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THE RECOVERY OF ATTORNEY'S FEES: A NEW
METHOD OF FINANCING LEGAL SERVICES

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I. INTRODUCTION

THE Economic Opportunity Act states in its preamble that it is "the
policy of the United States to eliminate the paradox of poverty in
the midst of plenty in this Nation by opening to everyone the opportunity
. . . to live in decency and dignity."1 Under this Act, a national program
to provide legal services for the poor was established as part of the Office
of Economic Opportunity (OEO).2 The overall objectives of the legal
services program were:

First: To make funds available to implement efforts initiated and designed by local
communities to provide the advice and advocacy of lawyers for people in poverty.
Second: To accumulate empirical knowledge to find the most effective method to bring
the aid of the law and the assistance of lawyers to the economically disadvantaged
people of this nation . . .
Third: To sponsor education and research in the areas of procedural and substantive
law which affect the causes and problems of poverty.
Fourth: To acquaint the whole practicing bar with its essential role in combatting
poverty and provide the resources to meet the response of lawyers to be involved in
the War on Poverty.
Fifth: To finance programs to teach the poor and those who work with the poor to
recognize problems which can be resolved best by the law and lawyers.3

The rhetoric was grandiose, but the funding was meager. In 1968 it
was conservatively estimated that the cost of providing legal services
for the poor4 would be $250,000,000.5 In contrast to this figure the bud-

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Law Review for his invaluable research assistance in the preparation of this article.


2. Id. § 222, 42 U.S.C. § 2809(a)(3) (1970). Criminal cases cannot generally be handled
by legal services attorneys. Id. Legislation was recently passed by the House of Representa-
tives to make legal services an autonomous corporation. H.R. 12350, 92d Cong., 2d Sess. §§
17, 1972).


4. The federal poverty line is $3,000 per year for a family of four. Silver, The Imminent
Failure Of Legal Services For The Poor: Why And How To Limit Caseload, 46 J. Urban L.
217 (1969). It should be noted that although OEO does not set a dollar standard for eligibil-
ity for legal services, it suggests that "[t]he standard should not be so high that it includes

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get for legal services in fiscal year 1967 was $24,600,000, and in fiscal year 1971, $70,100,000. Similarly, although there are more than thirty-three million people falling below the national poverty level, their needs are being served by only four thousand lawyers, eighteen hundred of whom are legal services attorneys.

Notwithstanding its comparatively small budget and staff, legal services has had a certain measure of success, often antagonizing federal, state, and local politicians in the process. Legal services, however, will

clients who can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter. . . .

The eligibility criteria should include such factors as income, dependents, assets and liabilities, cost of a decent living in the community, and an estimate of the cost of the legal services needed.” Guidelines for Legal Services Programs, in 1 CCH Pov. L. Rep. § 6700.35 (1968). In New York City, the indigency standard was $3,000 per year for individuals, and $500 for each additional dependent. Order on Motion Approving Application for Incorporation of Community Action for Legal Serv., Inc., In re Judd at 7 (App. Div., 1st Dep’t, Oct. 10, 1967). An even more liberal standard of indigency has now been introduced: $4,000 per year for a single individual, $4,600 for a family of two, and $600 more for each additional dependent.

5. It is estimated that 14 million civil legal problems arise each year among the poor. Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 Geo. L.J. 516 (1968).
8. See Silver, supra note 4, at 217.
9. Id. at 217 & n.6. Assuming that each of the thirty-three million poor had need of a lawyer in a civil matter only once every four years, each poverty lawyer would have to handle approximately 2,000 cases a year, or in excess of seven cases every working day. It has been liberally estimated that an attorney can handle up to 900 cases a year. Id. at 227. Any attorney who processes even that many cases, it has been argued, may fail to do an adequate job on each case. Id.

While there is a great demand for lawyers in terms of the number of problems poor people have, the very problems themselves are such that attorneys must expend more time and effort to provide the same level of representation as that received by the middle-class. Id. at 221. It was estimated in 1969 that so numerous and complex were the legal problems of the poor that even if one were to assume “that lawyers do not die and poor people do not grow in numbers, and that every private attorney in the United States devoted himself exclusively to representing poor people, not until 1973 would it be even theoretically possible to offer adequate legal services to the poor.” Id. (emphasis deleted). Even with sweeping institutional reforms, presently and for the near future at least, “the need and demand for legal services among the poor will greatly exceed the very limited supply.” Id. at 221-22.

10. See N.Y. Times, Feb. 2, 1972, at 1, col. 3.
12. See Arnold, Whither Legal Services, Juris Doctor, Feb., 1971, at 3. For the response of the Director of OEO to a study of the California Rural Legal Assistance Program see 1
become an adequate and effective program only when it receives sufficient funds, when it is cut loose from political interference and, most importantly, when the number of private attorneys interested in the legal representation of the poor is radically increased. A possible solution for these problems has recently come from an unexpected source. Continuing the gradual erosion of the American rule which denies the recovery of counsel fees to a successful litigant in a civil case, the courts have begun to consider the propriety of including as part of recoverable costs the reasonable attorney's fees of legal services lawyers.

The purpose of this article is to analyze the situations in which legal services attorneys may be awarded counsel fees under existing precedents and to advocate the formulation of a new rule which would permit the award of counsel fees in all civil cases and thus enhance the effectiveness of legal representation for the poor in this country. To this end, the article will examine such issues as whether the recovery of reasonable attorney's fees by legal services would alleviate the financial and political pressures on the legal services program and whether the recovery of counsel fees in poverty cases would encourage more private attorneys to handle many of these cases in the future. It will also explore the cases in which legal services attorneys may presently recover attorney's fees, consider whether a rule permitting the recovery of counsel fees in all civil cases is warranted, and analyze the effect such a rule would have on the poor in general and the legal services program in particular.

CCH Pov. L. Rep. ¶ 6725 (1971). Additional examples of political interference are documented in Lenzner, supra note 11, at 9. Recently Vice President Agnew expressed dissatisfaction with the "whole ball of wax," as he called the legal services program, and stated that closer supervision was necessary. N.Y. Times, Feb. 3, 1972, at 1, col. 2. See also N.Y. Times, April 20, 1972, at 14, col. 4.

The bill recently passed by the House to turn legal services into an independent corporation provides that no official of the federal government shall exercise any "direction, supervision, or control" over the new corporation and its staff. H.R. 12350, 92d Cong., 2d Sess. § 1013 (1972). President Nixon has recognized that the "program is concerned with social issues and is thus subject to unusually strong political pressures." 1 U.S. Code Cong. & Ad. News 744 (1971). The President has expressed support for the idea of a legal services corporation that will be "assured of independence." Id. at 745.

That legal services attorneys can be subject to extreme judicial action see Weintraub v. Adair, 331 F. Supp. 148 (S.D. Fla. 1971), which enjoined such action by a state court judge.

13. As used in this article, "costs" includes all of those items for which the winning party can compel the losing party to reimburse him. It is not used in any narrow sense of "statutory" costs as distinguished from reimbursable disbursements. See N.Y. C.P.L.R. arts. 81-83 (McKinney 1963, Supp. 1971). See also Carmody-Forkosch New York Practice 830 n.14 (8th ed. M. Forkosch & A. Wilson 1963).

II. The Recovery of Counsel Fees to Alleviate Pressures on the Legal Services Program

In order to analyze whether the recovery of reasonable attorney's fees would benefit the legal services program, three distinct problems must be considered: (A) the financial pressures on the program; (B) political interference; and (C) the need to involve the private bar in the representation of the poor.

A. Financial Pressures

As indicated earlier, the funds provided for legal services are woefully inadequate to fulfill its stated mission. Since there are approximately thirty-three million people eligible for free legal representation, legal services offices are often required to make certain adjustments to remain viable. For example, offices may be closed for part of the day; certain types of cases may not be handled; appeals may not be taken; motion practice may often be non-existent; and test cases will be preferred over individual claims.

Additional revenues might remedy many of these shortcomings. The most critical and obvious need is for a larger, more experienced, and better paid legal staff. Not only could a larger staff take on more cases but, more importantly, the cases taken could be handled more effectively. Similarly, additional money would mean more and varied types of supportive services such as social workers, bilingual secretaries, investigators, and duplicating machines. Finally, more attention could be given to community programs designed to educate the poor about legal services and their own legal rights.

B. Political Interference

The award of counsel fees would not only help augment and diversify the operations of legal services, it would lessen the opportunities for political interference. Of course, the establishment of legal services as a

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15. See notes 4-7 supra and accompanying text. This article assumes that Congress will maintain legal services funding at present relative levels and not reduce funding by any amounts recovered as counsel fees.

16. For a discussion of these measures see Silver, supra note 4, at 227-40; Silverstein, Eligibility for Free Legal Services in Civil Cases, 44 J. Urban L. 549 (1967). In this connection, the OEO guidelines for legal services state that "[t]here should not be an arbitrary limit to the scope or type of civil legal services provided to eligible clients. All areas of the civil law should be included and a full spectrum of legal work should be provided: advice, representation, litigation, and appeal." 1 CCH Pov. L. Rep. ¶ 6700.36, at 7703 (1968). For a description of the frustrations faced by a legal services attorney see McLaughlin, The Legal Services Merry-Go-Round, Juris Doctor, Feb., 1971, at 14.

17. See text accompanying note 3 supra.

18. See note 12 supra.
public corporation independent of the executive branch will be the single most important factor in reducing, although by no means ending, political interference.\footnote{19} As long as the budget for legal services is appropriated by Congress the program will be accountable to Congress. As alternative sources of revenue are made available to legal services, it will become less dependent on federal funding with its concomitant threat of political interference.

C. The Private Bar

Effective representation for the thirty-three million poor of this country will become a reality only when the private bar shoulders a large part of this responsibility. One method of stimulating its interest in representing the poor is to demonstrate that attorney's fees are recoverable in many "poverty" lawsuits. If attorney's fees are recoverable in such actions, these suits become, in effect, contingent fee cases, which have traditionally been handled by the private bar. The recovery of counsel fees would thus become the means by which the interest of the private bar in representing the poor could be stimulated. Since one of the objectives of legal services is to "find the most effective method to bring the aid of the law and the assistance of lawyers to the economically disadvantaged people of this nation,"\footnote{20} legal services would seem to have an \textit{affirmative obligation} to try to create precedents for the recovery of counsel fees in as many "poverty" cases as possible.

III. Circumstances in Which Counsel Fees Are Presently Recoverable by Legal Services Attorneys

A. The American Rule and Its Exceptions

Traditionally, American courts have refused to award reasonable attorney's fees to a prevailing party in a civil law suit.\footnote{21} The successful party, whether he be plaintiff or defendant, is thus never fully compensated since he must pay his counsel fees out of his own pocket.\footnote{22} Over

\footnote{19} See note 2 supra.
\footnote{20} 1 CCH Pov. L. Rep. ¶ 6700.10, at 7701 (1968).
\footnote{22} See Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75, 85 (1963); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38
the years, however, certain well-defined exceptions have been engrafted upon this rule.

1. Statutes

Statutes which award counsel fees to the successful litigant basically fall into two categories. The first category requires the award of attorney's fees to the successful litigant in every case in which he has been injured by a violation of the statute. For example, the Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Provisions such as this represent two separate policy decisions—the award of attorney's fees to successful litigants encourages the enforcement of the particular statute in question and at the same time places the cost of enforcement on those who violate the statute.

The second category of statutes provides that attorney's fees may be granted to the successful litigant in the discretion of the court. In exercising this discretion, the court may consider whether the losing party has acted in bad faith. Thus the Civil Rights Act of 1964 includes the following section: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Under this category

U. Colo. L. Rev. 202 (1966). A party who must bear the costs of his attorney receives, to that extent, no remedy for his injury. See Note, Attorney's Fees; Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967). One court conceded that statutory costs do not fully compensate a party for his expenses, but stated that "it has been the public policy of this State, from time immemorial, to regard them as adequate." Manko v. City of Buffalo, 271 App. Div. 286, 302, 65 N.Y.S.2d 128, 143 (4th Dep't 1946), aff'd mem., 296 N.Y. 905, 72 N.E.2d 623 (1947).


of statutes, the recovery of counsel fees not only encourages enforcement and shifts the costs of that enforcement but also punishes the bad faith of the losing party.

2. Private Law Enforcement

Even in the absence of statutory authority, recent federal cases seem to be developing another exception to the traditional rule. Attorney’s fees should be awarded to the successful litigant in those situations where society wishes to encourage private lawsuits as a method of law enforcement. Thus, in *Mills v. Electric Auto-Lite Co.*, the Supreme Court while recognizing the general American rule, stated that “both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery.” The award of attorney’s fees, therefore, was held to provide “an important means of enforcement of the proxy statute.” Here again, the opportunity to recover legal fees acts as an incentive to private litigation and, more importantly, shifts the cost of law enforcement to the violators themselves. It has thus been suggested that courts should award attorney’s fees to successful litigants in environmental actions to encourage such private policing suits. This transfer of the burden of legal fees might make “for a world of viable civil rights, more consumer protection, and less air pollution.”

3. Groundless or Vexatious Suits

Another widely recognized exception to the general rule permits a party to recover attorney’s fees when his adversary has engaged in unusual misconduct or harassment, such as instituting a frivolous or


29. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), the Supreme Court emphasized that when a plaintiff brings an action under the Civil Rights Act of 1964 and obtains an injunction “he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” Id. at 403 (footnote omitted). See also *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 148 (5th Cir. 1971).


31. Id. at 391-92 (footnote omitted).

32. Id. at 396 (footnote omitted).


34. Id. at 329 (footnote omitted).
In a number of recent cases involving desegregation, counsel fees were awarded when, in the opinion of the court, the evasion, delay, or obstinate conduct of a party to the litigation justified the awards. In these cases the courts seem to have shifted the burden of counsel fees primarily to punish the bad faith of the losing party to the litigation.

4. Prior Litigation

Courts may sometimes award a party attorney's fees incurred in a prior litigation with a third party. For example, if A becomes involved in a lawsuit with C because of B's wrongful conduct, A may thereafter sue B in a separate action and recover A's attorney's fees expended in the first action. A, however, may not recover from B the cost of attorney's fees expended in the second suit. If a grantee of land who has been conveyed the land with covenants of title is sued by a person having an adverse interest in the land, the grantee may sue the grantor who has covenanted against the existence of such flaws in the title and recover damages for the defect in title as well as his counsel fees incurred in litigating the question of title in the first suit. A variant of this exception would allow A, in a separate suit, to recover from B attorney's fees expended in defending a prior suit brought maliciously either by B or through B's action. As in the case of the exception for groundless or vexatious suits, the underlying reason for this exception is again to penalize the wrongdoer for his misconduct.

5. Equitable Fund Doctrine

It has been the rule in the United States for some time that when a party produces, protects, or increases a fund in which others will share,
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equity will award the party the cost of his counsel fees out of that fund. In shareholder derivative actions, for instance, a plaintiff who successfully produces a fund for the benefit of the corporation or the shareholders is entitled to have his legal fees paid out of the fund produced. Recent cases have extended this doctrine to allow the recovery of attorney's fees in cases in which no fund or direct pecuniary benefit was produced. Attorney's fees may thus be recovered if some form of substantial benefit is produced even though that benefit is of a non-pecuniary nature.

6. Contracts

The question whether, and to what extent, a party may be obligated to pay the counsel fees of another may be resolved by contract before any dispute arises. Thus, a landlord may place in a lease a provision


43. Schechtman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957); Bosch v. Meeker Corp. Light & Power Ass'n, 257 Minn. 362, 101 N.W.2d 423 (1960).

permitting him to recover attorney's fees incurred as a result of the tenant's failure to perform any covenant in the lease. Courts, however, may refuse to enforce such contractual provisions when their enforcement would violate public policy.

7. Actions for Divorce or Separation

Counsel fees are generally awarded to the wife in matrimonial actions. The theory underlying this exception to the general rule is that a husband is duty bound to furnish his wife with necessaries and since legal services are necessaries the husband must bear this expense.

B. The Recovery of Counsel Fees by Legal Services

Before considering how these exceptions would allow legal services attorneys to recover reasonable counsel fees, some objections to permitting recovery by legal services under any circumstances must be answered. First, since those represented by legal services do not pay for legal representation it could be argued that the award of such fees in these cases would be improper. This argument assumes that when attorney's fees are awarded under the exceptions mentioned above, the reason for the award is solely to compensate the successful party. A study of the policy reasons behind the exceptions does not support this assumption. As has been demonstrated, attorney's fees are recoverable more often than not primarily to penalize the misconduct of a party, to encourage the enforcement of certain types of legislation, or to shift the cost of statutory enforcement. Obviously a person who does not pay for an attorney should not recover attorney's fees. When the person is represented by legal services, any award of counsel fees should be paid directly to legal services itself. Indeed, one court has ruled that in the absence of proof that counsel fees will actually reach the legal services lawyer, the award should be denied.


47. H. Clark, Domestic Relations § 14.2, at 428 (1968); McCormick § 64. States may provide a recovery to either spouse under certain conditions. See Stoebuck, supra note 22, at 208.

48. H. Clark, supra note 47, § 14.2, at 428-29. An award of counsel fees, however, will be denied if the wife is suing or defending in bad faith or without probable cause.

Second, since legal services is a government funded program, some might contend that it should not be permitted to recover attorney's fees. Legal services was established to provide free legal representation for the poor and obviously may not charge its clients a fee or keep any part of the recovery. Similarly, legal services attorneys are generally forbidden to take fee-generating cases because private attorneys will presumably handle them on a contingent fee basis. The objective of the legal services program is to take those cases in which the anticipated recovery would not attract a private attorney, such as various types of housing matters, administrative agency hearings, or constitutional challenges to legislation or administrative regulations. But assuming that a case falls properly within the guidelines for legal services, there is no OEO policy barring the recovery of legal fees from the losing party to the litigation

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50. This may be the position taken in Gaddis v. Wyman, 336 F. Supp. 1225 (S.D.N.Y. 1972) (mem.). In a civil contempt proceeding against New York State welfare officials brought by an OEO funded legal aid office, the court observed that the welfare officials could not deny public assistance to otherwise eligible applicants in anticipation of a new residency requirement passed by the state legislature where the officials had been enjoined from denying public assistance on the ground that the applicant had failed to meet the prior residency requirement. Id. at 4. The court added that it was denying attorney's fees to the OEO funded legal aid office which commenced the action because the denial of public assistance by the officials was due to bureaucratic anticipation of new legislation and not to willful disobedience of the injunction. Id. at 5. Similarly, the court held there was no statutory basis for awarding attorney's fees. Id. The court did observe, however, that the OEO funded attorneys did not expend any of their own private funds, presumably meaning that attorney's fees cannot be granted when the lawyers expend public rather than private funds on a case. Id.


52. The New York court rules of the Appellate Division, First Department, state: "Except as may be specifically provided in the order of the Appellate Division, no corporation, association or organization [which terms include local legal services corporations] shall itself receive or participate in any fee or compensation paid by or on behalf of a client for the rendition of legal services . . . ." Rules of Practice of the Appellate Division, First Department, 22 N.Y. Codes, Rules & Regs. § 608.7(f) (1970). This prohibition refers to fees paid by a client or on behalf of a client by someone else. It does not refer to court awarded fees paid by the opposing party in the litigation.

Individual Appellate Division orders approving the creation of local legal services corporations may contain provisions relating to this problem. The order approving the creation of Bronx Legal Services Corporation B states: "neither the Corporation nor any of its employees shall receive or retain any remuneration, lawyers' fees or contingent fees for services . . . ." Order on Motion Approving Incorporation of Bronx Legal Serv. Corp. B, In re Judd at 7 (App. Div., 1st Dep't, Oct. 10, 1967). This language again seems to refer to fees paid by the client for services rendered. In those instances when attorney's fees are recoverable from the client, the recovery is not so much a fee for services rendered by the lawyer as a punishment for the losing party.

In this connection, the National Consumer Act provides that in an action to enforce a consumer's remedy where "the consumer is represented by a non-profit organization [such
— in fact there seem to be strong reasons to encourage the recovery. In those circumstances where the award of attorney's fees is to penalize misconduct, the losing party should not benefit because a legal services attorney represents the successful litigant. Similarly, in those cases where the award of attorney's fees acts to switch the cost of policy enforcement to those who violate the policy, there is no reason to deny the award of counsel fees to legal services. On the contrary, in both situations, not to award attorney's fees to legal services would militate against public policy.

Assuming then that there is no bar to awarding attorney's fees to legal services lawyers, in what circumstances should they be awarded?53

1. Statutes

Although there are many federal and state statutes which permit the court to award counsel fees,54 the majority of these statutes would not concern the average legal services attorney. Illustrative federal and New York State statutes that would concern the legal services attorney are set forth below.55

53. Although in the ordinary case the recovery of reasonable counsel fees will be sought from a private party, an additional problem may be raised if the recovery of counsel fees is sought in a suit where a governmental agency is a party. Should a governmental agency be penalized for misconduct by having its funds reduced? This complex topic is not treated specifically in this article. In attempting to recover counsel fees from a governmental agency, however, this problem will have to be faced. In Gaddis v. Wyman, 336 F. Supp. 1225 (S.D.N.Y. 1972) (mem.), the court avoided this problem in a suit against state welfare officials by denying the recovery of attorney's fees on other grounds.

54. See notes 23 & 25 supra.

55. The OEO Guidelines provide that legal services programs "should not provide free legal advice in fee-generating cases, such as . . . cases in which a fee provided by statute or administrative rule is sufficient to retain an attorney." 1 CCH Pov. L. Rep. § 6700.35, at 7703 (1968). Thus in certain of the situations cited in the succeeding text, many cases should properly be referred to private attorneys. Even though a statutory fee is provided, however, private attorneys may still refuse to take a case because of its complexity or for other reasons. In these instances legal services attorneys should handle them and the Guidelines so allow. "If the fee is not sufficient to attract a private lawyer, the client may be eligible for the assistance of the OEO-funded program." Id.

As a matter of practice, legal services attorneys in New York City generally refer to private counsel certain landlord and tenant cases where a statutory fee is provided. Provisions of the Administrative Code of the City of New York permit the recovery of reasonable attorney's fees if a tenant is unlawfully removed by a landlord from any rent controlled housing accommodation or if a landlord charges more than the maximum rent permitted under rent control regulations. New York, N.Y. Admin. Code § Y51-11.0(d)(2)-(3) (1971); see N.Y. Real Prop. Law § 234 (McKinney Supp. 1971).
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a. Civil Rights Acts of 1866 and 1964

In *Lee v. Southern Home Sites Corp.*, the defendant refused to sell property to plaintiff Lee because he was a Negro. Lee brought a class action against the defendant under a provision of the Civil Rights Act of 1866 which forbids discrimination in the sale of housing and real property. After enjoining future discrimination and ordering the defendant to sell Lee the property, the district court denied plaintiff's motion for an award of attorney's fees. On appeal the Fifth Circuit, although otherwise affirming the decision, remanded the case to the district court to make findings of fact on the issue of attorney's fees. The court stated that federal courts "have a duty to fashion an effective remedy to carry out the purpose of the statute." One part of that remedy is the award of counsel fees.

Apart from its use in discrimination cases, one provision of the Civil Rights Act of 1866 has important application in cases involving "sewer service" where default judgments have been based on fraudulent service of process. In a recent New York case the court, in denying a motion to dismiss, upheld a counterclaim for damages brought under section 1983 against a process server, his employer, and the opposing party, on the theory that sewer service constitutes a deprivation of a right secured by the Constitution. Since courts have previously awarded attorney's fees under this section, the legal services attorney should request reasonable attorney's fees as part of the damages sought.

56. 444 F.2d 143 (5th Cir. 1971), noted in 40 Fordham L. Rev. 714 (1972).
58. 444 F.2d at 144.
61. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1970).
62. E.g., Dyer v. Love, 307 F. Supp. 974 (N.D. Miss. 1969). In *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), the court observed that the award of attorney's fees was part of an effective remedy to carry out the purposes of section 1982. Id. at 144. Similar arguments can be made for section 1983, particularly when the acts complained of are clearly unconscionable as in the case of sewer service.
The Civil Rights Act of 1964 prohibits discrimination in places of public accommodation and discrimination in hiring. In suits brought to enforce these provisions, the Act specifically provides that counsel fees may be awarded to the successful litigant in the discretion of the court. Thus, in appropriate cases brought under either of these Civil Rights Acts, legal services attorneys should request counsel fees on the theory that the effective enforcement of these Acts mandates the award of such fees.

b. Consumer Credit Protection Act

In connection with any consumer credit transaction, any creditor who fails to disclose to any person any information required under the Consumer Credit Protection Act (such as the finance charge expressed as an annual percentage rate) is liable to that person for twice the amount of the finance charge (subject to a minimum of $100 and a maximum of $1000) and, in the case of a successful action to enforce these provisions, the costs of the action together with reasonable attorney's fees as determined by the court. A legal services attorney may find violations of the Consumer Credit Protection Act in various credit transaction situations in which he might be allowed to recover counsel fees from the other side.

c. Section 234 of the New York Real Property Law

Section 234 of the New York Real Property Law provides that whenever a lease of residential property shall provide that the landlord may recover attorney's fees incurred as a result of the failure of the tenant to perform any covenant contained in the lease, there shall be implied in the lease a reciprocal covenant by the landlord to pay the tenant's reasonable attorney's fees incurred as a result of the failure of the landlord to perform any covenant in the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease. Since clauses allowing the landlord to recover counsel fees are common in many form leases, section 234 may

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63. 42 U.S.C. §§ 2000a-3(b) & 2000e-5(k) (1970); The Supreme Court has held that counsel fees should be awarded to one who obtains an injunction under § 2000a-3(b) "unless special circumstances would render such an award unjust." Newman v. Piggly Wiggly Enterprises, Inc., 390 U.S. 400, 402 (1968) (per curiam).


65. Id. § 1639(a)(5).


67. N.Y. Real Prop. Law § 234 (McKinney Supp. 1971). The statute provides that any waiver of this protection violates public policy. Id.
have application in many landlord and tenant cases involving a lease of residential property.

The section may also have application in situations where the lease has expired and a statutory tenancy has been created under rent control laws. In *Deary v. Keith* the lease, which contained an obligation by the tenant to pay the landlord's attorney's fees in various situations, had expired in 1961. The tenant continued to live in the premises, thereby creating a statutory tenancy. In 1971 the landlord instituted an unsuccessful summary proceeding to oust the tenant. In ruling that the tenant could recover attorney's fees spent in defending the summary proceeding, the court found: (1) that the lease provision obligating the tenant to pay landlord's fees carried over into the statutory tenancy; (2) that the passage of section 234 of the Real Property Law in 1966 transformed the tenant's obligation to pay the landlord's counsel fees into a mutual obligation; and (3) that while section 234 could not apply to suits brought prior to 1966, it clearly applied to the suit brought by the landlord in 1971.

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d. **Section 8303 of the New York Civil Practice Law and Rules**

Section 8303(a)(2) of the New York Civil Practice Law and Rules provides that the court may award "to any party to a difficult or extraordinary case, where a defense has been interposed, a sum not exceeding five percent of the sum recovered or claimed, . . . and not exceeding the sum of three thousand dollars . . ." Although the section does not specifically refer to attorney's fees, it seems that the award of an additional five percent of the sum recovered is in fact such an award. The five percent is only permitted in difficult or extraordinary cases, presumably where legal fees would be disproportionately high. The uses of this section are protean, although it should be noted that the New York courts have not given the section an expansive reading. In particularly complex cases or in cases where the issues are unusual, legal services attorneys in New York should request the recovery of legal fees.

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70. Id. at 20-21.
72. See 8 J. Weinstein, H. Korn & A. Miller, New York Civil Practice § 8303.09 (1971).
73. For the factors considered by a court in determining whether a case is "difficult or extraordinary" see Schwartz v. Bartle, 51 Misc. 2d 215, 272 N.Y.S.2d 805 (Sup. Ct. 1966). In negligence actions, no matter how difficult or extraordinary, courts will usually not award this additional allowance. See McGrath v. Irving, 24 App. Div. 2d 236, 265 N.Y.S.2d
2. The Enforcement of Preferred Policies

Even in the absence of statute, recent cases have demonstrated that attorney's fees may be awarded to encourage the enforcement of certain preferred policies and thus shift the cost of such enforcement to those who violate those policies. Although there are many instances where this rule may be helpful, mention will be made of only three situations in which preferred public policies would dictate the recovery of counsel fees by legal services. First, a strong case can be made that consumer protection is such a preferred policy. Second, one could argue that a special proceeding brought by tenants of multiple dwellings in the City of New York for a judgment directing the deposit of rents into court and their use for the purpose of remedying conditions dangerous to life, health, or safety (a "rent strike") furthers strong public policy—i.e., forcing better housing conditions. Finally, in the rare case where a legal services attorney might become involved in environmental litigation, public policy would clearly mandate a recovery.

3. Groundless or Vexatious Suits

Of all the instances when attorney's fees are traditionally recovered, perhaps the most useful for legal services is the award of counsel fees in groundless or vexatious suits. In *Silberzweig v. Masino* the landlord brought four non-payment of rent proceedings against the tenant at various times over the course of months. The tenant counterclaimed in the last proceeding for abuse of process and harassment. In addition, the legal services attorneys asked for an award of legal fees. After a
lengthy trial, the court found that by bringing four non-payment of rent proceedings and engaging in other vexatious conduct the landlord had indeed been guilty of abuse of process and harassment and granted the tenant recovery on her counterclaim. More significantly, however, the court awarded the legal services attorneys $500 in legal fees. Since additional time and effort on the part of the attorneys was required to execute the judgment, the court subsequently granted an additional $400 in legal fees.

Whenever he wins a case in which bad faith, harassment, or dilatory tactics are employed against him, e.g., requests for numerous adjournments or attempts at surprise on the eve of the trial by motions to amend pleadings to add new claims or defenses, the legal services attorney should ask the court for an award of fees. In cases where service of process has been fraudulent, resulting in a default judgment, a legal services attorney should request the recovery of attorney's fee based on section 1983 of the Civil Rights Act of 1866. As an alternative ground of recovery, however, the attorney should argue that fraudulent service of process constitutes abuse of process and harassment—bases on which reasonable attorney's fees could be granted.

4. Prior Litigation

The rule that attorney's fees incurred in a lawsuit with a third party are recoverable in a second suit from one whose misconduct caused the first lawsuit may be useful in certain consumer actions. For example, A is fraudulently induced by B to sign a retail installment contract to purchase a defective television set. B assigns the contract to C, a finance company. A refuses to continue his payments upon discovery of the defect. C sues A to force him to continue making the payments. Since New York law requires C to take subject to any defenses A may have against B, A successfully defends the suit brought by C. A, in a second action against B, may recover the cost of his counsel fees incurred in

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the first action but not in this second action. Although the exception seems to require plaintiff to bring a separate suit if he wishes to collect attorney's fees expended in the first action, in some instances there is no reason why attorney's fees could not be recovered if the one whose misconduct precipitated the litigation is impleaded into the first suit. For example, if a health insurance company wrongfully refuses to pay a doctor's bill and the doctor sues the patient, the patient should implead the health insurance company and if he is successful in showing that the health insurance company is liable, the patient should be allowed a pro rata share of his attorney's fees. The recovery must be pro rata because the patient can only recover the amount of attorney's fees attributable to the original suit brought by the doctor and not to the third party suit.

5. Divorce or Separation

As a practical matter, legal services attorneys will rarely be able to recover counsel fees in matrimonial actions since both the husband and wife are usually indigent. In a case where the husband is able to pay and a divorce, contested or uncontested, or separation is granted the wife, attorney's fees should be recovered.

6. Equitable Fund

Finally, there is one situation where the recovery of attorney's fees is permitted to a private attorney, but should not be permitted to a legal services attorney. When a party produces, protects, or increases a fund in which others will share, equity will provide him the cost of his counsel fees out of the fund produced. For example, if a legal services attorney should successfully bring a class action against a public utility for overcharges, a fund would be created which would be divided among the class of plaintiffs represented in the action. The fund created is in actuality the plaintiffs' recovery; consequently, since legal services cannot charge their clients a fee or take part of the recovery, no attorney's fees should be awarded out of this recovery. In this case the money is not coming from the losing party to the lawsuit but from the client himself.

82. See note 40 supra.
83. There are other instances in which a legal services attorney should be denied an award of counsel fees. Since claims of lawyers for legal services rendered in connection with a workmen's compensation award come out of the award itself, legal services attorneys cannot recover these fees. N.Y. Workmen's Comp. Law § 24 (McKinney 1965). Since legal fees payable to an attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veteran's Administration are deducted from benefits paid the claimant, these fees should not be recoverable by legal services. 38 U.S.C. § 3404(c)(3) (1970).
As can be seen, existing precedents provide legal services attorneys many opportunities to seek reasonable attorney’s fees either by motion, by counterclaim, or in a separate action. Generally and unexplainedly, few legal services attorneys make the request.  

IV. THE RECOVERY OF ATTORNEY’S FEES IN ALL CASES

Although legal services may presently rely on the above precedents to recover attorney’s fees, one may ask whether it would be more advantageous for legal services and the poor whom the program represents if there were a general rule permitting the recovery of counsel fees in all cases. The American rule which generally forbids the award of attorney’s fees to a successful litigant has been extensively criticized by commentators. The thrust of their criticism has generally been the same, i.e., that by not awarding counsel fees, the law does not make the successful litigant whole because he must pay out these expenses himself. In order to evaluate the merits of the American rule, one must briefly consider the rule’s historical roots, the justification offered for its continued existence and comparative practice in other countries.

A. History

In England prior to the reign of Edward I, a successful plaintiff in certain actions could recover the expenses of litigation—including attorney’s fees. In 1275, the Statute of Gloucester permitted the plaintiff in a wide range of cases to recover the costs of his “writ purchased,” which included the costs of an attorney. Similar treatment for defendants was slower in coming but by the provisions of the Statute of Westminster in 1606, defendants could recover costs whenever they were recoverable by a plaintiff. Suffice it to say that at the time of the American...
can Revolution, both the common law and equity courts of England awarded attorney's fees to a prevailing party. 90

The English rule, however, was not originally adopted in the United States; 91 for what reasons, it is not entirely clear. It has been suggested in partial explanation that the colonists were generally suspicious of lawyers and viewed the law as a readily understandable body of rules. 92 In the nineteenth century, however, some states did permit the award of attorney's fees by statute. 93 These statutes, however, expressed the award as a set dollar amount, 94 not leaving the amount of the award to the discretion of the court or expressing it as a percentage of the recovery. Thus, as the value of money declined, recoveries under these statutes eventually became only nominal. 95

Three conclusions can be drawn from this brief history. First, although the prohibition against awarding counsel fees was clearly the prevailing rule, it was by no means the universal rule in this country. Second, the historical reasons for the general American rule are either unclear or have little relevance today. The modern legal system is not readily understandable by a layman (if indeed it was in the eighteenth century) and lawyers, while perhaps not totally rehabilitated in the public eye, are no longer viewed with suspicion or hostility. Indeed, the very enactment of legislation in the nineteenth century permitting the award of attorney's fees may indicate that the original reasons for rejecting the British approach had already lost some of their vitality. Finally, the failure of those statutes which did award attorney's fees was caused by faulty drafting and not by any repudiation of the basic concept or propriety of making such awards.

B. Policy Justifications

Since the American rule has persisted long after the initial reasons for its adoption, new justifications must have been offered in its support. First, it has been argued that the prevailing party should not recover his counsel fees from his opponent because, unlike other damages, legal fees are too remote from, and not directly caused by, the latter's

90. McCormick § 60.
91. See Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); McCormick § 60.
92. Goodhart, supra note 88, at 873.
94. See id.
95. McCormick § 60.
wrongful conduct. Legal fees are certainly no more remote than court costs which have traditionally been granted in America. It has been suggested that due to today's complex legal system which necessitates the hiring of a lawyer, legal fees may be foreseen as a direct result of a wrong committed.

A second justification for the rule is based on the alleged difficulty in determining a proper fee. The Supreme Court has pointed out that if the amount of the fee is discretionary a special master might have to be appointed to determine the fee, possibly making the hearing more complex than the basic suit itself. It must be remembered, however, that there are several significant instances in which courts already make discretionary fee awards. There is nothing to indicate that the courts are now, or have been in the past, unable to determine proper awards, free from delay of excessive controversy. In addition, who is better able than the judge who has heard the evidence to evaluate the complexity of the case and the time expended by the lawyer? What the reasonable fee should be will depend primarily on these factors and the prevailing legal charges in the community. Finally, the court's burden of deciding one additional issue is easily counterbalanced by the granting of full compensation to a successful party.

It is also claimed that a change in the American rule might induce attorneys to charge excessive fees. Again, this fear does not seem to be borne out in the situations where counsel fees are presently recoverable. In any event, a change in the rule would only permit the recovery of reasonable attorney's fees. What is reasonable will be decided by a judge or a master (both presumably attorneys) after reviewing the case.

The final justification for not permitting the recovery of counsel fees, viz., that to do so would discourage litigants from bringing uncertain

97. See McCormick § 71, at 257.
98. See Oelrich v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872); St. Peter's Church v. Beach, 26 Conn. 354, 365 (1857); Frost v. Jordan, 37 Minn. 544, 36 N.W. 713 (1887).
100. See text accompanying notes 23-48 supra. See also Stoebuck, supra note 22, at 207-11.
101. One judge stated that with respect to attorney's fees "it is possible to arrive at a proper charge in almost any case without much difficulty." In re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931). The results of this process in the cases where fees are presently allowed "have not aroused serious opposition." Comment, Distribution of Legal Expense Among Litigants, 49 Yale L.J. 699, 711 (1940).
102. McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619, 639 (1931).
claims, would appear, in fact, to support a change. There are too many cases in American courts today—a good portion of which, it is suggested, are frivolous and unsubstantial. If a change in the general rule would discourage such suits, it would be of considerable benefit to the administration of justice. Of course, it is conceivable that a change in the rule could discourage the initiation of some substantial suits, especially by the poor. The possibility of loss and the added burden of paying his opponent's counsel fees might discourage a poor person from bringing even a meritorious suit. The present rule, however, may have just as inhibitory an effect on the vast majority of potential litigants, including the poor. Under a rule preventing the award of attorney's fees, the successful party is never fully compensated because he must always pay his lawyer's fees, which may exceed or approximate the total recovery in the action. As the cost of legal fees begins to approach the anticipated recovery, the incentive to bring the suits diminishes.

C. Comparative Practice

Research has not disclosed one country which follows the American rule. On the contrary, Austria, England, France, Hungary, Italy, Sweden, and Switzerland award legal fees to the prevailing party, although the manner in which the awards are made varies widely. Professor Ehrenzweig has stated that "this country now is probably alone in failing to allow counsel fees to the victorious litigant."

From this brief analysis, it appears that the American rule: (1) has questionable historical roots; (2) is unsupportable on policy grounds; and (3) has not been adopted in other legal systems.

103. Ehrenzweig, supra note 22, at 797; Kuenzel, supra note 22, at 82.
104. Kuenzel, supra note 22, at 82-83.
105. See id. at 78.
106. Ehrenzweig, supra note 22, at 797.
107. Id.; Kuenzel, supra note 22, at 82-83.
109. See Goodhart, supra note 88, at 851-54.
115. Ehrenzweig, supra note 22, at 797.
V. THE EFFECT OF ALLOWING THE RECOVERY OF ATTORNEY’S FEES IN ALL CASES

Assuming the rule were changed to permit the award of reasonable attorney’s fees in every case, what effect would such a change have on legal services attorneys and the poor whom they represent?

A. Effect on Legal Services

As stated previously in this article, a rule permitting the award of attorney’s fees to the prevailing party would provide legal services with an alternative source of funds, helping to alleviate financial and political pressure. Likewise, such a rule would make every case a contingent fee case, thereby encouraging a large segment of the private bar to handle many “poverty” cases.

Of course, it might be argued that a change in the American rule would obviate the need for legal services because the private bar could then conceivably handle every case on a contingent fee basis. This argument overlooks two considerations. First, a rule permitting the recovery of reasonable attorney’s fees does not necessarily mean a recovery of the entire fee charged by a lawyer. It might be uneconomical for a private lawyer to take a small landlord-tenant case or a complex constitutional case because in both instances the fee would probably not be commensurate with the time or research needed to try the case. In the landlord-tenant action, although the amount of legal research and work required might be minimal, the time spent in court waiting for the case to be called might be prohibitive. Likewise in the constitutional case, the time spent in research alone might make it uneconomical for a private lawyer to take it. Second, a large part of legal services practice centers around administrative hearings before federal, state, and city agencies for which no award of attorney’s fees may be available.

116. To effect this change, it would probably be necessary to make appropriate provisions by statute. For a proposed statute dealing with the award of attorney’s fees see Stoebuck, supra note 22, at 211-18.

117. See text accompanying notes 17-20 supra. It is impossible to estimate exactly how much additional revenue might become available to legal services if counsel fees were awarded to the prevailing party in all cases. In the first year of operation, however, legal services won 75% of all cases that went to trial. Note, Litigation Costs: The Hidden Barrier to the Indigent, 53 Geo. L.J. 516, 516 n.1 (1968). Even if these statistics may vary every year, legal services will still receive a substantial amount of new revenue.

118. Even with every American lawyer shouldering a part of the responsibility for representing the poor, however, it has been estimated that there would still be a need for more lawyers. See note 9 supra.

119. For example, MFY Legal Services, Inc., a New York legal services corporation, reports that approximately 20% of their cases fall in this area. Annual Report of Mobilization for Youth to the Appellate Division, First Department 14 (1970).
One last issue should be considered. It could be argued that legal services should not benefit from a rule permitting the award of attorney's fees in all cases. As demonstrated earlier in this article, awarding counsel fees to legal services makes sense when the reason for the award is to punish the losing party or to shift the cost of policy enforcement to those who violate the particular policy.\textsuperscript{120} Some might say that the recovery of counsel fees by legal services makes no sense in cases where the sole reason for the award is compensation of the prevailing party (who receives free legal assistance). To answer the argument, two facts must be kept in mind. First, the actual number of cases faced by a legal services attorney where compensation would be the sole reason for awarding attorney's fees would probably be small. In cases involving questions of consumer protection, fair employment, and even decent housing, counsel fees could be awarded on the ground that the costs of enforcing these policies must be borne by those who violate them.\textsuperscript{121} Second, even in cases where compensation of the prevailing party is the sole reason for the award, basic policy reasons still dictate the recovery. Legal services for the poor is free only to the indigent person. Someone has to pay for it and that someone—the taxpayer—should be compensated, the compensation being the increased effectiveness of the legal services program.

B. Effect on the Poor

Although a change in the rule might strengthen legal services and involve more private attorneys in representing the poor, it might at the same time discourage the poor from bringing suits by exposing them to a possible judgment for their opponent's legal fees if they lose the case.\textsuperscript{122} One judge has said that even if the present system is deficient in some respects, it is of benefit to the poor since "the doors of our courts are not closed to the small litigant who cannot risk being ruined by the imposition of his adversary's full expenses."\textsuperscript{123}

A recent New York case\textsuperscript{124} presents one solution to the problem. A landlord successfully sued his tenant for back rent and, in addition, sought to recover his attorney's fees under a clause in the lease which obligated the tenant to reimburse the landlord for counsel fees incurred in such an action. Declining to award attorney's fees, the court stated that "[s]trong public policy consideration requires that in a case such as

\textsuperscript{120} See notes 49-53 supra and accompanying text.
\textsuperscript{122} See text accompanying note 106 supra.
this where the tenant is an indigent represented by the Legal Aid Society, such tenant should not be made or required to pay the landlord's counsel fees under such a standard provision as we have here.\textsuperscript{125} To apply the lease provision against the tenant "would simply be to increase the judgment and make it even more difficult for the tenant to pay her rent."\textsuperscript{126} The court thus suggested that, assuming the prevailing party's attorney's fees are to be paid by the losing party, the harm done by placing this extra charge on the poor outweighs the benefit of compensating the prevailing party for his legal fees.

In light of this case, a rule should be developed that whenever the losing party is poor,\textsuperscript{127} he should not be required to pay the attorney's fees of the prevailing party, unless the court finds that the poor person has acted in bad faith in either bringing or defending the suit.\textsuperscript{128} Such a rule is clearly justified on policy grounds and may be mandated by the fourteenth amendment.

As Mr. Justice Harlan stated in \textit{Boddie v. Connecticut}:\textsuperscript{129} "It is to courts ... that we ultimately look for the implementation of a regularized, orderly process of dispute settlement."\textsuperscript{130} Since a society should encourage the peaceful resolution of grievances in its courts, rules can be tested to see whether they further this policy objective. Clearly, a rule that would force the losing party to bear all legal costs might deter a poor person from suing even on a meritorious claim and to that extent is bad.\textsuperscript{131} While justice is hopefully not a matter of luck,\textsuperscript{132} there is an

\textsuperscript{125} Id. at 674, 283 N.Y.S.2d at 233.
\textsuperscript{126} Id.; cf. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331 (1948). In Adkins, the Court stated: "The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution." Id. at 339-40.
\textsuperscript{127} For a possible standard see note 4 supra.
\textsuperscript{128} As in the case of changing the American rule to permit the recovery of attorney's fees, a provision exempting the poor who have acted in good faith from paying such fees could be incorporated into a statute. The general equity powers of a court could affect similar results but, for uniformity of result, the adoption of a statute would seem preferable. Of course, even under a statute the court would still determine whether the indigent has acted in good faith in suing or defending the action.
\textsuperscript{129} 401 U.S. 371 (1971).
\textsuperscript{130} Id. at 375.
\textsuperscript{131} In discussing the poor person's limited access to European courts, one commentator has stated: "And it is indeed little wonder that those who are systematically excluded from the official justice are turning to violent methods of self help." Cappelletti, Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe, 69 Mich. L. Rev. 847, 873 (1971).
\textsuperscript{132} See Goodhart, supra note 88, at 876-77.
element of risk in every case. Faced with these inherent risks and
ignorant of court procedures, a poor person may decide not to sue rather
than chance losing and being adjudged liable for his opponent’s legal
fees. If there is one segment of society which should be encouraged to
vindicate its rights, it is the economically disadvantaged who are ex-
plotted to a greater degree than the more affluent.

As for the fourteenth amendment, the Supreme Court has held that a
civil litigant may not be denied an opportunity to be heard. Likewise,
the Court has found that poverty may be the basis for invidious dis-
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133. See Schroeder v. City of New York, 371 U.S. 208, 212 (1962); Mullane v. Central
Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Brinkerhoff-Farís Trust & Savings
Co. v. Hill, 281 U.S. 673, 682 (1930); Hovey v. Elliott, 167 U.S. 409, 416 (1897); Orchard

134. See Gardner v. California, 393 U.S. 367 (1969); Rinaldi v. Yeager, 384 U.S. 305
(1966); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963);
Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956). In reaching this
conclusion the Court has differed with an earlier view which held that “[t]he mere state of
being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or

135. 401 U.S. at 381-83. The Boddie Court did state, however, that “[w]e do not
decide that access for all individuals to the courts is a right that is, in all circumstances,
guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise
may not be placed beyond the reach of any individual . . . .” Id. at 382-83.

136. Id. at 387 (Brennan, J., concurring).

JJ., concurring). “[T]he promise of equal justice for all would be an empty phrase for
the poor if the ability to obtain judicial relief were made to turn on the length of a per-
If, then, the poor litigant who has acted in good faith should be exempt from having to pay the prevailing party's legal fees, who should bear the cost of these fees—the prevailing party himself or the state? To force the non-indigent prevailing party to absorb the cost of his legal fees might arguably violate the equal protection clause. For a classification to be reasonable and not violative of the equal protection clause, it must include "all persons who are similarly situated with respect to the purpose of the law." What is the purpose of the rule exempting the poor litigant who has acted in good faith from having to pay the prevailing party's legal fees? Clearly it is to encourage him to use the courts as a method of resolving disputes. This is a benefit to society as a whole and the cost of achieving such an objective should be borne by the taxpayer and not placed solely on the shoulders of non-indigent litigants who prevail in their suits against the poor. In this sense, a rule forcing the non-indigent prevailing party to absorb his legal expenses may be considered "under-inclusive" since many people who benefit from the rule are not similarly forced to bear their fair share of the costs. Even if a rule requiring the non-indigent prevailing party to absorb his expenses could pass constitutional muster, as a matter of fairness the state should not adopt such a rule. By winning the action the prevailing party has demonstrated that he has a presumptively valid claim or defense against the poor person. It would seem equitable, then, for the state to create a fund to pay the attorney's fees of parties prevailing in suits involving the indigent.

138. Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 346 (1949). The classification imposed by a law must be reasonable; i.e., it must be based upon real differences which bear a proper and just relation to the things in respect to which the classification is imposed. See McLaughlin v. Florida, 379 U.S. 184 (1964); Truax v. Corrigan, 257 U.S. 312 (1921); Southern Ry. v. Greene, 216 U.S. 400 (1910); Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897); Barbier v. Connolly, 113 U.S. 27 (1885).


140. The cost to the state may be mitigated by certain factors. First of all, a rule that awards attorney's fees to the prevailing party will deter frivolous lawsuits, thereby easing court congestion and saving the state money in this regard. Secondly, the state need only pay the reasonable attorney's fees of opposing counsel where the indigent has brought a meritorious suit or had a meritorious defense and lost. Whenever an indigent litigant acts in bad faith, the state should not pay. Finally, even with paying those additional expenses, the cost to the state would be less than that which would result from recent proposals that the state guarantee an indigent the right to counsel in civil cases. See Goodpaster, The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts, 56 Iowa L. Rev. 223, 248 (1970); O'Brien, Why Not Appointed Counsel in Civil Cases? The Swiss Approach, 28 Ohio State L.J. 1 (1967); Willging, Financial Barriers and the Access of Indigents to the Courts, 57 Geo. L.J. 253, 286 (1968); Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966); Note, Discriminations Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435, 450-52.
It should be emphasized, however, that these considerations only support a rule exempting the poor who have acted in *good faith* from paying the prevailing party's legal fees. An indigent who sues or defends in bad faith should be forced to pay his adversary's legal fees as a penalty and the state should not underwrite such expenses.\textsuperscript{141} By paying fees under such circumstances, the state would actually encourage frivolous and groundless suits.

**VI. CONCLUSION**

It would seem that legal services attorneys may presently recover counsel fees in many situations under existing precedents. In order to encourage the participation of the private bar in the representation of the poor, legal services has an affirmative obligation to help make new precedents in this area. Hopefully the antiquated American rule which forbids the award of attorney's fees to the successful party will continue to be eroded and will ultimately be changed. If this occurs, the private bar could shoulder a significant share of the burden of representing the indigent and allow legal services to concentrate their energies on those cases which, for whatever reason, the private bar cannot or will not handle.

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(1967); Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967).

As has been demonstrated, a rule awarding counsel fees in all cases may encourage the private bar to handle many of these cases on a traditional contingent fee basis, thereby obviating the need for the state to finance attorneys for the poor.

141. Obviously, someone who is "judgment-proof" cannot be forced to pay. If this is the case, there will at least be an unsatisfied judgment outstanding against him which can be executed when and if he is ever able to pay.

It has been suggested that since "abusive practices really emanate from the attorney," legal services should pay the opposing party's counsel fees where the action "was extremely frivolous, or where unduly dilatory and time-consuming tactics were adopted." Clark, Legal Services Programs—The Caseload Problem, or How to Avoid Becoming the New Welfare Department, 47 J. Urban L. 797, 806 (1970).