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discrimination foster each other in the United States . . . .[144]

Each of the above quoted factors would be eliminated through suits brought against that particular discrimination without school desegregation cases attempting to bear an unbearable load: the long-range elimination of virtually every form of racial discrimination.

The victims of segregation will neither understand nor accept the distinction between de jure and de facto segregation. Although the state action limitation must be maintained if the language of the fourteenth amendment is to have any meaning, the segregation which remains throughout the United States is evidence of the fact that previous treatment of segregation has been less than effective. Indeed, as discriminatory school policies of the past become more and more distant without corresponding reductions in school segregation, it becomes obvious that in providing for greater school desegregation, the courts are treating a symptom rather than its disease. Where school policies are neutral, but school segregation remains through segregated residential patterns, the courts should seek a vehicle which promises to relieve those residential patterns. As school segregation increasingly reflects residential patterns formed by housing and employment discrimination rather than school discrimination, means must be sought to relieve the inequality in housing and employment. In short, *Brown I* and the resultant school desegregation cases have done much to eliminate assignment on the basis of race, *one* of the causes of racial imbalance in schools. Other, more direct vehicles should be sought to eliminate the other causes.

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ATTORNEY FEES IN SCHOOL DESEGREGATION CASES

In *Bradley v. School Board (Fees)*[1] the City of Richmond School Board was ordered to pay in excess of $43,000 for the attorney fees of opposing counsel in the ten-month school desegregation case *Bradley v. School Board (Consolidation).*[2] The amount allotted for attorney fees should not have been too surprising; desegregation litigation is particularly expensive due to its protracted nature as well as its need for specially

[144]Bradley v. School Bd. (Consolidation), No. 3353 at 253 (E.D. Va. Jan. 5, 1972).

[1]53 FR.D. 28 (E.D. Va. 1971).
[2]No. 3353 (E.D. Va., Jan. 5, 1972).

qualified attorneys.[3] The allowance itself, however, was somewhat unusual, in that attorney fees, absent a statute or contractual agreement to the contrary, are normally borne by the individual litigants.[4] Because the onus of attorney fees may well have a bearing on the amount of such non-fee-generating litigation, and thus the speed with which school desegregation is accomplished, the topic of attorney fees in desegregation cases deserves attention.

School desegregation cases were non-existent prior to *Brown v. Board of Education (Brown I)*,[5] wherein the Supreme Court found unconstitutional the separate but equal doctrine[6] as applied to public education. In so ruling the Court realized that the problems surrounding the desegregation of entire school systems would be of "considerable complexity;"[7] it therefore postponed consideration of a remedy until such time as there could be a full hearing on possible forms of relief. In *Brown v. Board of Education (Brown II)*[8] the Court proposed its solution: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."[9] The Court thus anticipated litigation and relied upon the equitable powers of the district courts to shape judgments in a manner consistent with both the administrative needs of individual school systems and the constitutional rights of all children to a desegregated education.[10] As a proposition of common law, however, these judgments would not include a taxing of attorney fees upon the loser as costs, inasmuch as American courts are not normally competent to provide such relief in law or equity.[11]

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[3]The need for specially qualified attorneys is not only a factor of the specialization required but is also related to the reluctance of many attorneys to handle such litigation. *See* NAACP v. Button, 371 U.S. 415, 443 (1963); Sanders v. Russell, 401 F.2d 241, 244-45 (5th Cir. 1968).

[4]Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-19 (1967); Stewart v. Sonneborn, 98 U.S. 187, 197 (1878); Philp v. Nock, 84 U.S. (17 Wall.) 460 (1873); Flanders v. Tweed, 82 U.S. (15 Wall.) 450, 452-53 (1872); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 230-31 (1872); Teese v. Huntingdon, 64 U.S. (23 How.) 2, 8-9 (1859); Day v. Woodworth, 54 U.S. (13 How.) 363, 370-72 (1851); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

[5]347 U.S. 483 (1954).

[6]This doctrine was originally upheld in Plessy v. Ferguson, 163 U.S. 537 (1896).

[7]Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

[8]349 U.S. 294 (1955).

[9]*Id.* at 299.

[10]*Id.* at 300.

[11]Cases cited note 4 *supra. See generally* Goodhart, *Costs*, 38 YALE L.J. 849 (1929) (hereinafter Goodhart). The American theory has been the subject of extensive criticism. *See* Avilla, *Shall Counsel Fees be Allowed?*, 13 J. ST. B. CALIF. 42 (1938); Ehrenzweig,

The rationale behind this rule is clear. An important objective of American jurisprudence is unhindered access to the courts. It is argued that the taxing of attorney fees as costs upon the loser would discourage litigation, inasmuch as those of moderate means would be unwilling or unable to afford the risk of losing.[12] Even if a party remained willing to litigate, a determination of attorney fees by the courts would be time-consuming and expensive;[13] moreover, victorious attorneys might well feel justified in padding their expenses in anticipation of the fact that their client would not bear the expense. Indeed, the very fact that the amount of attorney fees would be evaluated by a judge seemingly intrudes upon a theory of justice which prides itself on its respect for written law rather than the unfettered discretion of individuals.[14] And finally, earlier thinking on the possibility of awarding attorney fees as a part of costs was probably influenced by colonial individualism which looked upon the law as an understandable body of rules not requiring an attorney's expertise.[15]

It can, of course, be argued that the use of attorney fee awards would prod out-of-court desegregation,[16] and thus further the ultimate goal of *Brown I*. This contention, however, disregards the assumption of the Supreme Court that reasonable minds will differ as to a school board's method and timing of desegregation,[17] as well as ignores the proscription of *Brown II* that the courts be used to test the constitutionality of desegregation plans.[18] It is thus the implicit assumption in a school desegregation case, or any case for that matter, that no legal interest in the abstract is any more important than any other legal interest, and that there is at least some doubt as to which legal interest will ultimately prevail. American

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Reimbursement of Counsel Fees and the Great Society, 54 CALIF. L. REV. 792 (1966); Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 J. ST. B. CALIF. 107 (1951); Kuenzel, *The Attorney's Fee: Why Not A Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Stirling, *Attorney's Fees: Who should Bear the Burden?*, 41 J. ST. B. CALIF. 874 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966).

[12]*See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); *cf.* Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964); *id.* at 236-39 (Goldberg, J., concurring).

[13]Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872); Monolith Portland Midwest Co. v. Kaiser Alum. & Chem. Corp., 407 F.2d 288, 298 (9th Cir. 1969).

[14]*See* Goodhart at 877.

[15]For a critical view of this historical attachment to each litigant paying his own attorney fees see Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

[16]Text accompanying notes 64-67 *infra*.

[17]The Supreme Court in Brown v. Board of Educ., 349 U.S. 294 (1955), noted a number of different variables which might affect the manner in which a school board would want to approach desegregation. *Id.* at 295. Because of these variables the Court felt compelled to provide for a flexible standard in evaluating constitutionality.

[18]Brown v. Board of Educ., 349 U.S. 294, 299 (1955).

courts make this assumption in the absence of a statute or contractual provision to the contrary.[19]

In contrast, the enactment of a statute allowing the taxation of attorney fees as costs rebuts the presumption that all interests litigated are legally indistinguishable. Often Congress will declare that the vindication of certain legal interests supersedes the policy considerations supporting each litigant's bearing his own attorney fees.[20] Congress provided in section 2000a-3(b) of the Civil Rights Act of 1964 that counsel fees in a litigation alleging discrimination in public accommodations may be awarded at the Court's discretion.[21] In *Newman v. Piggie Park Enterprises, Inc.*[22] the Supreme Court interpreted this section as an expression of congressional intent to encourage Title II litigation and to punish those who would assert any legal justification for discriminatory conduct.[23] The initiator of a Title II action was depicted as a " 'private attorney general,' vindicating a policy that Congress considered of the highest priority."[24] Significantly, the Court rejected the theory that section 2000a-3(b) should be interpreted as a mere attempt to discourage defenses of no legal merit;[25] the court noted that an attorney fee award based on an unmeritorious defense is distinguishable from an attorney fee award premised on congressional interest in encouraging litigation.[26]

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[19]*See* cases cited note 4 *supra.*

[20]*See, e.g.,* Packers and Stockyards Act, 7 U.S.C. § 210(f) (1970); Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b) (1970); Clayton Act, 15 U.S.C. § 15 (1970); Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); Trust Indenture Act, 15 U.S.C. § 77www(a) (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Copyright Act, 17 U.S.C. § 116 (1970); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Servicemen's Readjustment Act, 38 U.S.C. § 1822(b) (1970); Communications Act of 1934, 47 U.S.C. § 206 (1970); Interstate Commerce Act, 49 U.S.C. § 16(2) (1970).

[21]42 U.S.C. § 2000a-3(b) (1970). It should be noted that the statute accomplished this feat by describing such attorney fees as a part of the "cost" of the litigation. Costs are traditionally paid by the loser of an action at law or equity, in the court's discretion. *Cf.* 28 U.S.C. §§ 1920, -21, -23, -27 (1970).

[22]390 U.S. 400 (1968).

[23]*Id.* at 402.

[24]*Id.*

[25]42 U.S.C. § 2000a-3(b) (1970) was previously interpreted in Bell v. Alamatt Motel, 243 F. Supp. 472 (N.D. Miss. 1965), to be a non-punitive measure to discourage unmeritorious litigation. *Id.* at 474.

[26]390 U.S. at 402 n.4. *See also* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970). In *Parham* the court, faced with a provision similar to § 2000a-3(b), permitted the award of attorney fees in litigation involving discriminatory hiring practices. Applicant was found not to have been refused work for racial reasons, although his bringing the action was construed as a "catalyst" which prompted a more vigorous fair employment program by the company. Interestingly, the court of appeals permitted applicant to collect attorney fees for the prosecution of his appeal even though it resulted in neither an injunction nor an award of damages. Since the appeal vindicated no rights, it

Given the absence of statutory authorization for the award of attorney fees, the distinction becomes more than a matter of semantics in discussing their allocation in desegregation cases. The Supreme Court recognized in *Sprague v. Ticonic National Bank*[27] that courts in equity have always possessed the authority to award attorney fees when the special circumstances of a case were such that justice required the relief. Though "such allowances are appropriate only in exceptional cases and for dominating reasons of justice,"[28] it is an accepted rule that an unmeritorious defense constitutes such an exceptional case.[29] Thus, while a right in law to attorney fees must look to the statute creating that right for a guide as to a fee allocation, an award of attorney fees in equity looks to the justness of the winner's having to pay his own fees in the litigation in order to determine if a special assessment should be paid by the loser.[30] Since there is no statutory right to court-awarded attorney fees in school desegregation cases, and because there is a significant difference between the conditions under which a court may award attorney fees, depending upon the existence or non-existence of a permitting statute, it is, therefore, through the principles of equity alone that attorney fees may be awarded in school desegregation cases.[31]

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would appear that Parham was reimbursed for having brought the initial action, and the company was punished for having made such a litigation initially necessary. In addition the company was punished by having to pay all attorney fees for the appeal even though it accomplished nothing. This ruling can be interpreted as encouraging appeals even when the possibility of success is nonexistent.

[27]307 U.S. 161 (1939).

[28]*Id.* at 167.

[29]*See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.4 (1968); Undersea Eng'r & Constr. Co. v. International Tel. & Tel. Corp., 429 F.2d 543 (9th Cir. 1970); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951).

[30]In Brewer v. School Bd., No. 71-1900 (4th Cir., Mar. 7, 1972) an award of attorney fees was justified on a somewhat different equitable basis. In *Brewer* the Norfolk School Board was ordered to pay the cost of busing students to achieve racial balance. The court found that the School Board was not defending the suit in bad faith but nonetheless taxed the plaintiff's attorney fees to the school board. It was noted that where one litigant preserves a fund which will be available to others in his class, the fund will reimburse the successful litigant; in theory, by assessing the costs to the fund all those who benefit from the litigation pay for its prosecution. Though no common fund was preserved in *Brewer*, the fact that each student would receive a "pecuniary benefit" was held to constitute an exceptional circumstance which approached common fund status. Because it would have been impractical to collect from all students who benefited from the litigation, the court taxed the defendant, inasmuch as the school board was in the best position to absorb the expense. This approach may have some effect on the taxation of attorney fees in busing cases, but it should not affect most desegregation litigation inasmuch as there is usually no question of a common fund being created.

[31]*Contra*, Bradley v. School Bd. (Fees), 53 F.R.D. 28, 41 (E.D. Va. 1971). For a discussion of this opinion see text accompanying notes 67-71 *infra*.

The first instance of attorney fees being awarded in a school desegregation case was *Bell v. School Board.*[32] There the Fourth Circuit Court of Appeals, noting the Richmond School Board's "long continued pattern of evasion and obstruction" in failing to initiate desegregation plans, overruled the district court's refusal to grant attorney fees as an abuse of discretion.[33] The court relied principally on *Rolax v. Atlantic Coast Line Railroad Co.*[34] in its decision. In *Rolax,* also a Fourth Circuit opinion, the attorney fees of an indigent black worker had been taxed against the union which unjustly discriminated against him. The court, in approving the taxation, first held that the issues litigated did not present a real controversy, inasmuch as the defenses had been refuted by prior litigation,[35] and further noted the economic disparity between the plaintiff and union defendant.[36] The *Rolax* case thus presented two factors justifying the attorney fee award.

Bell, though relying on *Rolax,* made no note of an economic disparity between plaintiff and defendant. It thus becomes important to analyze a second case cited authoritatively in *Bell: Vaughan v. Atkinson.*[37] This Supreme Court case dealt with a suit in admiralty in which attorney fees were awarded to a seaman who had been forced by his employer's recalcitrance to bring suit for maintenance and cure. It was the company's "willful and persistent" default which justified the award;[38] however, the award was granted as a matter of damages at law, rather than relief in equity.[39] *Bell's* reliance on this decision suggests two possibilities. First, the court may have been trying to apply the holding of *Vaughan* and thus permitting attorney fees to be summarily awarded by the court. This theory is difficult to support in that the Supreme Court in *Vaughan* relied on the tradition of damages in admiralty,[40] whereas in *Bell* the court of appeals proceeded exclusively on an equitable theory.[41] A more satisfactory interpretation of *Vaughan's* presence in *Bell* lies in its utility as an isolater of a defendant's conduct as the sole premise for an attorney fee award. Whereas *Rolax* involved both economic disparity and a defendant's bad faith in forcing a plaintiff to litigate clearly established rights,[42]

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[32]321 F.2d 494 (4th Cir. 1963).
[33]*Id.* at 500.
[34]186 F.2d 473 (4th Cir. 1951).
[35]*Id.* at 478.
[36]*Id.* at 481.
[37]369 U.S. 527 (1962).
[38]*Id.* at 530-31.
[39]*Id.* at 530.
[40]*Id.*
[41]Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963).
[42]Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951).

Vaughan involved only the latter.[43] Thus, in *Bell* it was the Richmond School Board's having made litigation necessary, despite the clear legal duty to desegregate, that triggered the equitable award of attorney fees.

This justification for an equitable award of attorney fees was elucidated in *Bradley v. School Board (Free Choice).*[44] There the Fourth Circuit refused to increase an equity award of seventy-five dollars for attorney fees, stating: "Attorneys' fees are appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy."[45] In other words, it is only the school board's malevolent conduct forcing an individual to litigate clearly established rights that will justify the taxation of attorney fees.[46] Such a litigation, though necessary in the practical sense that it is required to force school board compliance with constitutional requirements, is in principle unnecessary in that the school board is fully aware of its constitutional duty prior to the litigation. On the other hand, a good faith litigation of the constitutional means of desegregation, even though giving rise to substantial relief, is not a proper basis for the equitable remedy.[47] A finding of good or bad faith is a discretionary determination of the trial court.[48]

The award of attorney fees in school desegregation cases is, therefore, no more than a court's evaluation of a school board's reasonableness in litigating the constitutionality of a particular desegregation plan or its application.[49] The defense of an issue which is no longer open to doubt

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[43]Vaughan v. Atkinson, 369 U.S. 527 (1962).

[44]345 F.2d 310 (4th Cir.), *vacated on other grounds,* 382 U.S. 103 (1965).

[45]*Id.* at 321.

[46]Conduct which forces an unnecessary litigation should be distinguished from vexatious conduct of an attorney in the prosecution of an action. In the latter circumstance the court may tax unreasonable costs to the guilty attorney. 28 U.S.C. § 1927 (1970).

[47]*See* Bradley v. School Bd. (Free Choice), 345 F.2d 310, 321 (4th Cir.), *vacated on other grounds,* 382 U.S. 103 (1965). The amount of fees is usually a "reasonable" amount. The dissent in *Bradley (Free Choice)* suggested that the amount could be evaluated by looking at the school board's expenses. *Id.* at 324. The paltry sum of $75 was reasonable because the *Bradley* case involved primarily a constitutional check on the "free choice plan" and only collaterally a specific abuse of the plan. The district court awarded attorney fees for the unreasonable defense of the specific abuse.

[48]Whitley v. City Bd. of Educ., No. 71-1843 at 4-5 (4th Cir. Mar. 21, 1972); Brewer v. School Bd., No. 71-1900 at 14 (4th Cir., Mar. 7, 1972); Cappel v. Adams, 434 F.2d 1278, 1279-80 (5th Cir. 1970); Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970); Bradley v. School Bd. (Free Choice), 345 F.2d 310, 321 (4th Cir.), *vacated on other* grounds, 382 U.S. 103 (1965).

[49]In Bradley v. School Bd. (Free Choice), 345 F.2d 310 (4th cir.), *vacated on other grounds,* 382 U.S. 103 (1965), the court refused to award attorney fees to the extent that the action constituted a litigation of the constitutionality of the free choice plan, inasmuch as there was a real dispute. However, the court upheld the district court award of $75 which

constitutes an unmeritorious defense and is, therefore, an appropriate instance for an attorney fee award.[50] Each case is evaluated upon its own merit.[51] Significantly, *Bell* is the only case to date in which a district court has been overruled in its determination to permit or to disallow the equitable award.[52] Though on occasion a reviewing court has noted that the specific circumstances of the case would have justified an award of attorney fees, such court has also noted that a finding of bad faith was within the discretion of the trial court and not to be overturned in the absence of blantant abuse.[53]

Thus it appears that the *Bell-Bradley* standard of unnecessary litigation, though criticized,[54] is firmly entrenched in the restraint of equity.

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represented an assessment upon the school board for litigating a patently unconstitutional abuse of the plan. *Accord,* Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966). However, in some instances the courts will not award attorney fees for a collateral issue. It is unclear whether this is a factor of the court's unwillingness to find an unnecessary litigation on the issue or an unwillingness to impose attorney fees for such a small portion of the action. *See* Betts v. County School Bd., 269 F. Supp. 593 (W.D. Va. 1967); Wright v. County School Bd., 252 F. Supp. 378 (E.D. Va. 1966).

[50]*See* Whitley v. City Bd. of Educ., No. 71-1843 (4th Cir. Mar. 21, 1972); Nesbit v. Statesville City Bd. of Educ., 418 F.2d 1040 (4th Cir. 1969); Cato v. Parham, 403 F.2d 12 (8th Cir. 1968); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968); Hill v. Franklin County Bd. of Educ., 390 F.2d 583 (6th Cir. 1968); Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966); Griffin v. County School Bd., 363 F.2d 206 (4th Cir.), *cert. denied,* 385 U.S. 960 (1966); Bradley v. School Bd. (Free Choice), 345 F.2d 310 (4th Cir.), *vacated on other grounds,* 382 U.S. 103 (1965); Griffin v. Board of Supervisors, 339 F.2d 486 (4th Cir.), *rev'd on other ground sub nom.,* Griffin v. County School Bd., 377 U.S. 218 (1964); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963).

[51]*See* Dyer v. Love, 307 F. Supp. 974 (N.D. Miss. 1969). *Dyer* was a voter reapportionment suit which dealt collaterally with the issue of attorney fees in equity. The court, after granting attorney fees, noted "that the allowance of an attorney's fee herein is not to be considered as a precedent for the allowance of fees in other cases of similar import. Every case must stand upon its own bottom." *Id.* at 987.

[52]It should be noted, however, that the Fourth Circuit Court of Appeals has re-evaluated the specifics of an award under extenuating circumstances. In Griffin v. County School Bd., 363 F.2d 206 (4th Cir.), *cert. denied,* 385 U.S. 960 (1966), the court disallowed a district court's allocation of taxable costs among defendants on the grounds that such a determination was for the parties *inter se. Id.* at 212. The court also refused to adopt the district court's determination that the failure of plaintiffs to assert their claim in state rather than federal courts should act to reduce the equitable award.

[53]Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970); Cato v. Parham, 403 F.2d 12, 16 (8th Cir. 1968); Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965); Bradley v. School Bd. (Free Choice), 345 F.2d 310, 321 (4th Cir.), *vacated on other grounds,* 382 U.S. 103 (1965). *See also* Hill v. Franklin County Bd. of Educ., 390 F.2d 583 (6th Cir. 1968). In *Hill* the court of appeals found an attorney fee award of one thousand dollars "somewhat disproportionate" to a judgment of $286.80, but not an abuse of discretion.

[54]*See* Felder v. Harnett County Bd. of Educ., 409 F.2d 1070, 1076 (4th Cir. 1969) (Sobeloff and Winter, JJ., dissenting); Clark v. Board of Educ., 369 F.2d 661, 670-71 (8th

Indeed, one court of appeals reasoned with considerable logic that the willingness of Congress to provide for attorney fees in certain civil rights cases should be interpreted as a restraining force on the court's inclination to relax the standards of equity in other civil rights areas.[55] It is, therefore, asserted that any "movement" to increase the liberality with which attorney fees are awarded in school desegregation cases must come from the lower court's subjective evaluation of desegregation litigation, rather than from a change in the actual standard of unnecessary litigation. The puzzling aspect of school desegregation litigation in the 1970's is not the strict requirements of equity but rather the unwillingness of federal courts to find that those requirements have been met.

The Supreme Court found in 1954[56] that segregated educational facilities were unconstitutional and in 1955[57] ordered school boards to desegregate. Until 1963 no school board was found guilty of unreasonable obstinacy in using the courts to avoid desegregation;[58] possibly the meaning of segregation was so unclear that any remedial relief would have been unjust.[59] Even today there are problems in determining the lengths to which a school board must go in providing or insuring an integrated education for all children.[60] Nonetheless, in situations where a school board is using litigation to delay, rather than define, the constitutional duty to desegregate, the justification for awarding attorney fees becomes increasingly compelling.[61]

Cir. 1966); Bradley v. School Bd. (Free Choice), 345 F.2d 310, 324-25 (4th Cir.), *vacated on other grounds*, 382 U.S. 103 (1965) (Sobeloff and Bell, JJ., concurring and dissenting in part).

[55]Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965). *See also* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). But it has also been argued that when the same circumstances which first moved Congress to enact legislation exist there is a rationale for using equity to make the attorney fee award even in the absence of a statute. *See* Bradley v. School Bd. (Fees), 53 F.R.D. 28, 41-42 (E.D. Va. 1971).

[56]Brown v. Board of Educ., 347 U.S. 483 (1954).

[57]Brown v. Board of Educ., 349 U.S. 294 (1955).

[58]Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963).

[59]In theory segregation is easily defined; in practice distinctions may be very subtle. Though few would argue that some school boards have been less than subtle in their opposition to integration, it must also be realized that the courts have had difficulty in pinning down the exact nature of unconstitutional segregation. Under such circumstances it is difficult to argue that a school board is not entitled to a clarification in the form of an adjudication. *See generally* Note, *School Desegregation and Affirmative Equitable Relief:* Swann *and Beyond, supra* this issue.

[60]*Cf.* Swann v. Board of Educ., 402 U.S. 1 (1971); State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Green v. County School Bd., 391 F.2d 430 (1968).

[61]It has recently been suggested that attorney fees be awarded as a matter of course in all school desegregation cases in the absence of a showing that such an award would be unjust. It was reasoned that the duty and means of desegregation have been so well defined since 1954 that the presumption of a school board's good faith litigation is no longer valid.

A number of opinions have already expressed a desire to allow attorney fee awards on a more frequent basis. In *Bradley (Free Choice)*[62] two judges of the five-man court were in favor of permitting plaintiff to recover attorney fees even though the major issue litigated, the constitutionality of the free choice plan, was determined in defendant's favor.[63] The majority allowed seventy-five dollars for the fees of plaintiff in litigating the collateral issue of a specific abuse of the plan. The minority was unclear as to whether it believed that the seventy-five dollars was too small an amount, presuming it was proper to grant attorney fees only for the collateral issue, or whether it suggested that the defendants should have borne the expense of the complete litigation as a result of having forced an unnecessary litigation of one issue.[64] The punitive tone of the dissent suggests the latter theory.

The premise upon which a punitive theory of attorney fees has been grounded is well-expressed in *Clark v. Board of Education.*[65] There, although attorney fees were not allowed, the Eighth Circuit Court of Appeals declared: "The time is coming to an end when recalcitrant state officials can force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights."[66] The court was not hesitant to suggest that "the time is fast approaching when the additional sanction of substantial attorney fees should be seriously considered by the trial courts."[67] It is cautioned, however, that punishment is not the proper goal of equity inasmuch as equity is remedial and not punitive.

In a 1971 decision, *Bradley (Fees),*[68] a federal district court again considered the possibility of applying a punitive theory. The court then held that equity need not be the only theory under which attorney fees could be awarded,[69] although the decision was justified on equitable principles as well.[70] Judge Merhige was "persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and

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Thus, unless the school board can affirmatively establish its good faith in litigation, the court in equity should presume bad faith and grant its equitable relief of attorney fees. *See* Brewer v. School Bd., No. 71-1900 at 26-30 (4th Cir., Mar. 7, 1972) (Winter, J., concurring specially).

[62]345 F.2d 310 (4th Cir.), *vacated on other grounds,* 382 U.S. 103 (1965).

[63]*Id.* at 324 (Sobeloff and Bell, JJ., concurring and dissenting in part).

[64]*Id.*

[65]369 F.2d 661 (8th Cir. 1966).

[66]*Id.* at 671.

[67]*Id.*

[68]53 F.R.D. 28 (E.D. Va. 1971).

[69]*Id.* at 41.

[70]*Id.*

appropriate relief must include the award of expenses of litigation."[71] The opinion did not provide a satisfactory explanation for this conclusion. Apparently the court felt that the authority to award damages at law is independent of the right to award attorney fees in equity, and that the right to award damages includes the authority to award attorney fees.[72] The logical fallacy of the argument is obvious: Congress has not passed a statute permitting the court to award attorney fees in school desegregation cases. In the absence of such a statute the courts are bound by the general rule that attorney fees are not awarded in actions at law. Any other decision would imply that the traditional self-restraint expected of a court sitting in equity may be by-passed by merely calling the relief "full and appropriate" rather than "equitable".

It thus must be concluded that the future of school desegregation litigation does not appear to hold out a bright future so far as attorney fee awards are concerned. Despite the unconscionable use of the courts to delay desegregation,[73] federal district courts appear unwilling to award attorney fees in the absence of federal legislation. This patent unwillingness to exercise discretion, though reviewable, has been interpreted as abusive only once.[74] Hopefully as the courts clarify the standards for desegregation, they will find the existence of segregated schools more "exceptional" and thus a "situation" deserving of equitable relief in the form of an attorney fee award.

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[71] *Id.*

[72] 42 U.S.C. § 1983 (1970) provides that discriminators "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The district courts have original jurisdiction in such litigation, "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . . ." 28 U.S.C. § 1343(3) (1970). Judge Merhige's opinion never states what statute gives his court the right to award damages. Hence, the above suggested explanation is at best conjecture.

[73] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 448 n.5 (1968) (Douglas, J., concurring.)

[74] Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963).