inquiry in cases in which plaintiffs otherwise establish their status as private attorneys general, at least in the absence of any profit incentive in the litigation. Even the *La Raza* court, which spent several paragraphs discussing the financial burden element as a function of the private attorney general principle, eventually ignored the question in its holding.²²⁵ *Sierra Club v. Lynn*, the San Antonio Ranch case, focused upon the virtues of private effectuation of strong public policy to the complete exclusion of the financial inquiry.²²⁶

In most environmental cases, plaintiffs' lack of a financial incentive to bring litigation will constitute sufficient grounds to convince equity courts to encourage such suits through fee-shifting. In any event, the focus of judicial emphasis on other considerations argues against constructing a narrower or stricter standard with respect to the financial status of the environmental plaintiff.

6. General Equitable Considerations

If any lesson can be drawn from the cases, it is that courts sitting in equity dislike being tied down to a fixed set of dispositive rules. As the *Sierra Club v. Lynn* court said of the three well established exceptions to the American rule:

This Court is in disagreement with such a hard and fast ap-

224. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 n.6 (N.D. Cal. 1972), citing *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972). *Contra*, *Gaddis v. Wyman*, 336 F. Supp. 1225 (S.D.N.Y. 1972).

225. Given . . . the presence of the three factors . . . 1) the effectuation of strong public policies; 2) the fact that numerous people received benefits . . . 3) the fact that only a private party could have been expected to bring this action—this court believes that it must . . . award attorneys' fees

57 F.R.D. at 101.

226. 5 B.N.A. ENVIRONMENT REP.—DECISIONS at 1745-46.

proach A slight deviation from one of the established elements of any of the exceptions would [not] *ipso facto* deprive the plaintiffs of an award should the trial court decide that equity dictates the award.²²⁷

The court then followed its own advice and awarded fees even though the judgment on the merits had "clearly and unequivocally" denied all of plaintiffs' requested relief. It did so in broad private attorney general terms, stating that "a very important service has been performed in creating a greater public awareness of the dangers of pollution threatening [a] very valuable natural resource."²²⁸

Apart from its implications for the degree of litigious success required for fee-shifting,²²⁹ *Sierra Club v. Lynn* emphasizes the flexibility of an equity court's considerations in fashioning orders to meet the requirements of a litigation situation. It is in that light that the elements of the private attorney general principle detailed in *La Raza* should be characterized as variable factors favoring the award of fees rather than as the dispositive standards of a fixed rule.²³⁰ At least until a more substantial case law is developed, the factors motivating equity courts in this area will undoubtedly continue to be that flexible.

IV. LIMITATIONS TO FEE-SHIFTING IN ENVIRONMENTAL LITIGATION

A. *The Judicial Standard*

Just as the private attorney general doctrine represents one expression of the inadequacy of a no-fee rule, so too are some of the common tests that guide the courts in the traditional no-fee context ill-suited in the private attorney general cases. It is often stated as the black letter rule in the United States that if the courts are empowered to and choose to award costs (which may include counsel fees) those costs should go to the "prevailing" party.²³¹ Generally, the prevailing party is one who succeeds in that court in obtaining a judgment in his favor against the opposing party. Thus, where a taxpayer, for example, wins some pre-

227. *Id.* at 1745 (emphasis added).

228. *Id.*, quoting from the court's previous judgment and order of May 21, 1973.

229. See notes 244-46 *infra* and accompanying texts.

230. See also *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972).

231. 6 J. MOORE, *supra* note 16, at ¶ 54.70[4], at 1310.

liminary victories against the government but *ultimately* suffers a final judgment against him, the court may award costs to the United States,²³² regarding it as a prevailing party.

The notion of "prevailing party," however, must be qualified. First, the prevailing party requirement is nearly always a creature of statutory origin;²³³ it is not a controlling principle in the absence of a statutory mandate or other specific rule. Professor Moore has observed:

[A]part from an express provision in a statute or rule, the allowance of costs to the prevailing party is not an inexorable principle and the court in its discretion can direct otherwise, [and] when the court exercises its discretion the identification of the prevailing party may become so unimportant as to be almost immaterial.²³⁴

Second, once the court determines that one party satisfies the standard of meritoriousness to permit the court's consideration of fee-shifting, then it must decide to what extent fee-shifting is indicated.

This two-step analysis is well illustrated in *Ledge Hill Farms, Inc. v. W.R. Grace and Co.*,²³⁵ an antitrust action. There the court recognized that it could be assumed, based on the jury verdict, that defendant had committed an antitrust violation but that it did not proximately cause damage to plaintiff. The court awarded costs to defendant, which was legally the prevailing party (as required by statute in this instance), but in exercising its discretion limited those costs, initially taxed at \$3,607.96, to a \$20 docket fee.

These two facets, "meritoriousness" and "equitable discretion" of the equitable exceptions, are considered below.

1. Meritoriousness

Although the "prevailing party" standard is the common threshold test for invoking the court's discretion in fee-shifting based upon statutory authorization, other less rigorous tests have been employed in the equitable exceptions. In *Kahan v.*

232. See *Stroller v. United States*, 444 F.2d 1391 (5th Cir. 1971).

233. See, e.g., 28 U.S.C. § 2412 (1970); Federal Rule of Civil Procedure 54(d); authorities cited notes 56-57 *supra*.

234. 6 J. MOORE, *supra* note 16, at ¶ 54.70[4], at 1310.

235. 230 F. Supp. 638 (S.D.N.Y. 1964).

Rosenstiel,²³⁶ which relied on both the common fund and obdurate behavior approaches, the court simply required that plaintiff's action be "meritorious."²³⁷ Meritoriousness, the court recognized, had often been equated with the ability of plaintiff's case to withstand a motion to dismiss.²³⁸ Yet, by not expressly adopting that test, the court in *Kahan* implied an even more flexible analysis which not only recognized a departure from the strict prevailing party concept, but also, where warranted, from notions focusing exclusively upon the ultimate outcome of the lawsuit. Thus, counsel fees may be awarded where a case becomes moot,²³⁹ as in *Kahan*; where it is settled;²⁴⁰ where no complaint was ever filed;²⁴¹ and even where a judgment was ultimately entered against plaintiff on the merits.²⁴² Even in *Mills* fees were awarded at an intermediate stage despite the fact that "the question of relief" had to await further proceedings.²⁴³

Both the "prevailing party" and the "meritoriousness" tests are result-oriented. The difference is that the former looks to the end result while the latter focuses upon the therapeutic result of the various facets of the litigation both in terms of the instant case and beyond. Because of its fixed end result focus, the "prevailing party" test is singularly unsuited as a standard for deter-

236. 424 F.2d 161 (3d Cir. 1970). The factual background of the *Kahan* case is discussed in the text accompanying note 92 *supra*.

237. 424 F.2d at 167. The court held that it was not necessarily a condition precedent to recovery of attorneys' fees that "suit be brought to successful completion since such a requirement might discourage prompt settlement." *Id. See, e.g., Levine v. Bradlee*, 378 F.2d 620 (3d Cir. 1967); *Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964).

238. *Id.*; *see, e.g., Chrysler Corp. v. Dann*, 43 Del. Ch. 252, 223 A.2d 384 (1966). It would appear that the test enunciated in *Dann* suggests the requirement for a reasonable probability of ultimate success on the merits.

239. *See, e.g., Pegues v. Bakane*, 445 F.2d 1140, 1142 (5th Cir. 1971) (*dicta* in fair housing discrimination case); *Globus, Inc. v. Jaroff*, 279 F. Supp. 807, 810 (S.D.N.Y. 1968) (shareholder's derivative action).

240. *See, e.g., Fletcher v. A.J. Industries, Inc.*, 266 Cal. App. 2d 313, 325, 72 Cal. Rptr. 146, 153 (1st Dist. 1968).

241. *See, e.g., Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964).

242. In *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971), a nontenured teacher challenged the nonrenewal of his teaching contract. The college prevailed on the merits, but plaintiff still was awarded fees because he was forced to invoke the judicial process in order to obtain an explanation for his nonrenewal. The focus for the purposes of counsel fees was not the final judgment, but the results achieved, which from the plaintiff's standpoint and others similarly situated were significant despite the fact that he ultimately lost the case. *See Long v. Georgia Kraft Co.*, 455 F.2d 331 (5th Cir. 1972); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970).

243. 396 U.S. at 389.

mining when a court might, if it chooses, exercise its equitable discretion to award attorneys' fees.

The *Kahan* rationale has been followed in at least two recent notable environmental cases applying the private attorney general rule. In *Sierra Club v. Lynn*,²⁴⁴ plaintiffs were denied all the relief they sought. Yet the litigation did result in an order by the court holding the case in abeyance pending, *inter alia*, the filing by HUD of a satisfactory Environmental Impact Statement, which, along with other reports, was thereafter forthcoming. Under such circumstances, the district court granted counsel fees, stating:

Essentially, the plaintiffs forced heretofore untested hypotheses to be subjected to rigorous study which did in fact reveal the project to be safe, forcing . . . the government . . . to do what [it] . . . should have done of their own initiative in the first place Prior to the filing of the lawsuit there was no firm assurance that all of the studies eventually done would be done Thus even if the judgment in the above entitled case were read as totally unfavorable to the plaintiffs, and resulting in none of the relief which they originally sought, it would still remain within the inherent equitable power of the Court to award attorneys' fees if so prompted by "overriding considerations" indicating the need for such a recovery.²⁴⁵

A similar approach was adopted in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*,²⁴⁶ where the

244. 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1745 (W.D. Tex. 1973).

245. *Id.* at 1747-48 (citations omitted).

246. 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1891 (3d Cir. 1973) where the court observed:

We are not impressed by the government's argument that because some issues were decided adversely to petitioners each party should bear its own costs We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals It is our impression, overall, that petitioners, in their watchdog role, have performed a service. . . .

[T]he challenges here, even those not sustained, were mainly constructive and reasonable. And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.

Id. at 1895-96. *Contrast* Pyramid Lake Paiute Tribe v. Morton, Civil No. 70-2506 (D.D.C., filed June 22, 1973). In the *Paiute* case, because plaintiff was unsuccessful in some of its opening procedural moves (such as an abortive attempt at joinder), the court discounted otherwise reimbursable time expended by plaintiff's counsel in those unfruitful efforts.

court ignored the fact that some issues had been decided against petitioners.

Thus in *Lynn*, meritoriousness referred not to plaintiff's ultimate success in obtaining the sought-after relief or in prevailing on every issue but rather to certain positive results derived from plaintiff's efforts in the litigation. And those results, though not amounting to victories on the merits, nevertheless suggested that but for plaintiff's intervention, conduct in derogation of the statutory scheme would have gone unchecked and the required environmental impact statements and other statutory requirements would probably not have been satisfied. This flexible notion of meritoriousness recognizes that the congressional purpose is equally well served where an acceptable public project moves forward after forced compliance with the minimum statutory safeguards, as where an unsound project is stopped. Where either result is a product of an exercise of the legal process, the requisite degree of success on the merits has been demonstrated.

The meritoriousness inquiry is a threshold proposition. The court asks whether plaintiffs did "well enough" in showing what defendants did wrong or should not have done at all. Yet, the test is not a "bad faith" one, for plaintiffs' success in showing a failure by defendants is evaluated not simply in terms of the culpability of the defendant, but according to the plaintiffs' effectiveness in employing the legal process to force defendant's compliance with the statutory norm.

Once plaintiffs have established sufficient results—the required degree of meritoriousness for their litigation to render them eligible for the award of counsel fees—the court must then turn to the more basic equitable considerations. The application of those equitable considerations is discussed below.

2. Application of Equitable Principles

In deciding under what circumstances to award fees, equity courts must balance between two dangers. On one hand, lavish fee-shifting may encourage a court-clogging deluge of lawsuits. On the other, severe restriction of fee recoveries will eliminate the

Although the *Paiute* case follows *Kahan* in its departure from a narrow "prevailing party" test, it seems, in its strict measurement of the merits of each aspect of the litigation, to fall short of the flexible view of meritoriousness so prominent in *Lynn* and *NRDC v. EPA*, and so essential to the application of the equitable rules.

public benefits which underlay equity's development of exceptions to the no-fee rule in the first place. The fear of opening floodgates is especially relevant today in light of public distrust of lawyers' efforts to protect or promote fee-generating litigation, and the allegation could be made that the environment is aspiring to be the new arena for litigation displaced by no-fault insurance bills.

The deluge argument raises serious questions on the advisability of fee-shifting and can best be approached through an environmental analogy. The fear of a flood of litigation was commonly raised in opposition to the statutory and judicial liberalizations of the standing requirements for environmental actions that occurred in the late 1960's and thereafter. In practice, however, although in absolute number environmental cases have indeed increased dramatically, the relative growth of the courts' environmental case load has not.²⁴⁷ As far as frivolous suits are concerned, the courts appear quite capable of weeding them out, and the burdens of litigation remain such that attorneys are reluctant to sue unless they are likely to prevail.

As to meritorious claims, there is, of course, serious question whether practical burdens alone should bar cases that are meritorious and well-suited to judicial resolution. In any event, the practical burdens on courts have not proved so oppressive in part because the burdens on plaintiffs remain heavy. Even if fee-shifting were the rule rather than the exception in environmental litigation, the tendency of courts, while becoming more flexible, to restrict fee recoveries to prevailing parties, and the complex novelty of most environmental cases, combine to ensure that environmental suits will remain an uncertain gamble. Where plaintiffs' burdens do not produce adequate self-policing, the private attorney general criteria give courts ample opportunity to adjust awards discriminatingly to the merits of each plaintiff and each case.

The equitable considerations which should guide courts in regard to fee awards in specific cases flow straightforwardly from the principles already discussed in Part III. Their application in

247. For an in depth analysis of this phenomenon within one particular jurisdiction see Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004 (1972). Cf. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 381 U.S. 941 (1966).

the first two instances (the obduracy and common fund exceptions) is indicated by criteria that are relatively familiar to equity courts—bad faith standards in the former and common benefit/unjust enrichment principles in the latter.²⁴⁸ Guidelines on the specific application of the private attorney general theory are slightly more complicated. Some courts have gone so far as to say that once plaintiffs have fulfilled whatever criteria the court deems necessary to constitute private attorneys general, “attorneys’ fees *should be awarded unless the trial court can articulate specific reasons for a denial.*”²⁴⁹ In reality, of course, no exercise of equitable discretion can, by definition, be mandatory upon an equity court. The cases cited should instead stand for the proposition that when a private attorney general substantially serves the public interest through environmental litigation, there is a very compelling case for equitable waiver of the no-fee rule, since significant public interests would be frustrated by a denial of fee recovery.

Further arguments might be posed, as noted above,²⁵⁰ that tax-exempt foundation-funded plaintiffs be barred from fee-recovery, but in practice this argument has operated, if at all, to limit the amount of recovery.²⁵¹ “The award of attorneys’ fees is not [necessarily] intended to make plaintiffs or their attorneys

248. See notes 76, 88 *et seq. supra* and accompanying texts.

249. *Sierra Club v. Lynn*, 5 N.B.A. ENVIRONMENT REP.—DECISIONS 1745, 1746 (W.D. Tex. 1973) (emphasis added), citing *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 296 (5th Cir. 1970); *Cooper v. Allen*, 467 F.2d 836, 841 (5th Cir. 1971). See also *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972), where the court stated: “Indeed, under such circumstances, *the award loses much of its discretionary character . . .*” (emphasis added). Cf. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 99 (N.D. Cal. 1972).

250. See note 223 *supra* and accompanying text.

251. See cases cited at note 223 *supra*. Highly varying figures for fee awards have been suggested, including for example: that of the Criminal Justice Act, 18 U.S.C. § 3006 A(d) (1970), (\$30 an hour in court, \$20 for out of court time); *Sierra Club v. Lynn*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS at 1748, (a “bedrock minimum” of \$30 an hour); see *Pyramid Lake Paiute Tribe v. Morton*, Civil No. 70-2506 (D.D.C., filed June 22, 1973); and a \$12.82 per hour ceiling on any private attorney general fee awards in the pending case of *Harrisburg CARE v. Volpe*, Civil No. 71-143 (M.D. Pa. 1973), based on a pro rata calculation of the hourly wages of the State of Pennsylvania’s Attorney General (Brief for Defendant in Opposition to Plaintiffs’ Motion for Award of Fees and Costs at 30, undated). Cf. Memorandum in Support of Plaintiffs’ Motion for Reasonable Attorneys’ Fees, *TOOR v. HUD*, Civil No. 69-324 SAW (N.D. Cal. 1973), where plaintiffs argue at length for award of \$100 an hour in light of an extensive list of applicable criteria. *Id.* at 24 *et seq.* See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-18, DR 2-106 (1972).

whole;²⁵² the fee-recovery theories (and most particularly the private attorney general theory) are calculated to reward and encourage public interest plaintiffs, but this does not necessarily mean full compensation for services. As in other areas of fee litigation, reasonableness in the light of all circumstances appears to be the standard for environmental fee awards,²⁵³ and in private attorney general litigation the plaintiffs' voluntary public service nature may be considered part of the circumstances. As Judge Gesell noted in awarding \$30.00 an hour to plaintiffs' attorneys in *Pyramid Lake Paiute Tribe*,

[t]his charge . . . is at the very bottom of the scale but the nature of the case and the circumstances under which the lawyers undertook the work justify the court in fixing the fees at this bedrock minimum.²⁵⁴

In other areas of the law, courts are currently tending to grant fee-shifting awards which more truly compensate lawyers for the time they spend at fair hourly rates,²⁵⁵ and this tendency will probably extend to environmental litigation as the case law increases. Although the litigation is *pro bono publico*, it is increasingly obvious that environmental cases often require the serious full time efforts of organized plaintiff groups that spare time lawyering cannot provide. To require such plaintiffs to volunteer their efforts to a greater or lesser degree will to that same extent frustrate the public purpose that equity attempts to encourage. The major constraint upon awards calculated to encourage public interest suits should rather be more universal equitable reasonableness principles. The *Natural Resources Defense Counsel v. Environmental Protection Agency* court noted, in regard to recovery of costs against a government agency, that since the self-appointed guardians of the public interest "are not a public agency and are legally responsible to no one but themselves . . . we must satisfy ourselves that the taxpayers' money

252. *Sierra Club v. Lynn*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1745, 1748 (W.D. Tex. 1973).

253. Cf. 1 M. SPEISER, *supra* note 15, at § 8.1 *et seq.* (1972).

254. Civil No. 70-2506 at 5. It is interesting to note that the court apparently did not correspondingly deflate the fees claimed by expert witnesses in the case.

255. Derfner, *Attorneys' Fees in Pro Bono Publico Cases* 4 (Lawyer's Comm. for Civil Rights Multilith, Aug. 7, 1972). Cf. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 42 U.S.L.W. 2249 (3d Cir. Oct. 31, 1973).

will not be used to support needless or excessive legal items."²⁵⁶ The traditional rule of reason has much to commend it as a general controlling principle.

B. Government Defendants

Even though in most cases the doctrine of sovereign immunity has long since been circumvented as a ban to environmental litigation,²⁵⁷ it may continue to pose obstacles to fee recoveries.

1. Federal Officials

As a general proposition, the federal government cannot be sued without its consent.²⁵⁸ This rule has been held applicable to costs against the United States.²⁵⁹ Notwithstanding this seemingly intractable bar to governmental liability (some might say "responsibility"),²⁶⁰ litigants have devised and the courts tacitly consented to a practice of circumventing the bar through the legal fiction that suits are against individual officials who were acting beyond the scope of their authority²⁶¹ or unconstitutionally or pursuant to an unconstitutional statute.²⁶²

256. 5 B.N.A. ENVIRONMENT REP.—DECISIONS at 1896. The court continued, saying "[a]s attorneys for involuntary clients, their fees may properly be less than those [in] the marketplace . . ." *Id.* See notes 261, 262 *infra* and accompanying texts.

257. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.04 *et seq.* (1971); Note, *supra* note 140, at 1246.

258. See, e.g., *Feres v. United States*, 340 U.S. 135 (1950); *United States v. Sherwood*, 312 U.S. 584 (1941); *United States v. Lee*, 106 U.S. 196, 207 (1882) (dictum); *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 275 (1868); *Hill v. United States*, 50 U.S. (9 Hav.) 189, 190 (1850). 91 C.J.S. *United States* § 176 nn. 48 & 49 (1955) and cases cited therein. It has been observed that the decisional patterns followed more or less the same course for actions against both state and federal governments. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 215 (1965).

259. See *United States v. Chemical Foundation*, 272 U.S. 1, 20 (1926); *Pine River Logging & Improvement Co. v. United States*, 186 U.S. 279, 296 (1902).

260. The doctrine of sovereign immunity and the governmental irresponsibility which it represents have come under increasing attack by commentators in recent years. See 3 K. DAVIS *supra* note 257, at §§ 27.01-.10 (1958), §§ 27.00-.10 (Supp. 1970); L. JAFFE, *supra* note 258, at 229 (1965); Byse, *Proposed Reforms in Federal "Non-statutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389 (1970).

261. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912).

262. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Ex parte Young*, 209 U.S.

One would reasonably assume that if the immunity barrier were rendered inoperable by suing the official, the path would open for the award of attorneys' fees against the government if otherwise justified. The courts, however, have in the last few years adopted a number of principles that resurrect the old barriers. While the courts seem perfectly willing to permit certain governmental officials to be enjoined, where federal property or contractual and monetary interests are directly at stake²⁶³ or where the economic pressures associated with the pending government activity are substantial, they will not allow the government to be "stopped in its tracks."²⁶⁴ Thus, while some injunctions against government officials are permitted, others are denied where the "relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."²⁶⁵ Some opinions have enunciated the even more ambivalent test of determining whether the decree against the officer would "operate" against the sovereign.²⁶⁶

The recovery of damages against governmental officials is shrouded with further obstacles. Where officials must exercise their discretion and they act within the scope of their authority, they have been held to be immune from actions for damages to assure their freedom "to exercise their duties unembarrassed by the fear of damage suits."²⁶⁷

The net result from the fee-shifting standpoint has been to bar the award of costs against federal officers in the absence of statutory authorization.²⁶⁸ Thus, under the legal fiction of individual suits, the courts allow the injunction but not the costs or attorneys' fees, never apparently acknowledging the incon-

123 (1908).

263. See 3 K. DAVIS, *supra* note 257, at § 27.05 at 565 (1958), relying on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

264. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949), quoting *Decatur v. Paulding*, 39 U.S. (14 Pet.) 610, 613 (1840). For an excellent analysis of the significance and meaning of the *Larson* case see Cramton, *supra* note 260, at 400-11.

265. 337 U.S. at 691 n.11.

266. *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963).

267. *Barr v. Matteo*, 360 U.S. 564, 571 (1959); see 3 K. DAVIS, *supra* note 257, at § 26.01 *et seq.*

268. See 6 J. MOORE, *supra* note 16, at ¶ 54.75[5], at 1560-61.

sistency of such an approach. As a practical matter, by excluding the costs and fees the court discourages future injunction actions *ab initio* by its onerous refusal to award counsel fees. Certainly, once jurisdiction over the federal government is firmly lodged in the district court, there is no rule of equity that prevents the award of counsel fees. On the contrary, as Justice Harlan recently observed, once jurisdiction is vested in the court, "the scope of equitable remedial discretion is to be determined according to the distinctive historical tradition of equity as an institution."²⁶⁹

The doctrine of sovereign immunity does not normally bar environmental actions against federal officials on the merits, a fact to which the growing line of environmental cases attests. The inequity of recognizing a litigant's right to sue on the one hand but depriving him of otherwise available financial implements with which to vindicate that right, on the other, is patent. This point was clearly made in *Natural Resource Defense Council, Inc. v. Environmental Protection Agency*,²⁷⁰ where the court held that sovereign immunity was no bar to the award of counsel fees where there was a statute authorizing the award of counsel fees against any party and granting a citizen the right to commence a suit against the agency.²⁷¹ It cannot be argued credibly that a different result is required where jurisdiction is based on something less than an express rather than implied statutory invitation to private citizens to sue and where the right to counsel fees rests on an equitable principle rather than a statutory prescription.

269. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring); see *Holmberg v. Ambrecht*, 327 U.S. 392, 395-96 (1946); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939). Justice Harlan also asked rhetorically was not "a general grant of jurisdiction to the federal courts by Congress . . . adequate to empower a federal court to grant equitable relief for all areas of subject matter jurisdiction enumerated therein . . ." 403 U.S. at 405.

270. 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1391, 1393 (3d Cir. 1973).

271. The suit was brought under section 307 of the Clean Air Act, 42 U.S.C.A. § 1857h-5(b)(1) (Supp. 1973), providing for review of the action of the Administrator of EPA in the Courts of Appeal. Another section of the Act, section 304(a), (d), 42 U.S.C.A. § 1857h-2(a)(d) (Supp. 1973), allows citizens to commence suit against the Administrator where there is an alleged non-discretionary failure to perform his duties under the Act, and authorizes the award of reasonable attorneys' fees to any party. The court of appeals apparently believed that the authorization for fees in section 304(d) was sufficiently broad so that it covered actions commenced under section 307. It is interesting to note that despite the court's apparent reliance on statutory language to avoid the sovereign immunity bar, it apparently adopted the private attorney general principle to justify its departure from the no-fee rule.

Similarly, the request for fees should not fall within the penumbra of actions for damages against officials. Regardless of the ploy of naming an official as a defendant instead of the sovereign, it is the power of the state which plaintiff seeks to control. If the courts, based on whatever fictions they choose, permit plaintiff to control abuses of that power, counsel fees should not be precluded. Concern over the inhibitory effect such awards might have on the fearless exercise of official discretion is overstated. The United States will apparently pay the costs for which its officials become liable while serving in their official capacity and sued for an injunction.²⁷² A cursory inspection of the docket in almost any environmental case will show that, where an injunction is sought to force governmental compliance with a statute, it is government counsel which defends the action regardless of who is named as defendant. Again, the unfairness of such selective participation by the government in the lawsuit is manifest.

A favorite rallying point for the government has been the consistently misconstrued statute waiving governmental immunity for some costs. It provides in part:

Except as otherwise specifically provided by statute, a judgment for costs . . . but not including the fees and expenses of attorney may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court, having jurisdiction of such action.²⁷³

The effect of the statutory language on its face is simply to state an exception to the no-fee rule with respect to costs other than counsel fees. This section gives express statutory permission for some cost recoveries and declares that it is itself not a statutory waiver of the traditional no-fee rule as to counsel fees. It does *not*, on the other hand, state a prohibition against any awards where equity would otherwise compel them. Nevertheless, it has been said that this provision "prohibits"²⁷⁴ the awarding of attorneys'

272. See Note, *supra* note 140, at 1247 n.149.

273. 28 U.S.C. § 2412 (Supp. 1973).

274. 6 J. MOORE, *supra* note 16, at ¶ 54.75[4], at 1558. In *Pyramid Lake Paiute Tribe v. Morton*, Civil No. 70-2506 (D.D.C., filed June 22, 1973), the court in dicta construed section 2412 as codifying the "usual rule" that attorneys' fees cannot be awarded against the government unless a statute so provides. *Id.* at 2. See note 278 *infra* and cases cited therein.

fees. Yet the statutory language does no more than to simply exclude attorneys' fees from its coverage.

In *Cassata v. Federal Savings and Loan Insurance Association*,²⁷⁵ the court recognized that section 2412 "was merely a grant of power to the courts . . . it did not remove any power formerly lodged in the courts."²⁷⁶ The court went on to deny counsel fees, even after recognizing at least a colorable common fund argument,²⁷⁷ basing its refusal on a general argument of sovereign immunity against attorneys' fees irrespective of section 2412. Although *Cassata's* strict reading of sovereign immunity notwithstanding its equitable jurisdiction over the case is troubling, at least the court did not misread section 2412 as being other than a neutral factor as far as counsel fees were concerned; it emphasized that the statutory directive simply left the prior law unaltered. However, in other litigation including several recent environmental cases,²⁷⁸ the courts did not recognize that section 2412 posed no bar in itself, reading it instead as an explicit prohibition against fee-shifting.²⁷⁹

To date the sovereign immunity and section 2412 defenses have yielded in only a few exceptional cases, such as litigation involving Indian tribes,²⁸⁰ possibly an occasional interpleader ac-

275. 445 F.2d 122 (7th Cir. 1971).

276. *Id.* at 125.

277. *Id.* at 124-25.

278. See *Sierra Club v. Lynn*, 5 B.N.A. ENVIRONMENT REP.—DECISIONS 1745 (W.D. Tex. 1973); *Riverside v. Ruckelshaus*, 4 B.N.A. ENVIRONMENT REP.—DECISIONS 1748 (C.D. Calif. 1972), *Committee to Stop Route 7 v. Volpe*, 4 B.N.A. ENVIRONMENT REP.—DECISIONS 1681 (D. Conn. 1972).

279. The only argument that could even credibly be made with respect to section 2412 might be that the exclusion of attorneys' fees signified congressional intention to preserve the no-fee rule. One might respond that section 2412 states a statutory exception rather than an equitable exception to the no-fee rule and therefore should be independent of any inferences from omissions from the statute. This response encounters the *Fleischmann Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720 (1967), reasoning that where a statute provides the remedies, other remedies should not be implied. See discussion of *Fleischmann* in note 70 *supra*. It is not clear to what extent the *Fleischmann* reasoning survives cases such as *Mills and Hall*, nor does it seem likely that such reasoning would apply to statutes that do not state a cause of action but are generally remedial in nature. See generally note 69 *supra*.

280. See *Pyramid Lake Paiute Tribe v. Morton*, Civil No. 70-2506 (D.D.C., filed June 22, 1973). Here section 2412 and sovereign immunity principles were held inapplicable when Indians sought reimbursement for counsel fees. Where services of the Attorney General were unavailable, despite his obligation to represent Indian tribes in all suits at law and in equity, the tribes were entitled to seek counsel fees from the federal agency defending the instant environmental case.

tion,²⁸¹ and in cases like *Natural Resources Defense Council v. Environmental Protection Agency* where there was a statutory provision authorizing the award of fees generally and granting a citizen the right to commence suit against the agency. Claimants in other cases are pressing arguments that certain governmental entities are in fact governmental corporations and as such may be liable for counsel fees.²⁸² Notwithstanding these rays of light, the federal sovereign immunity bar has presented a more onerous impediment to fee-shifting than even the no-fee rule.

2. State Defendants

It should be noted at the outset that state sovereign immunity is by no means a universal practice among the states and in fact has been described as "on the run."²⁸³ In regard to state defendants in federal court,²⁸⁴ there are two possible lines of analysis. The first approach is that of *Fairmount Creamery Co. v. United States*²⁸⁵ and holds that the power to tax costs against the state is a direct consequence of assuming federal question jurisdiction, so that a circumvention of state sovereign immunity for jurisdictional purposes concomitantly bars that defense for purposes of cost recovery.²⁸⁶ Once a federal statute has conferred

281. In *General Ins. Co. of Am. v. Commodity Credit Corp.*, 430 F.2d 919 (10th Cir. 1970), plaintiff brought an interpleader action and one of the parties joined was the government. Thereafter, plaintiff moved for counsel fees. Although the claimants, including the government, had recovered the full amount of their losses, it is not clear whether the government received the interest to which it was entitled. In any event, plaintiff was awarded counsel fees from the sums in the court registry, which perhaps could otherwise have been claimed by the government to satisfy, if applicable, any interest owing on its claim.

282. Governmental corporations are placed "upon equal footing with private parties as to the usual incidence of suits in relation to the payments of costs and allowances." *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 85-86 (1941); 6 J. MOORE, *supra* note 16, at ¶ 54.75[5], at 1561-62. Such an argument has been presented in support of a claim for attorneys' fees in the Brief for Plaintiff-Appellants at 68-70, *Environmental Defense Fund v. TVA*, Civil No. 73-8174 (6th Cir. 1973, filed Nov. 21, 1973).

283. 3 K. DAVIS, *supra* note 257, at § 25.00, at 823 (Supp. 1970).

284. The availability of awards against state defendants in state court depends on two points: that there is no state statutory prohibition of recovery of fees as part of costs, and that officials are explicitly or by convention liable for costs. See Note, *supra* note 257, at 1253.

285. 275 U.S. 71 (1927).

286. Cf. Judge Peckham's footnote arguments *sua sponte* in *La Raza*, 57 F.R.D. at 101-02, citing *Fairmount Creamery Co. v. Minnesota*, 275 U.S. 71 (1927); *Utah v. U.S.*, 304 F.2d 25 (10th Cir. 1962). 6 J. MOORE, *supra* note 16, at ¶ 54.76[1].

jurisdiction against a government official, the *Sims v. Amos* court said:

[T]he state has no power to impart to its officers any immunity from such injunction or from its consequences, *including the court costs incident thereto*.²⁸⁷

The *La Raza* court chose the same route:

Since we conclude as the court did in *Sims* that the state may no more immunize an individual from costs incident to an injunction than it may . . . from the injunction itself, we find that sovereign immunity does not bar an award of attorney's fees

. . . .²⁸⁸

Alternatively some courts have argued that fee-shifting is barred by sovereign immunity and the eleventh amendment, because despite the judicial fiction of suits against individual officials it is nevertheless the state treasury which actually must pay the awards.²⁸⁹ The latter appears to be the minority view in fee-shifting decisions, however, and its eleventh amendment argument is weakened both by its failure to distinguish between damage awards and fee-shifting²⁹⁰ and by current trends toward awarding costs against the state in other areas of the law.²⁹¹ Absent extraordinary circumstances that operate to screen state defendants,²⁹² state immunity does not appear to bar fee recovery.

287. 340 F. Supp. at 694.

288. 57 F.R.D. at 102.

289. *Cf. Sincock v. Obara*, 320 F. Supp. 1098 (D. Del. 1970); CAL. GOV'T CODE § 825 (West Supp. 1973). With or without specific statutes it appears that state officials would have to pay costs out of their pockets in only the most extraordinary situations.

290. The merits of the arguments in the two cases are very different, of course. See Note, *supra* note 10, at 1252 n.175.

291. *Cf. Cost principles in welfare rights cases, Boddie v. Connecticut*, 401 U.S. 373 (1971); *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973), *cert. granted sub nom.*, *Edelman v. Jordan*, 412 U.S. 937 (1973). See also *Gaddis v. Wyman*, 304 F. Supp. 717 (N.D.N.Y. 1969), *aff'd sub nom.*, *Wyman v. Bowers*, 397 U.S. 49 (1970).

292. *Cf. Committee to Stop Route 7 v. Volpe*, 4 B.N.A. ENVIRONMENT REP.—DECISIONS 1681 (D. Conn. 1972), where recovery against the state defendant was barred because the state had relied upon the Federal Highway Administration's self-serving interpretation (in PPM 90-1 ¶ 5.a) that NEPA did not apply to highway design decisions until 13 months after its effective date. 4 B.N.A. ENVIRONMENT REP.—DECISIONS 1329, 1330-32. It is not clear how the state agency, which in that case had attempted to assume the primary NEPA role (that of preparing the EIS) itself, could then claim insulation from the terms of NEPA because of the federal memorandum. In any event, such examples should be restricted to their peculiar facts.

One can only surmise that as greater success greets citizens in prosecuting the private attorney general actions, more attention may inevitably be drawn to the basic unfairness wrought by the doctrine of sovereign immunity, especially as applied to the federal government.

V. CONCLUSION

The American no-fee rule is today justly coming under fire for its policy and technical peculiarities. A general change or revision of the rule, however, would require a careful, comprehensive reevaluation of the whole question of litigation costs. Precipitous across-the-board reversal of the rule might well exacerbate failings that already exist in our legal system. Yet, in advance of a general reform, equity has recognized some circumscribed areas of litigation which amply justify waivers of the no-fee rule on their own merits. The most dramatic of these exceptions deals with public interest citizen suits.

Nowhere is the need for public interest litigation more keenly felt than in the environmental area. The continuing insult to our environment will be no less tolerable tomorrow because it results from a self-satisfying consumption of the environment today. It serves no useful purpose here to add one more admonition to the manifold outpourings of environmentalists concerning the limits a people can abuse a finite entity with complete impunity. Neither the legislatures nor the executive branches of government, as presently constituted, are adequate to provide the ongoing evaluation and introspection needed to guard against improvident destruction of the environment. Failures of our short-sighted decision-making system create major irreversible or long-term harms. The losses are doubly appalling because the system does not adopt a self-correcting mechanism until it is too late.

It appears essential, at the very least, to subject private and public decisions that will significantly affect the environment to the scrutiny of the judicial process in adversary proceedings. One means immediately at hand to accomplish this task is by fostering private citizens' public interest litigation. With the prospect for award of counsel fees, the potential for such litigation is significantly enhanced.