

Maurer School of Law: Indiana University  
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 57 | Issue 3

Article 1

Spring 1982

# Introduction: Toward a Sociology of the Class Action

Bryant G. Garth

*Indiana University School of Law*

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Litigation Commons](#), and the [Sociology Commons](#)

## Recommended Citation

Garth, Bryant G. (1982) "Introduction: Toward a Sociology of the Class Action," *Indiana Law Journal*: Vol. 57: Iss. 3, Article 1.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol57/iss3/1>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

## Introduction: Toward a Sociology of the Class Action

BRYANT G. GARTH\*

The class action device raises a number of issues in civil litigation that invite empirical research for their elaboration and resolution.<sup>1</sup> Any student of American civil procedure can see that class actions play a central role in the enforcement of constitutional and legislative policy.<sup>2</sup> Until very recently, however, empirical research on class actions concerned almost exclusively one type of class action—class actions for damages.<sup>3</sup> Class ac-

---

\* B.A. 1972, Yale University; J.D. 1975, Stanford University; Ph.D. (European Doctorate) 1979, European University Institute (Florence); Associate Professor, Indiana University School of Law (Bloomington). The author is very grateful for the comments and suggestions made by his colleague, Ilene H. Nagel, on an earlier draft.

<sup>1</sup> Perhaps typical was a recent debate in the *Harvard Law Review* about the "Sociology of Article III" where neither commentator could point to empirical research on the crucial question of how responsive public interest lawyers are to their clientele. Compare Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980) with Brilmayer, *A Reply*, 93 HARV. L. REV. 1727 (1980).

Maurice Rosenberg comments that "[i]n the procedural area it is particularly difficult to get a warm reception for empirical research, because civil procedure is so heavily law-oriented. Here the lawyer's ancient instincts have long prevailed." Rosenberg, *Civil Justice Research and Civil Justice Reform*, 15 LAW & SOC'Y REV. 473, 477 (1980-81).

The recent work of The Civil Litigation Research Project, centered at the University of Wisconsin Law School, is generating considerable useful empirical work on civil litigation. See 15 LAW & SOC'Y REV. 401-748 (1980-81) for a collection of papers produced by that project. Problems of collective advocacy in the courts, however, have not been considered explicitly.

<sup>2</sup> As Senator De Concini recently remarked: "Class suits affect consumers, large and small business; they affect the extent to which the substantive policies underlying our federal laws go enforced; and they affect the use of our judicial resources. The stakes are high." *Reform of Class Action Litigation Procedures, 1978: Hearings Before the Subcomm. on Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 1* (1978) (opening statement by Senator De Concini, Chairman).

<sup>3</sup> See, e.g., DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience* (pts. 1-2), 1976 AM. B. FOUNDATION RESEARCH J. 1023, 1274; DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Study Revisited*, 1979 AM. B. FOUNDA-

tions for injunctive relief are numerically and practically more important, but were neglected by researchers. The empirical questions asked, while interesting, were also relatively narrow: who won? how much? how much of that went to lawyers and how much to members of the class?

Like a generation of empirical researchers concerned with the criminal justice system, students of civil procedure had difficulty moving beyond "quantitative" studies based generally on the outcomes reported in official court documents and statistics based on these outcomes. The problem with this research is that the methodology, however sophisticated, tends to be narrow, and the theoretical perspective is limited to elements that contribute to specific outcomes, such as a verdict of guilty or not guilty or a particular prison sentence. Sociologists increasingly recognize that this research needs to be supplemented by more "qualitative" empirical studies that can "open . . . to public view the back regions and activities of processing institutions"<sup>4</sup> and by theoretical perspectives that force deeper consideration of social and political aspects of particular institutional processes.

One purpose of this symposium is to highlight interdisciplinary research on primarily injunctive class actions such as those seeking to reform employment practices, schools, hospitals, prisons, and other institutions.<sup>5</sup> Another purpose is to illustrate how qualitative empirical research helps to reveal the social and political role of class actions—especially their role in effecting changes in behavior to conform to the law. The papers published here were presented to a panel on "Class Action Lawsuits" at the 1981 annual meeting of the American Sociological Association, and two of them provide in-depth looks at class action litigation in important settings—the delivery of hospital care to the poor<sup>6</sup> and the implementa-

---

TION RESEARCH J. 449; Jones, *An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Suits, 1971-1978*, 60 B.U.L. REV. 306 (1980); Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U.L. REV. 542 (1980); Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 HOUS. L. REV. 769 (1977); Wolfram, *The Antibiotics Class Actions*, 1976 AM. B. FOUNDATION RESEARCH J. 253; Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974).

<sup>4</sup> I. Nagel & J. Hagan, *Process and Outcome in the Study of Social Problems: Multiple Methods and Theoretical Transformation* (unpublished paper delivered at Law and Society Annual Meeting, Minneapolis, May 18-20, 1978).

<sup>5</sup> For the numerical figures on this litigation, see, e.g., 1979 AD. OFF. OF THE U.S. CTS., 1979 ANN. REP. OF THE DIRECTOR A-171. Leading theoretical discussions of this class injunctive litigation include Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); and *Special Project—The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). A useful recent collection of articles is *Symposium: Judicially Managed Institutional Reform*, 32 ALA. L. REV. 267 (1981).

<sup>6</sup> See Paul-Shaheen & Perlstadt, *Class Action Suits and Social Change: The Organization and Impact of the Hill-Burton Cases*, 57 IND. L.J. 385 (1982).

tion of the Philadelphia decree on the educational rights of retarded children.<sup>7</sup>

This introduction suggests a framework for empirical research into class actions and some specific questions and research that can be undertaken. It begins by contrasting three types of litigation—individual, class, and organizational—and then suggests topics for empirical research that emerge from this contrast. Next, it examines how the characteristics of *class* litigation create specific problems in accountability, effectiveness, and legitimacy. Explanation of these problems can provide a framework for developing a sociology of the class action that will contribute to understanding just what class actions are capable of accomplishing.

### INDIVIDUAL, ORGANIZATIONAL, AND CLASS ACTIONS

What is unique about the class action under Federal Rule of Civil Procedure 23 and state analogs is that it enables a lawyer to move from individual to collective advocacy by creating an entity—the class—with some but not all of the attributes of an organization. The action no longer is merely an individual lawsuit, but there is not necessarily an active interest group or organization behind the litigation.

The class action is like an organizational lawsuit since there may be a relatively large membership in the class (although it may not always be easily identifiable). Like an active organization, class status also increases the bargaining power of litigants suing institutional and corporate defendants. And of course the court decision in a class action goes beyond individual action by binding all the class members.

Unlike an active organization, however, a class can be created at relatively little cost through the initiative of a motivated lawyer. The well-known barriers to effective collective action can be overcome simply by meeting the requirements of rule 23.<sup>8</sup> Thus, in 1941 an influential article argued that the class action can serve as an even more effective civil law enforcement device than an organizational action.<sup>9</sup> Lawyers attracted by the “handsome reward” of greater attorney’s fees in class actions can lead the way toward the effective enforcement of collective rights in court.

The power of these lawyer-entrepreneurs has grown enormously in recent years. Since the mid-1960’s, Congress has multiplied statutory rights

---

<sup>7</sup> See Rosenberg & Phillips, *The Institutionalization of Conflict in the Reform of Schools: A Case Study of Court Implementation of the PARC Decree*, 57 *IND. L.J.* 425 (1982).

<sup>8</sup> In the words of Marc Galanter, “[T]he class action may . . . be thought of as a device for securing the benefits of scale without undergoing the outlay for organizing.” Galanter, *Delivering Legality: Some Proposals for the Direction of Research*, 11 *LAW & SOC’Y REV.* 225, 240 (1976).

<sup>9</sup> Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 *U. CHI. L. REV.* 69 (1941).

that have been particularly well-suited to class action, beginning with the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>10</sup> Most class actions are brought for injunctive and other relief to enforce claims based on violations of civil rights.<sup>11</sup> A proliferation of rights has been accompanied by a liberalization of standing<sup>12</sup> and a breakdown in professional barriers to solicitation<sup>13</sup> and advertising.<sup>14</sup> It is easier than ever before for a lawyer to find a client to serve as a class representative. Furthermore, Congress has also been very liberal in allowing prevailing plaintiffs to obtain attorney's fees from defendants in actions to enforce these new rights.<sup>15</sup> All these factors point toward an increased incentive and role for private attorneys general<sup>16</sup> and the classes they create for law enforcement purposes.

One view of class action litigation that seeks to change behavior through injunctions is that there is no need to consider the characteristics of the class. If the action succeeds, an injunction will follow and remedy the legal wrong on behalf of the class.<sup>17</sup> Sociological outcome research about class actions does not seem very important in that perspective, since the only focus of attention is whether class actions win in court. Again, that is an interesting question, but it ignores what is special and problematical about the class action device. Legal researchers need to reconsider the assumption that class actions merely serve a function that can be stated as an equation: lawyers plus class actions equals enforced legal rights (that ought to be enforced).

The assumption has stifled research into class actions. Scholars have paid insufficient attention to the issues that arise because the class is not necessarily, or even usually, a true substitute for an effective organization. Leaders of an active organization must be responsive to the "membership" or they will lose their support and be replaced by other leaders. That is not true of class actions, where the leaders are a lawyer and

---

<sup>10</sup> According to Arthur Miller, these statutes form "the core around which the majority of contemporary class discrimination actions gather." Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 671 (1979).

<sup>11</sup> See note 5 *supra*.

<sup>12</sup> See, e.g., Parker & Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771 (1979).

<sup>13</sup> See *In re Primus*, 436 U.S. 412 (1978).

<sup>14</sup> See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *In the matter of R. M. J.*, 102 S. Ct. 929 (1982).

<sup>15</sup> The most significant statute is the Civil Rights Attorney's Fee Act of 1976, 42 U.S.C. § 1988 (1976). A useful discussion is A. MILLER, *ATTORNEY'S FEES IN CLASS ACTIONS* (1980). The newest statute providing attorney's fees is the Equal Access to Justice Act, 28 U.S.C. § 2412 (Supp. IV 1980) (effective October 1, 1981).

<sup>16</sup> This term, as used here, refers to the private attorneys in this context, not the individual litigants to whom the term was original applied. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

<sup>17</sup> The assumption is criticized in Note, *Due Process Rights in Title VII Class Actions of Absentees—the Myth of Homogeneity of Interest*, 59 B.U.L. REV. 661 (1979).

perhaps a few self-selected class representatives. Therefore, class actions can enforce rights against the wishes of class members, but unfortunately legal researchers have not yet considered when and how this takes place. Furthermore, issues will arise in an employment discrimination case, for example, requiring choices about goals, timetables, qualifications, promotions, recruitment plans, and the like. An active organization can debate the issues and make recommendations to the court. A class, even an active class, has no such readily accessible forum. Thus, the court may not get competent information about class views and perceived interests. We know very little about how the class device works in transmitting such information.

Obviously there are many kinds of "classes" and "organizations," but the point is that an *active* organization pursuing the interests of its membership possesses the capacity to articulate and respond to the membership interests and views. Organizational representatives, unlike class representatives, must justify to the membership the goals they pick and their decisions about priorities and strategies.<sup>18</sup> But a class need have no such exchange of information. This may have prompted one prominent commentator to suggest that the class action functions as a "barrier to the expression of dissent."<sup>19</sup>

Another problem of the class injunctive action as opposed to litigation by an active organization is how to monitor results. The winning of a decree does not automatically translate into changed behavior toward class members.<sup>20</sup> Effective monitoring requires diligence and resources, and it may be that active organizations have more potential to undertake that kind of supervision than class counsel or class representatives. Some evidence supports this general distinction, but it too requires considerably more empirical research and refinement.<sup>21</sup> If civil litigation increasingly involves interests of great numbers of persons, and class and organizational actions are two ways to aggregate and present those interests, then lawyers need to have a much greater awareness of how these actions operate and what the key differences are between them. It is instructive that in Western Europe, where the class action has been much discussed, reformers have relied on devices that give special standing to established

---

<sup>18</sup> There is in fact considerable recent attention to the problem of assuring accountability to the membership. See, e.g., *Health Research Group v. Kennedy*, 82 F.R.D. 21 (D.D.C. 1979); Note, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U.L. REV. 174 (1981).

<sup>19</sup> Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). For a discussion of some of these issues in more detail, see Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, \_\_\_\_ NW. L. REV. \_\_\_\_ (1982).

<sup>20</sup> See generally J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978).

<sup>21</sup> See *id.*; R. MARSHALL, C. KNAPP, M. LIGETT & R. GLOVER, *EMPLOYMENT DISCRIMINATION* (1978).

organizations, not on class actions, as means to represent collective or diffuse interests in court.<sup>22</sup>

The perceived benefits of class or organizational actions for injunctive relief must also be considered in comparison with *individual* actions for injunctions. After all, there is little need to study class or organizational actions if individuals can obtain the same injunctive relief. To be sure, class actions prevent mootness<sup>23</sup> of individual claims, raise the stakes to the defendants, and widen the dispute to involve other persons and interests, but few courts have stated explicitly that a broad injunction is more easily obtainable by a class than by an individual seeking to reform an institution whose conduct victimizes him.<sup>24</sup> Equitable remedies turn on subtle factors, however, and it is clear that lawyers seeking injunctive relief do aim, either through class certification or otherwise, to convince the court that there is a large constituency behind the legal claim and the relief sought. There is no doubt a received wisdom in this type of litigation, but we have little concrete, accessible information on just what difference it does or might make if an action seeking a particular form of relief proceeds on behalf of an individual, class, or organization.<sup>25</sup>

It is notable, however, as the articles that follow suggest, that none of the major Hill-Burton health care cases described by Perlstadt and Paul-Shaheen proceeded individually,<sup>26</sup> and the Pennsylvania Association for Retarded Children (PARC) case discussed by Rosenberg and Phillips proceeded as a class action with the participation of an organization created and legitimized by the litigation.<sup>27</sup> It appears reasonably well settled in practice, if not in theory, that it is necessary to bring either organizational or class actions or both if injunctive relief is sought affecting the interests of large numbers of individuals. The aggregation may make the court more willing to contemplate action by relatively low status individuals that could disrupt major institutions.

The remainder of this introduction is a discussion of the following articles in light of the issues raised by the class-organization distinction. Of course, a "paper" organization created only for a lawsuit is not the kind of organization referred to here.<sup>28</sup> The distinction is between ongoing, bona fide organizations and abstract, formal classes. The unique

---

<sup>22</sup> See, e.g., Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparative Contribution*, 25 BUFFALO L. REV. 643 (1976); Taylor & Head, *Representing Collective Interests in Civil Litigation: A Comparative Synopsis*, 58 J. URB. L. 587 (1981).

<sup>23</sup> See, e.g., *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

<sup>24</sup> Cf. Adler, *The Viability of Class Actions in Environmental Litigation*, 2 ECOLOGY L.Q. 533, 563 (1972).

<sup>25</sup> See generally 1 H. NEWBERG, CLASS ACTIONS § 1010.1 (1977).

<sup>26</sup> See Paul-Shaheen & Perlstadt, *supra* note 6, at 411.

<sup>27</sup> See Rosenberg & Phillips, *supra* note 7, at 429.

<sup>28</sup> Such an abstract entity should be treated no differently than the individuals directly involved in the lawsuit. Lawsuits by unincorporated associations can be treated in some senses as class actions. See FED. R. CIV. P. 23.2.

feature of United States law is that it allows litigation on behalf of the latter, and that is what requires a particular sociology of the class action. The class is an entity whose features are not well understood.<sup>29</sup>

"SHORT CIRCUITING" THE POLITICAL PROCESS THROUGH  
CLASS ACTIONS: TRANSFORMING A DISPUTE

A sociology of the class action must build on the insight that, in the words of Perlstadt and Paul-Shaheen, the class action permits the "short circuiting" of the political process.<sup>30</sup> Political action seeking reform on behalf of a particular group may proceed in several ways. Perhaps the classic pattern is the creation of an organization that pursues a multilateral strategy set by its leadership, which is accountable to the membership. It may choose to lobby, build coalitions, or litigate, perhaps finding that for some issues litigation is an effective pressure group activity. The PARC litigation may illustrate this kind of approach, although Rosenberg and Phillips show how the litigation setting increases the power and influence of some organizations as opposed to others.<sup>31</sup> The point, however, is to see the development from an issue to an organization to political or legal action. Another pattern for social change might be to omit the organizational stage: protest by an unorganized group may force some kind of legislative response.<sup>32</sup> It is suggested that the classic patterns are short circuited by class actions.

Recent studies of the "transformation of disputes," however, such as those of Professor Mather, add a further complicating factor.<sup>33</sup> The linear models of political or legal action are not entirely accurate. The act of articulating a dispute causes a continuing redefinition of the dispute (for example in terms suitable for presentation in court), and redefinition may in turn further expand or narrow the dispute. To return to the article by Rosenberg and Phillips, the participation of the organizations on behalf of the retarded in the process of court-supervised negotiations tends to cause a definition of issues in terms of the "possible," rather than according to the organizations' own goals. Indeed, recent studies assert that the definition of a dispute in terms of the language of the law typically

<sup>29</sup> An excellent historical treatment of the class action and its unique representative features is Yeazell, *From Group Litigation to Class Action: Interest, Class and Representation* (pts. 1-2), 27 U.C.L.A. L. REV. 514, 1067 (1980).

<sup>30</sup> Paul-Shaheen & Perlstadt, *supra* note 6, at 410.

<sup>31</sup> Rosenberg & Phillips, *supra* note 7, at 436-37. *See also, e.g.*, Bell, *supra* note 19; Yeazell, *supra* note 29, at 1112-15.

<sup>32</sup> This is the model explored in some detail in F. PIVEN & L. CLOWARD, *POOR PEOPLE'S MOVEMENTS* (1977).

<sup>33</sup> *See, e.g.*, Mather, *Conclusion: On the Mobilizing Potential of Class Actions*, 57 IND. L.J. 451 (1982); Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blamings, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1981); Mather & Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1981).



narrows the dispute and the political consequences that might come from its resolution.<sup>34</sup> What is often asserted is that legalization tends "to individualize collective conflict,"<sup>35</sup> but legal scholars have not explored how the process may work for class and organizational actions.

Paul-Shaheen and Perlstadt describe in their article on health care to the poor how class actions might work to transform disputes while short circuiting traditional political processes. Federal legislation in 1945 resulted in some language favoring a commitment by federally aided hospitals constructed under the Hill-Burton Act<sup>36</sup> to aid the poor, but nothing specific was stated nor was a means provided to enforce any requirement.<sup>37</sup> It is unlikely that the political power of the poor could have secured legislative change to ensure aid to the poor; no organization existed to push such demands, and there was not even any dissent expressed by the poor. The political equilibrium meant some symbolic rights, but nothing concrete was provided to the poor.

Motivated lawyers, however, can disrupt such an equilibrium through litigation, especially with class actions. The federal legal services program created in 1965 produced and subsidized a network of such lawyers.<sup>38</sup> These lawyers developed legal theories, educated other lawyers, found clients who could legally represent a class, and brought class actions to reform the system of delivering hospital care to the poor. This short circuiting of the political process succeeded in forcing new laws and regulations and new attention to the problem of hospital care for the poor.

Despite these successes, the lawyers accomplished relatively little in terms of concrete benefits for individuals. As Paul-Shaheen and Perlstadt note in their conclusion, the attorney leadership provided "access to the courts," but it did not "reach down into the plaintiff class and provide it with any skills or permanent organization through which the plaintiffs might have pursued the benefits they won as a class."<sup>39</sup>

It appears, therefore, that the class action provides a means both to expand and to narrow a dispute. Generalized grievances can be organized, aggregated, and presented to decisionmakers, but the expansion is circumscribed and accordingly may have a limited long term impact on the class or on those whose conduct is sought to be changed. Not every class action will follow that pattern, but the example illustrates the complexity of the class action if one focuses on disputes and their transformation. Commentators who have tended to see the litigation process as

---

<sup>34</sup> See Mather & Yngvesson, *supra* note 33, at 788-97.

<sup>35</sup> Trubek, *The Construction and Deconstruction of a Disputes Focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727, 746 (1981).

<sup>36</sup> 42 U.S.C. § 290-91 (1976).

<sup>37</sup> Paul-Shaheen & Perlstadt, *supra* note 6, at 391-92.

<sup>38</sup> See generally E. JOHNSON, JR., JUSTICE AND REFORM (2d ed. 1978); B. GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR (1980).

<sup>39</sup> See Paul-Shaheen & Perlstadt, *supra* note 6, at 423.

either an expansion to collective advocacy or reduction to an individual dispute have overlooked how the expansion process itself may lead to the same lack of a political impact that is characteristic of an individual dispute. These characteristics of class actions suggest the need for research not only into how this transformation process works,<sup>40</sup> but also into the accountability and effectiveness of class actions. While the question cannot be answered for all class actions, ultimately lawyers and social scientists must ask in whose interests certain class actions are brought, particularly if the result is considerable litigation but little substantive change.

### ACCOUNTABILITY AND CLASS ACTION LITIGATION

The accountability issue is a familiar one in "public interest" litigation, including class actions,<sup>41</sup> but it merits special attention when the political process is short circuited. Decisions whether to initiate a lawsuit and, if so, what to seek through the process are vital. Lawyers, courts, and litigation expenses are all scarce resources,<sup>42</sup> and victories in litigation may result in changes that impose further costs—the oft-mentioned "costs of regulation." Organizational actions can raise accountability concerns, but there is at least an identifiable constituency to whom decisions must be responsive. As the Hill-Burton litigation suggests, however, class action litigation may operate under few such restraints. Some restraints are imposed by the judicial oversight created by rule 23, but, as one commentator recently demonstrated, the overall impact of rule 23 is to restrict scrutiny and participation if not invited by the judge.<sup>43</sup> The judge who is limited generally to a dialogue with counsel may not be in the best position to see that counsel is accountable to the interests of others.

The hospital litigation does not address the true extent of the problem. Publicly funded lawyers, such as those involved there, are accountable in part to the government and in part to the governing boards of legal services programs. The country is now witnessing, however, a severe cut-back, if not elimination, in funding for the federal legal services program.<sup>44</sup>

---

<sup>40</sup> For example, little is known about the motives of lawyers or litigants, and the role of the incentive for attorney's fees. See generally note 45 *infra*. A recent district court opinion raises another issue. The court refused to certify a class solely because of an asserted ethical violation by a law firm that stated that, as a matter of policy, it would not collect costs from class plaintiffs if the lawsuit was unsuccessful. *Golub v. Mid-Atlantic Toyota Distrib.*, 93 F.R.D. 485 (D. Md. 1982). Such a ruling could have profound practical implications if followed consistently.

<sup>41</sup> See, e.g., Note, *In Defense of An Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice*, 90 YALE L.J. 1436, 1453-57 (1981).

<sup>42</sup> See, e.g., Bellow & Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 336 (1978).

<sup>43</sup> See Yeazell, *supra* note 29, at 1113-15.

<sup>44</sup> See, e.g., Drew, *A Reporter at Large: Legal Services*, NEW YORKER, March 1, 1982, at 97. President Reagan continues to seek the abolition of the Legal Services Corporation.

At the same time, as noted before, there has been a strong recent trend toward making defendants pay the attorney's fees of prevailing plaintiffs in certain kinds of litigation, especially civil rights. These attorneys increasingly can advertise and perhaps even personally solicit cases involving those kinds of claims. If, as a sample of federal judges recently opined, many private class action lawyers are motivated largely by economic incentives,<sup>45</sup> then the accountability issue assumes even greater significance. Private attorneys may find relatively passive clients and bring class actions with little concern for the particular views and interests of class members, especially class members with disparate interests.

There has been considerable recent attention to the problem of accountability of individual lawyers to individual clients,<sup>46</sup> but there is an even greater need to explore accountability issues in class actions. The enthusiasm for private attorneys general, however, has led to ignoring the class whom the private attorney is supposed to represent. A court finding of "adequacy of representation" in a class action does not necessarily imply real accountability. After a meticulous study of the public interest law industry, one commentator noted that "participants and commentators have given little attention to the process by which the sector allocates its scarce resources among the many competing underrepresented interests or even the process by which an individual firm chooses."<sup>47</sup> Discussions about law enforcement and class actions require a better knowledge of what the practice now is and whether it differs by types of lawyers, characteristics of class members, or subject matter of the litigation. Finally, to return to the other concern that was mentioned before, it would be helpful to know how lawyer responsiveness to the class affects the results of a lawsuit or, more generally, the outcomes of a dispute.

### EFFECTIVENESS IN CLASS ACTIONS

The effectiveness of a class action lawsuit can be defined in several ways. It may be construed as simply winning or losing the lawsuit, although lawsuits rarely put an end to the issues that produce them. Effectiveness may also concern the long term result of litigation, whether measured in broad political terms or against the goals defined by the relevant actors. As suggested before, the short circuiting potential of class actions may lead to short-lived litigation victories.

A sociological literature recently has emerged to focus on the effectiveness of litigation as a means of obtaining long term benefits for par-

---

<sup>45</sup> Two-thirds of federal judges surveyed agreed that "classes are often formed by attorneys mainly to increase the eventual fee award." See A. MILLER, *supra* note 15, at 299.

<sup>46</sup> See, e.g., D. ROSENTHAL, *LAWYERS AND CLIENTS: WHO'S IN CHARGE?* (1977).

<sup>47</sup> B. WEISBROD, J. HANDLER & N. KOMESAR, *PUBLIC INTEREST LAW* 100 (1978).

ticular groups.<sup>48</sup> Some of it is plainly skeptical, whether referring to individual, class, or organizational litigation. Other studies try to specify the conditions that will maximize the effectiveness of litigation. For example, an important study of governmental enforcement of laws against employment discrimination found that the chances of lasting benefits depended on whether there was an organization capable of providing a sustained effort to monitor the litigation results and help see that they were implemented.<sup>49</sup> One can hypothesize that a class action that had no organizational dimension at the outset and did not generate such structures in the process of the legal action would tend not to be effective in monitoring results. But the level of research available today does not permit one to say how often that is the case at the outset or what happens during litigation.

The PARC study supports the hypothesis that active involvement in litigation may strengthen the position of organizations that had little power or legitimacy at the outset. Useful research can be done on this topic, which also raises some issues of accountability as one organization or another is given a badge of respectability by the courts. The result of the litigation, however, at least provides a framework for monitoring and bargaining that otherwise might not take place.

The more general question is how courts can and do affect power relationships, and it is not necessarily true that class actions will not lead to some changes in the distribution of power. As we have seen, class actions may have no lasting impact, but several recent studies suggest that the conduct of the lawsuit can determine whether a lasting impact is made. Disadvantaged plaintiff groups who succeed in winning the lawsuit can obtain more benefits to the extent that the court "can compel a radical disestablishment of the existing accommodation of interests and induce the establishment of a new accommodation in which the interests of the disadvantaged group are given sufficient weight to alleviate the systematic harms that prompted and justified the court's intervention."<sup>50</sup> Put another way, if the court is convinced of the need to implement change on behalf of the less powerful, research suggests that the court can act to change somewhat the balance of power, for example by creating an active organization backed by the court. But then there is the problem of whether courts really should strengthen a political group. That problem will be examined next.

---

<sup>48</sup> See sources cited notes 20 & 21 *supra*. All research in this area owes a debt to Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

<sup>49</sup> See R. MARSHALL, C. KNAPP, M. LIGGETT & R. GLOVER, *supra* note 21.

<sup>50</sup> Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 *ALA. L. REV.* 399, 403 (1981). See also Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 *VA. L. REV.* 43 (1979).

## RESEARCH AND THE LEGITIMACY OF CLASS ACTION LITIGATION

There is a growing list of works extolling or excoriating the role of class actions in what has been called "public law litigation."<sup>51</sup> Unfortunately, however, it lacks sufficient information about how class actions work in practice. Again some insight into the sociology of the class action can improve the level of the debate.

Legitimacy concerns have tended to be expressed according to one of two well-worn strategies of debate—the role of courts and the so-called gap in the enforcement of laws. The debate on the role of courts seems to assume a particular function that courts are supposed to perform—neutral adjudication where the facts are found and law applied. History shows that courts have never conformed to this description, but courts are often measured by this ideal standard.<sup>52</sup> Complicated class actions involving far-reaching injunctive remedies, the argument goes, too often involve courts in nonneutral, political functions that properly should be left to the other political branches.

The most frequent response to this concern is to say that new kinds of litigation are necessary because new rights have been created that require active court involvement for their enforcement. The measurement for legitimacy is the enforcement of rights that are supposed to benefit the disadvantaged. If rights are not enforced by public means and traditional remedies, private attorneys general and new approaches to remedies must be accepted.

The debate is a standoff because both sides can point to an overriding concern. For one side that concern is the virtue of neutral courts and for the other it is the enforcement of vital constitutional and statutory rights. Trying to take a middle ground, others argue that the answer is to go as far as possible toward liberal enforcement without giving up what is essential to preserve the image of courts.<sup>53</sup>

The point here is not to resolve this debate, but rather to show some of the researchable issues it neglects. Some law enforcement litigation out of the universe of possible lawsuits is being brought, and many potential lawsuits never develop. Some become class actions, others organizational actions, or both, and little is known about what difference it makes. Nor is much known about how these lawsuits begin, how they are con-

---

<sup>51</sup> Chayes, *supra* note 5. Samples of the current debate include the sources in note 5 *supra*; D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Aldisert, *The Role of the Courts in Contemporary Society*, 38 U. PITT. L. REV. 437 (1977).

<sup>52</sup> M. SHAPIRO, *COURTS* (1981). This is not to say that no changes have taken place, however. See, e.g., Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981); Hurst, *The Functions of Courts in the United States, 1950-1980*, 15 LAW & SOC'Y REV. 401 (1981).

<sup>53</sup> See, e.g., Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 397 (1981).

ducted, and how classes or members of an organization affect that conduct. Finally, it is not known what difference it makes whether and how the litigation relates to concerns of class or organization members. Hypotheses can be suggested on the basis of interdisciplinary work such as that published in this issue, but much work remains. Questions about the legitimacy or illegitimacy of modern class litigation require a better picture of the sociology of the class action.

